

(b) Programs in which commercial or non-developmental items can satisfy the military requirement are preferred as candidate programs. A nominated program will address which standard commercial, industrial practices will be used in the pilot program and how those practices will be applied.

(c) Nomination of candidate programs must be accompanied by a list of waivers being requested to Statutes, FAR, DFARS, DoD Directives⁴ and Instructions,⁵ and where applicable, DoD Component regulations. Waivers being requested must be accompanied by rationale and justification for the waiver. The justification must include:

(1) The provision of law proposed to be waived or limited.

(2) The effects of the provision of law on the acquisition, including specific examples.

(3) The actions taken to ensure that the waiver or limitation will not reduce the efficiency, integrity, and effectiveness of the acquisition process used for the defense acquisition program; and

(4) A discussion of the efficiencies or savings, if any, that will result from the waiver or limitation.

(d) No nominated program shall be accepted until the Under Secretary of Defense has determined that the candidate program is properly planned.

PART 3—TRANSACTIONS OTHER THAN CONTRACTS, GRANTS, OR COOPERATIVE AGREEMENTS FOR PROTOTYPE PROJECTS

Sec.

3.1 Purpose.

3.2 Applicability.

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AUTHORITY: Section 801 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65) and Section 804 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106-398).

SOURCE: 66 FR 57383, Nov. 15, 2001, unless otherwise noted.

⁴See footnote 3 to §2.4(b).

⁵See footnote 3 to §2.4(b).

3.1 Purpose.

This part implements section 801 of the National Defense Authorization Act for Fiscal Year 2000 (Pub. L. 106-65) and section 804 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Pub. L. 106-398). It establishes the requirement for the inclusion of a clause in transactions other than contracts, grants or cooperative agreements for prototype projects awarded under authority of 10 U.S.C. 2371 that provides Comptroller General access to records when payments total an amount in excess of \$5,000,000.

3.2 Applicability.

This part applies to the Secretary of a Military Department, the Directors of the Defense Agencies, and any other official designated by the Secretary of Defense to enter into transactions other than contracts, grants or cooperative agreements for prototype projects that are directly relevant to weapons or weapon systems proposed to be acquired or developed by the Department of Defense, under authority of 10 U.S.C. 2371. Such transactions are commonly referred to as "other transaction" agreements and are hereafter referred to as agreements.

3.3 Definitions.

Contracting activity. An element of an agency head and delegated broad authority regarding acquisition functions. It includes elements designated by the director of a defense agency which has been delegated contracting authority through its agency charter.

Head of the contracting activity. The official who has overall responsibility for managing the contracting activity.

3.4 Policy.

(a) A clause must be included in solicitations and agreements for prototype projects awarded under authority of 10 U.S.C. 2371, that provide for total government payments in excess of \$5,000,000 to allow Comptroller General access to records that directly pertain to such agreements.

(b) The clause referenced in paragraph (a) of this section will not apply with respect to a party or entity, or

subordinate element of a party or entity, that has not entered into any other contract, grant, cooperative agreement or "other transaction" agreement that provides for audit access by a government entity in the year prior to the date of the agreement. The clause must be included in all agreements described in paragraph (a) of this section in order to fully implement the law by covering those participating entities and their subordinate elements which have entered into prior agreements providing for Government audit access, and are therefore not exempt. The presence of the clause in an agreement will not operate to require Comptroller General access to records from any party or participating entity, or subordinate element of a party or participating entity, or subordinate element of a party or participating entity, which is otherwise exempt under the terms of the clause and the law.

(c)(1) The right provided to the Comptroller General in a clause of an agreement under paragraph (a) of this part, is limited as provided by subparagraph (c)(2) of this part in the case of a party to the agreement, an entity that participates in the performance of the agreement, or a subordinate element of that party or entity, if the only cooperative agreements or "other transactions" that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note).

(c)(2) The only records of a party, other entity, or subordinate element referred to in subparagraph (c)(1) of this part that the Comptroller General may examine in the exercise of the right referred to in that subparagraph, are records of the same type as the records that the government has had the right to examine under the audit access clauses of the previous cooperative agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(d) The head of the contracting activity (HCA) that is carrying out the agreement may waive the applicability of the Comptroller General access requirement if the HCA determines it would not be in the public interest to apply the requirement to the agreement. The waiver will be effective with respect to the agreement only if the HCA transmits a notification of the waiver to the Committees on Armed Services of the Senate and the House of Representatives, the Comptroller General, and the Director, Defense Procurement before entering into the agreement. The notification must include the rationale for the determination.

(e) The HCA must notify the Director, Defense Procurement of situations where there is evidence that the Comptroller General Access requirement caused companies to refuse to participate or otherwise restricted the Department's access to companies that typically do not do business with the Department.

(f) In no case will the requirement to examine records under the clause referenced in paragraph (a) of this section apply to an agreement where more than three years have passed after final payment is made by the government under such an agreement.

(g) The clause referenced in paragraph (a) of this section, must provide for the following:

(1) The Comptroller General of the United States, in the discretion of the Comptroller General, shall have access to and the right to examine records of any party to the agreement or any entity that participates in the performance of this agreement that directly pertain to, and involve transactions relating to, the agreement.

(2) Excepted from the Comptroller General access requirement is any party to this agreement or any entity that participates in the performance of the agreement, or any subordinate element of such party or entity, that, in the year prior to the date of the agreement, has not entered into any other contract, grant, cooperative agreement, or "other transaction" agreement that provides for audit access to its records by a government entity.

(3)(A) The right provided to the Comptroller General is limited as provided in subparagraph (B) in the case of a party to the agreement, any entity that participates in the performance of the agreement, or a subordinate element of that party or entity if the only cooperative agreements or "other transactions" that the party, entity, or subordinate element entered into with government entities in the year prior to the date of that agreement are cooperative agreements or transactions that were entered into under 10 U.S.C. 2371 or Section 845 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103-160; 10 U.S.C. 2371 note).

(B) The only records of a party, other entity, or subordinate element referred to in subparagraph (A) that the Comptroller General may examine in the exercise of the right referred to in that subparagraph are records of the same type as the records that the government has had the right to examine

under the audit access clauses of the previous agreements or transactions referred to in such subparagraph that were entered into by that particular party, entity, or subordinate element.

(4) This clause shall not be construed to require any party or entity, or any subordinate element of such party or entity, that participates in the performance of the agreement, to create or maintain any record that is not otherwise maintained in the ordinary course of business or pursuant to a provision of law.

(5) The Comptroller General shall have access to the records described in this clause until three years after the date the final payment is made by the United States under this agreement.

(6) The recipient of the agreement shall flow down this provision to any entity that participates in the performance of the agreement.

PARTS 4-20 [RESERVED]