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Title 48—Federal Acquisition Regulations System

(This book contains chapter 2, parts 201 to 299)

Part

CHAPTER 2—Defense Acquisition Regulations System, Department of Defense 201

CHAPTER 2—DEFENSE ACQUISITION REGULATIONS SYSTEM, DEPARTMENT OF DEFENSE

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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

201.104 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.

[56 FR 36284, July 31, 1991. Redesignated at 64 FR 39430, July 22, 1999]

201.105 Issuance.

201.105–3 Copies.

The DFARS and the DFARS Procedures, Guidance, and Information (PGI) are available electronically via the World Wide Web at *http://www.acq.osd.mil/dpap/dars/index.htm.*

[69 FR 63326, Nov. 1, 2004]

201.107 Certifications.

In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), a new requirement for a certification by a contractor or offeror may not be included in the DFARS unless—

(1) The certification requirement is specifically imposed by statute; or

(2) Written justification for such certification is provided to the Secretary of Defense by the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Secretary of Defense approves in writing the inclusion of such certification requirement.

[63 FR 11528, Mar. 9, 1998, as amended at 65 FR 39704, June 27, 2000]

201.109 Statutory acquisition-related dollar thresholds-adjustment for inflation.

(d) A matrix showing the most recent escalation adjustments of statutory acquisition-related dollar thresholds is available at PGI 201.109.

[71 FR 75892, Dec. 19, 2006]

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 DoDI 5000.63, Defense Acquisition Regulations (DAR) 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(AT&L), 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 the change to the regulation.

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 that addresses the requirements of 201.402(2). The justification should be in the form of a memorandum for the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics).

(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; 63 FR 11528, Mar. 9, 1998; 65 FR 6552, Feb. 10, 2000; 68 FR 7439, Feb. 14, 2003]

201.201–70 Maintenance of Procedures, Guidance, and Information.

The DAR Council is also responsible for maintenance of the DFARS Procedures, Guidance, and Information (PGI).

[69 FR 63326, Nov. 1, 2004]

Subpart 201.3—Agency Acquisition Regulations

201.301 Policy.

(a)(1) 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. The DFARS contains—

(i) Requirements of law;

(ii) DoD-wide policies;

(iii) Delegations of FAR authorities;

(iv) Deviations from FAR requirements; and

(v) Policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors.

(2) Relevant procedures, guidance, and information that do not meet the criteria in paragraph (a)(1) of this section are issued in the DFARS Procedures, Guidance, and Information (PGI).

(b) When FEDERAL REGISTER publication is required for any policy, procedure, clause, or form, the department or agency requesting Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (AT&L)) 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; 65 FR 6552, Feb. 10, 2000; 69 FR 63326, Nov. 1, 2004]

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 1.105–2(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 1.105–2(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)

[56 FR 36284, July 31, 1991, as amended at 64 FR 51074, Sept. 21, 1999]

201.304 Agency control and compliance procedures.

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

(1)(i) Approval of the USD (AT&L) is required before including in a department/agency or component supplement, or any other contracting regulation document such as a policy letter or clause book, any policy, procedure, clause, or form that—

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

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

(ii) Except as provided in paragraph (2) of this section, the USD(AT&L) has delegated authority to the Director of Defense Procurement and Acquisition Policy (OUSD(AT&L)DPAP) to approve or disapprove the policies, procedures, clauses, and forms subject to paragraph (1)(i) of this section.

(2) In accordance with Section 29 of the Office of Federal Procurement Policy Act (41 U.S.C. 425), a new requirement for a certification by a contractor or offeror may not be included in a department/agency or component procurement regulation unless—

(i) The certification requirement is specifically imposed by statute; or

(ii) Written justification for such certification is provided to the Secretary of Defense by USD(AT&L), and the Secretary of Defense approves in writing the inclusion of such certification requirement.

(3) Contracting activities must obtain the appropriate approval (see

201.404) 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 regulation document such as a policy letter or clause book.

(4) Each department and agency must develop and, upon approval by OUSD(AT&L)DPAP, implement, maintain, and comply with a plan for controlling the use of clauses other than those prescribed by FAR or DFARS.

(5) Departments and agencies must submit requests for the Secretary of Defense, USD(AT&L), and OUSD(AT&L)DPAP approvals required by this section through the Director of the DAR Council.

[56 FR 36284, July 31, 1991, as amended at 60 FR 61591, Nov. 30, 1995; 63 FR 11528, Mar. 9, 1998; 64 FR 39430, July 22, 1999; 65 FR 6552, Feb. 10, 2000; 68 FR 7439, Feb. 14, 2003]

Subpart 201.4—Deviations From the FAR

201.402 Policy.

(1) The Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)DPAP), is the approval authority within DoD for any individual or class deviation from—

(i) FAR 3.104, Procurement Integrity, or DFARS 203.104, Procurement Integrity;

(ii) FAR Subpart 27.4, Rights in Data and Copyrights, or DFARS Subpart 227.4, Rights in Data and Copyrights;

(iii) FAR part 30, Cost Accounting Standards Administration, or DFARS part 230, Cost Accounting Standards Administration;

(iv) FAR subpart 31.1, Applicability, or DFARS subpart 231.1, Applicability (contract cost principles);

(v) FAR subpart 31.2, Contracts with Commercial Organizations, or DFARS subpart 231.2, Contracts with Commercial Organizations; or

(vi) FAR part 32, Contract Financing (except subparts 32.7 and 32.8 and the payment clauses prescribed by subpart 32.1), or DFARS part 232, Contract Financing (except subparts 232.7 and 232.8).

(2) Submit requests for deviation approval through department/agency channels to the approval authority in paragraph (1) of this section, 201.403, or 201.404, as appropriate. Submit deviations that require OUSD(AT&L)DPAP 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; 64 FR 8727, Feb. 23, 1999; 65 FR 6552, Feb. 10, 2000; 68 FR 7439, Feb. 14, 2003]

201.403 Individual deviations.

(1) Individual deviations, except those described in 201.402(1) and paragraph (2) of this section, must be approved in accordance with the department/agency plan prescribed by 201.304(4).

(2) Contracting officers outside the United States may deviate from prescribed nonstatutory FAR and DFARS clauses when—

(i) 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; and

(ii) Such governments or organizations will not agree to the standard clauses.

[65 FR 6552, Feb. 10, 2000]

201.404 Class deviations.

(b)(i) Except as provided in paragraph (b)(ii) of this section, OUSD(AT&L)DPAP is the approval authority within DoD for any class deviation.

(ii) The senior procurement executives for the Army, Navy, and Air Force, and the Directors of the Defense Commissary Agency, the Defense Contract Management Agency, and the Defense Logistics Agency, may approve any class deviation, other than those described in 201.402(1), that does not—

(A) Have a significant effect beyond the internal operating procedures of the department or agency;

(B) Have a significant cost or administrative impact on contractors or offerors;

(C) Diminish any preference given small business concerns by the FAR or DFARS; or

(D) Extend to requirements imposed by statute or by regulations of other agencies such as the Small Business Administration and the Department of Labor.

[65 FR 6552, Feb. 10, 2000, as amended at 65 FR 52951, Aug. 31, 2000; 68 FR 7439, Feb. 14, 2003]

Subpart 201.6—Career Development, Contracting Authority, and Responsibilities

201.602 Contracting officers.

201.602–2 Responsibilities.

(1) Follow the procedures at PGI 201.602–2 regarding designation of a contracting officer's representative (COR).

(2) A COR—

(i) Must be a Government employee, unless otherwise authorized in agency regulations;

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

(iii) 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;

(iv) Has no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract; and

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

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

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

(C) Specifying the period covered by the designation;

(D) Stating the authority is not redelegable; and

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

[71 FR 69489, Dec. 1, 2006]

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) In accordance with 10 U.S.C. 1724, in order to qualify to serve as a contracting officer with authority to award or administer contracts for amounts above the simplified acquisition threshold, a person must—

(i) Have completed all contracting courses required for a contracting officer to serve in the grade in which the

employee or member of the armed forces will serve;

(ii) Have at least 2 years experience in a contracting position;

(iii) Have—

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

(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; 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 qualification requirements in paragraph (1)(iii) of this subsection do not apply to a DoD employee or member of the armed forces who—

(i) On or before September 30, 2000, occupied—

(A) A contracting officer position with authority to award or administer contracts above the simplified acquisition threshold; or

(B) A position either as an employee in the GS–1102 occupational series or a member of the armed forces in an occupational specialty similar to the GS–1102 series;

(ii) Is in a contingency contracting force; or

(iii) Is an individual appointed to a 3-year developmental position. Information on developmental opportunities is contained in DoD Instruction 5000.66, Operation of the Defense Acquisition, Technology, and Logistics Workforce Education, Training, and Career Development Program.

(3) Waivers to the requirements in paragraph (1) of this subsection may be authorized. Information on waivers is contained in DoD Instruction 5000.66.

[67 FR 65509, Oct. 25, 2002, as amended at 73 FR 21844, Apr. 23, 2008]

201.603–3 Appointment.

(a) 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.

(b) Agency heads may delegate the purchase authority in 213.301 to DoD civilian employees and members of the U.S. Armed Forces.

[56 FR 36284, July 31, 1991, as amended at 64 FR 56705, Oct. 21, 1999]

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.

Commercially available off-the-shelf item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in Section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

Congressional defense committees means—

(1) The Committee on Armed Services of the Senate;

(2) The Subcommittee on Defense of the Committee on Appropriations of the Senate;

(3) The Committee on Armed Services of the House of Representatives; and

(4) The Subcommittee on Defense of the Committee on Appropriations of the House of Representatives.

Contract administration office also means a contract management office of the Defense Contract Management Agency.

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

Department of Defense Education Activity
TRICARE Management Activity
Acquisition and Procurement Office, Washington Headquarters Services

ARMY

Headquarters, U.S. Army Contracting Agency
Joint Contracting Command—Iraq/Afghanistan
National Guard Bureau
Program Executive Office for Simulation, Training, and Instrumentation
U.S. Army Aviation and Missile Command
U.S. Army Communications-Electronics Command
U.S. Army Corps of Engineers
U.S. Army Intelligence and Security Command
U.S. Army Joint Munitions and Lethality Life Cycle Management Command
U.S. Army Materiel Command, Office of Command Contracting
U.S. Army Medical Command
U.S. Army Medical Research and Materiel Command
U.S. Army Military Surface Deployment and Distribution Command
U.S. Army Research, Development, and Engineering Command
U.S. Army Space and Missile Defense Command
U.S. Army Sustainment Command
U.S. Army Tank-Automotive and Armaments Command

NAVY

Office of the Deputy Assistant Secretary of the Navy (Acquisition & Logistics Management)
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
Marine Corps Systems Command
Installations and Logistics, Headquarters, U.S. Marine Corps

AIR FORCE

Office of the Assistant Secretary of the Air Force (Acquisition)
Office of the Deputy Assistant Secretary (Contracting)
Air Force District of Washington
Air Force Operational Test & Evaluation Center
Air Force Special Operations Command
United States Air Force Academy
Air Force Materiel Command
Air Force Reserve 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
Program Executive Office for Aircraft Systems
Program Executive Office for Command and Control & Combat Support Systems
Program Executive Office for Combat and Mission Support
Program Executive Office for F/A–22 Programs
Program Executive Office for Joint Strike Fighter
Program Executive Office for Weapons

DEFENSE ADVANCED RESEARCH PROJECTS AGENCY

Office of the Deputy Director, Management

DEFENSE CONTRACT MANAGEMENT AGENCY

Office of the Director, Defense Contract Management Agency

DEFENSE FINANCE AND ACCOUNTING SERVICE

External Services, Defense Finance and Accounting Service

DEFENSE INFORMATION SYSTEMS AGENCY

Defense Information Technology Contracting Organization

DEFENSE INTELLIGENCE AGENCY

Office of Procurement

DEFENSE LOGISTICS AGENCY

Acquisition Management Directorate
Defense Supply Centers
Defense Energy Support Center

NATIONAL IMAGERY AND MAPPING AGENCY

Procurement and Contracting Office

DEFENSE THREAT REDUCTION AGENCY

Acquisition Management Office

NATIONAL SECURITY AGENCY

Headquarters, National Security Agency

MISSILE DEFENSE AGENCY

Headquarters, Missile Defense Agency

UNITED STATES SPECIAL OPERATIONS COMMAND

Headquarters, United States Special Operations Command

UNITED STATES TRANSPORTATION COMMAND

Directorate of Acquisition

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 Contract Management Agency, the Defense Finance and Accounting Service, the Defense Information Systems Agency, the Defense Intelligence Agency, the Defense Security Service, the Defense Logistics Agency, the National Imagery and Mapping Agency, the Defense Threat Reduction Agency, the National Security Agency, the Missile Defense Agency, 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, Technology, and Logistics), and the Director of Defense Procurement and Acquisition Policy, 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.

Procedures, Guidance, and Information (PGI) means a companion resource to the DFARS that—

(1) Contains mandatory internal DoD procedures. The DFARS will direct compliance with mandatory procedures using imperative language such as ''Follow the procedures at* * *'' or similar directive language;

(2) Contains non-mandatory internal DoD procedures and guidance and supplemental information to be used at the discretion of the contracting officer. The DFARS will point to non-mandatory procedures, guidance, and information using permissive language such as ''The contracting officer may use* * *'' or ''Additional information is available at* * *'' or other similar language;

(3) Is numbered similarly to the DFARS, except that each PGI numerical designation is preceded by the letters ''PGI''; and

(4) Is available electronically at *http://www.acq.osd.mil/dpap/dars/index.htm.*

Senior procurement executive means, for DoD—

Department of Defense (including the defense agencies)—Under Secretary of Defense (Acquisition, Technology, and Logistics);

Department of the Army—Assistant Secretary of the Army (Acquisition, Logistics and Technology);

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, and Logistics).

Tiered evaluation of offers, also known as *cascading evaluation of offers,* means a procedure used in negotiated acquisitions, when market research is inconclusive for justifying limiting competition to small business concerns, whereby the contracting officer—

(1) Solicits and receives offers from both small and other than small business concerns;

(2) Establishes a tiered or cascading order of precedence for evaluating offers that is specified in the solicitation; and

(3) If no award can be made at the first tier, evaluates offers at the next lower tier, until award can be made.

[56 FR 36287, July 31, 1991]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 202.101, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and on GPO Access.

PART 203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Sec.

203.070 Reporting of violations and suspected violations.

Subpart 203.1—Safeguards

203.104 Procurement integrity.
203.104–5 Disclosure of proprietary and source selection information.
203.170 Business practices.

Subpart 203.5—Other Improper Business Practices

203.502–2 Subcontractor kickbacks.
203.570 Prohibition on persons convicted of frauds or other defense-contract-related felonies.
203.570–1 Scope.
203.570–2 Prohibition period.
203.570–3 Contract clause.

Subpart 203.7—Voiding and Rescinding Contracts

203.703 Authority.

Subpart 203.10—Contractor Code of Business Ethics and Conduct

203.1004 Contract clauses.

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

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

§ 203.070 Reporting of violations and suspected violations.

Report violations and suspected violations of the following requirements in accordance with 209.406–3 or 209.407–3 and DoDD 7050.5, Coordination of Remedies for Fraud and Corruption Related to Procurement Activities:

(a) Certificate of Independent Price Determination (FAR 3.103).

(b) Procurement integrity (FAR 3.104).

(c) Gratuities clause (FAR 3.203).

(d) Antitrust laws (FAR 3.303).

(e) Covenant Against Contingent Fees (FAR 3.405).

(f) Anti-kickback Act (FAR 3.502).

(g) Prohibitions on persons convicted of defense-related contract felonies (203.570).

[69 FR 74990, Dec. 15, 2004]

Subpart 203.1—Safeguards

203.104 Procurement integrity.

203.104–5 Disclosure of proprietary and source selection information.

(d)(4) For purposes of FAR 3.104–5(d)(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.

[56 FR 36288, July 31, 1991, as amended at 62 FR 2612, Jan. 17, 1997]

203.170 Business practices.

To ensure the separation of functions for oversight, source selection, contract negotiation, and contract award, departments and agencies shall adhere to the following best practice policies:

(a) Senior leaders shall not perform multiple roles in source selection for a major weapon system or major service acquisition.

(b) Vacant acquisition positions shall be filled on an ''acting'' basis from below until a permanent appointment is made. To provide promising professionals an opportunity to gain experience by temporarily filling higher positions, these oversight duties shall not be accrued at the top.

(c) Acquisition process reviews of the military departments shall be conducted to assess and improve acquisition and management processes, roles, and structures. The scope of the reviews should include—

(1) Distribution of acquisition roles and responsibilities among personnel;

(2) Processes for reporting concerns about unusual or inappropriate actions; and

(3) Application of DoD Instruction 5000.2, Operation of the Defense Acquisition System, and the disciplines in the Defense Acquisition Guidebook.

(d) Source selection processes shall be—

(1) Reviewed and approved by cognizant organizations responsible for oversight;

(2) Documented by the head of the contracting activity or at the agency level; and

(3) Periodically reviewed by outside officials independent of that office or agency.

(e) Legal review of documentation of major acquisition system source selection shall be conducted prior to contract award, including the supporting documentation of the source selection evaluation board, source selection advisory council, and source selection authority.

(f) Procurement management reviews shall determine whether clearance threshold authorities are clear and that independent review is provided for acquisitions exceeding the simplified acquisition threshold.

[72 FR 20757, Apr. 26, 2007]

Subpart 203.5—Other Improper Business Practices

203.502–2 Subcontractor kickbacks.

(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 Prohibition on persons convicted of frauds or other defense-contract-related felonies.

203.570–1 Scope.

This subpart implements 10 U.S.C. 2408. For information on 10 U.S.C. 2408, see PGI 203.570–1.

[71 FR 14100, Mar. 21, 2006]

203.570–2 Prohibition period.

DoD has sole responsibility for determining the period of the prohibition described in paragraph (b) of the clause at 252.203–7001, Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies. The prohibition period—

(a) Shall not be less than 5 years from the date of conviction unless the agency head or a designee grants a waiver in the interest of national security. Follow the waiver procedures at PGI 203.570–2(a); and

(b) May be more than 5 years from the date of conviction if the agency head or a designee makes a written determination of the need for the longer period. The agency shall provide a copy of the determination to the address at PGI 203.570–2(b).

[69 FR 74990, Dec. 15, 2004]

203.570–3 Contract clause.

Use the clause at 252.203–7001, Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies, in all solicitations and contracts exceeding the simplified acquisition threshold, except solicitations and contracts for commercial items.

[64 FR 14398, Mar. 25, 1999. Redesignated at 69 FR 74990, Dec. 15, 2004]

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, and Logistics).

[56 FR 36288, July 31, 1991, as amended at 60 FR 61592, Nov. 30, 1995; 65 FR 39704, June 27, 2000]

Subpart 203.10—Contractor Code of Business Ethics and Conduct

203.1004 Contract clauses.

(b)(2)(ii) Insert the following address in paragraph (b)(3) of the clause at FAR 52.203–14, Display of Hotline Poster(s): DoD Inspector General, ATTN: Defense Hotline, 400 Army Navy Drive, Washington, DC 22202–2884.

[73 FR 46815, Aug. 12, 2008]

PART 204—ADMINISTRATIVE MATTERS

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204.7301 Definitions.
204.7302 General.
204.7303 Policy.
204.7304 Procedures.
204.7305 Contract clauses.

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.

Follow the procedures at PGI 204.101 for signature of contract documents.

[71 FR 9268, Feb. 23, 2006]

Subpart 204.2—Contract Distribution

204.201 Procedures.

Follow the procedures at PGI 204.201 for the distribution of contracts and modifications.

[70 FR 58982, Oct. 11, 2005]

204.203 Taxpayer identification information.

(b) The procedure at FAR 4.203(b) does not apply to contracts that include the clause at FAR 52.204–7, Central Contractor Registration. The payment office obtains the taxpayer identification number and the type of organization from the Central Contractor Registration database.

[68 FR 64558, Nov. 14, 2003]

Subpart 204.4—Safeguarding Classified Information Within Industry

204.402 General.

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 products, both classified and unclassified.

[71 FR 9268, Feb. 23, 2006]

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.

(c) Use the clause at 252.204–7005, Oral Attestation of Security Responsibilities, in solicitations and contracts that include the clause at FAR 52.204–2, Security Requirements.

[57 FR 14992, Apr. 23, 1992, as amended at 64 FR 45197, Aug. 19, 1999]

Subpart 204.6—Contract Reporting

204.670 Contract action reporting requirements.

Departments and agencies shall report contracting actions in accordance with the requirements at PGI 204.670.

[71 FR 44926, Aug. 8, 2006]

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.

Contracting officers shall close out contracts in accordance with the procedures at PGI 204.804. The closeout date for file purposes shall be determined and documented by the procuring contracting officer.

[73 FR 4114, Jan. 24, 2008]

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 Government Accountability 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 cost or pricing data (see FAR 15.403–4), 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.

[56 FR 36289, July 31, 1991, as amended at 62 FR 40472, July 29, 1997; 63 FR 11528, Mar. 9, 1998; 71 FR 53044, Sept. 8, 2006]

Subpart 204.9—Taxpayer Identification Number Information

SOURCE: 64 FR 43099, Aug. 9, 1999, unless otherwise noted.

204.902 General.

(b) DoD uses DD Form 350, Individual Contracting Action Report, to meet these reporting requirements.

[64 FR 43099, Aug. 9, 1999, as amended at 71 FR 9268, Feb. 23, 2006]

Subpart 204.11—Central Contractor Registration

SOURCE: 68 FR 64558, Nov. 14, 2003, unless otherwise noted.

204.1103 Procedures.

(e) On contractual documents transmitted to the payment office, provide the Commercial and Government Entity code, instead of the DUNS number or DUNS+4 number, in accordance with agency procedures.

[70 FR 57188, Sept. 30, 2005]

204.1104 Solicitation provision and contract clauses.

When using the clause at FAR 52.204–7, Central Contractor Registration, use the clause with 252.204–7004, Alternate A.

Subpart 204.12—Annual Representations and Certifications

SOURCE: 73 FR 1823, Jan. 10, 2008, unless otherwise noted.

204.1202 Solicitation provision and contract clause.

When using the provision at FAR 52.204–8, Annual Representations and Certifications—

(1) Use the provision with 252.204–7007, Alternate A, Annual Representations and Certifications; and

(2) Do not include the following representations and certifications:

(i) 252.209–7005, Reserve Officer Training Corps and Military Recruiting on Campus.

(ii) 252.212–7000, Offeror Representations and Certifications—Commercial Items.

(iii) 252.216–7003, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government.

(iv) 252.225–7000, Buy American Act—Balance of Payments Program Certificate.

(v) 252.225–7020, Trade Agreements Certificate.

(vi) 252.225–7031, Secondary Arab Boycott of Israel.

(vii) 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(viii) 252.225–7042, Authorization to Perform.

(ix) 252.229–7003, Tax Exemptions (Italy).

(x) 252.229–7005, Tax Exemptions (Spain).

(xi) 252.239–7011, Special Construction and Equipment Charges.

(xii) 252.247–7022, Representation of Extent of Transportation by Sea.

Subpart 204.70—Uniform Procurement Instrument Identification Numbers

204.7000 Scope.

This subpart—

(a) Prescribes policies and procedures for assigning numbers to all solicitations, contracts, and related instruments; and

(b) Does not apply to solicitations or orders for communication service authorizations issued by the Defense Information Technology Contracting Organization of the Defense Information Systems Agency in accordance with 239.7407–2.

[68 FR 64556, Nov. 14, 2003]

204.7001 Policy.

(a) Use the uniform procurement instrument identification (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 unless the conditions in paragraph (c) of this section exist.

(c)(1) If continued performance under a contract number is not possible or is not in the Government's best interest solely for administrative reasons (*e.g.*, when the supplementary PII serial numbering system is exhausted or for lengthy major systems contracts with multiple options), the contracting officer may assign an additional PII number by issuing a separate continued contract to permit continued contract performance.

(2) A continued contract—

(i) Does not constitute a new procurement;

(ii) Incorporates all prices, terms, and conditions of the predecessor contract effective at the time of issuance of the continued contract;

(iii) Operates as a separate contract independent of the predecessor contract once issued; and

(iv) Shall not evade competition, expand the scope of work, or extend the period of performance beyond that of the predecessor contract.

(3) When issuing a continued contract, the contracting officer shall—

(i) Issue an administrative modification to the predecessor contract to clearly state that—

(A) Any future awards provided for under the terms of the predecessor contract (*e.g.*, issuance of orders or exercise of options) will be accomplished under the continued contract; and

(B) Supplies and services already acquired under the predecessor contract shall remain solely under that contract for purposes of Government inspection, acceptance, payment, and closeout; and

(ii) Follow the procedures at PGI 204.7001(c).

[71 FR 27640, May 12, 2006]

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 letter ''I'' or ''O''.

(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 (not necessary in electronic transmission). 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).

[56 FR 36289, July 31, 1991, as amended at 65 FR 14398, Mar. 16, 2000; 68 FR 64556, Nov. 14, 2003]

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 six positions identify the department/agency and office issuing the instrument. Use the DoD Activity Address Code (DoDAAC) assigned to the issuing office. DoDAACs can be found at *https://day2k1.daas.dla.mil/daasinq/.*

(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 blanket purchase 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

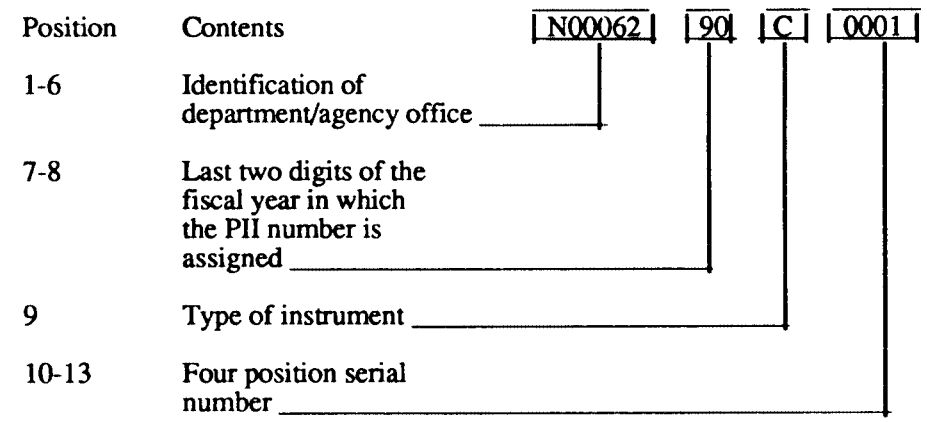
(xxiv) Reserved for departmental use—X

(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; 62 FR 34121, June 24, 1997; 64 FR 51075, Sept. 21, 1999; 65 FR 14398, Mar. 16, 2000; 65 FR 39704, June 27, 2000; 68 FR 7439, Feb. 14, 2003; 68 FR 64557, Nov. 14, 2003; 69 FR 63327, Nov. 1, 2004]

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 in accordance with 204.7005. 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.

[64 FR 43099, Aug. 9, 1999, as amended at 68 FR 64557, Nov. 14, 2003]

204.7005 Assignment of order codes.

(a) The Defense Logistics Agency, Acquisition Policy Branch (J71), Fort Belvoir, VA 22060–6221, is the executive agent for maintenance of code assignments for use in the first two positions of an order number when an activity places an order against another activity's contract or agreement (see 204.7004(d)(2)). The executive agent distributes blocks of two-character order codes to department/agency monitors for further assignment.

(b) Contracting activities submit requests for assignment of or changes in two-character order codes to their respective monitors in accordance with department/agency procedures. Order code monitors—

(1) Approve requests for additions, deletions, or changes; and

(2) Provide notification of additions, deletions, or changes to—

(i) The executive agent; and

(ii) The executive editor, Defense Acquisition Regulations, OUSD(AT&L)DPAP(DAR), 3062 Defense Pentagon, Washington, DC 20301–3062.

(c) Order code monitors are—

Army: Army Contracting Agency, Attn: SFCA-IT, 5109 Leesburg Pike, Suite 302, Falls Church, VA 22041–3201

Navy and Marine Corps: Office of the Assistant Secretary of the Navy (RD&A), 1000 Navy Pentagon, Room BF992, Washington, DC 20350–1000

Air Force: SAF/AQCI, 1060 Air Force Pentagon, Washington, DC 20330–1060

Defense Logistics Agency: Defense Logistics Agency, Acquisition Policy Branch (J–3311), John J. Kingman Road, Fort Belvoir, VA 22060–6221

Other Defense Agencies: Army Contracting Agency, Attn: SFCA-IT 5109 Leesburg Pike, Suite 302, Falls Church, VA 22041–3201

(d) Order code assignments can be found at *http://www.acq.osd.mil/dpap/dars/order_code_assignments.html.*

[68 FR 64557, Nov. 14, 2003, as amended at 69 FR 63327, Nov. 1, 2004; 72 FR 42313, Aug. 2, 2007; 73 FR 4113, Jan. 24, 2008; 73 FR 27464, May 13, 2008]

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 any combination of a two position alpha/numeric 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; 70 FR 58982, Oct. 11, 2005]

204.7102 Policy.

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

(1) Solicitations;

(2) Solicitation line and subline item numbers;

(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) 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

(2) The contract is a communications service authorization issued by the Defense Information Systems Agency's Defense Information Technology Contracting Organization.

[71 FR 9269, Feb. 23, 2006]

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) All subline items and exhibit line items under one contract line item shall be the same contract type as the contract line item.

(c) For a contract that contains a combination of fixed-price line items, time-and-materials/labor-hour line items, and/or cost-reimbursement line items, identify the contract type for each contract line item in Section B, Supplies or Services and Prices/Costs, to facilitate appropriate payment.

(d) 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).

(e) 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.

(f) 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; 70 FR 58982, Oct. 11, 2005]

204.7103–2 Numbering procedures.

Follow the procedures at PGI 204.7103–2 for numbering contract line items.

[70 FR 58983, Oct. 11, 2005]

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; 68 FR 75200, Dec. 30, 2003]

204.7104–2 Numbering procedures.

Follow the procedures at PGI 204.7104–2 for numbering contract subline items.

[70 FR 58983, Oct. 11, 2005]

204.7105 Contract exhibits and attachments.

Follow the procedures at PGI 204.7105 for use and numbering of contract exhibits and attachments.

[71 FR 9269, Feb. 23, 2006]

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.

(3) If the modification will decrease the amount obligated—

(i) There shall be coordination between the administrative and procuring contracting offices before issuance of the modification; and

(ii) The contracting officer shall not issue the modification unless sufficient unliquidated obligation exists or the purpose is to recover monies owed to the Government.

[56 FR 36289, July 31, 1991, as amended at 70 FR 58983, Oct. 11, 2005]

204.7107 Contract accounting classification reference number (ACRN).

Follow the procedures at PGI 204.7107 for assigning ACRNs.

[70 FR 58983, Oct. 11, 2005]

204.7108 Payment instructions.

Follow the procedures at PGI 204.7108 for inclusion of payment instructions in contracts.

[70 FR 58983, Oct. 11, 2005]

204.7109 Contract clause.

Use the clause at 252.204–7006, Billing Instructions, in solicitations and contracts if Section G includes—

(a) Any of the standard payment instructions at PGI 204.7108(d)(1) through (6); or

(b) Other payment instructions, in accordance with PGI 204.7108(d)(12), that require contractor identification of the contract line item(s) on the payment request.

[70 FR 58983, Oct. 11, 2005]

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 comply with the reporting requirements of subpart 204.6; or

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

[64 FR 43099, Aug. 9, 1999]

204.7201 Definitions.

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

(1) A code assigned by the Defense Logistics Information Service (DLIS) to identify a commercial or Government entity; or

(2) A code assigned by a member of the North Atlantic Treaty Organization (NATO) that DLIS records and maintains in the CAGE master file. This type of code is known as an ''NCAGE code.''

(b) *Contractor identification code* means a code that the contracting office uses to identify an offeror. The three types of contractor identification codes are CAGE codes, Data Universal Numbering System (DUNS) numbers, and Taxpayer Identification Numbers (TINs).

[64 FR 43099, Aug. 9, 1999]

204.7202 General.

204.7202–1 CAGE codes.

(a) DLIS assigns or records and maintains CAGE codes to identify commercial and Government entities. DoD 4000.25–5–M, Military Standard Contract Administration Procedures (MILSCAP), and Volume 7 of DoD 4100.39–M, Federal Logistics Information System (FLIS) Procedures Manual, prescribe use of CAGE codes.

(b)(1) If a prospective contractor located in the United States must register in the Central Contractor Registration (CCR) database (*see* FAR Subpart 4.11) and does not have a CAGE code, DLIS will assign a CAGE code when the prospective contractor submits its request for registration in the CCR database. Foreign registrants must obtain a North Atlantic Treaty Organization CAGE (NCAGE) code in order to register in the CCR database. NCAGE codes may be obtained from the Codification Bureau in the foreign registrant's country. Additional information on obtaining NCAGE codes is available at *http://www.dlis.dla.mil/Forms/Form__AC135.asp.*

(2) If registration in the CCR database is not required, the prospective contractor's CAGE code is not already available in the contracting office, and the prospective contractor does not respond to the provision at 252.204–7001, Commercial and Government Entity (CAGE) Code Reporting, use the following procedures:

(i) To identify the prospective contractor's CAGE code, use—

(A) The monthly H-series CD ROM that contains the H–4/H–8 CAGE master file issued by DLIS (Their address is: Customer Service, Federal Center, 74 Washington Avenue, North, Battle Creek, MI 49017–3084. Their telephone number is: toll-free 1–888–352–9333);

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

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

(D) The Internet to access the CAGE Lookup Server at *http://www.dlis.dla.mil/cage__welcome.asp.*

(ii) If no CAGE code is identified through use of the procedures in paragraph (b)(2)(i) of this subsection, ask DLIS to assign a CAGE code. Submit a DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code, (or electronic equivalent) to the address in paragraph (b)(2)(i)(A) of this subsection, ATTN: DLIS-SBB. The contracting office completes Section A of the DD Form 2051, and the contractor completes Section B. The contracting office must verify Section B before submitting the form.

(c) Direct questions on obtaining computer tapes, electronic updates, or

code assignments to DLIS Customer Service: toll-free (888) 227–2423 or (888) 352–9333; DSN 932–4725; or commercial (616) 961–4725.

[64 FR 43100, Aug. 9, 1999, as amended at 65 FR 63804, Oct. 25, 2000; 67 FR 49252, July 30, 2002; 68 FR 15380, Mar. 31, 2003; 68 FR 64558, Nov. 14, 2003]

204.7202–2 DUNS numbers.

Requirements for use of DUNS numbers are in FAR 4.602(d) and 4.603.

[64 FR 43100, Aug. 9, 1999]

204.7202–3 TINs.

Requirements for use of TINs are in FAR subpart 4.9.

[64 FR 43100, Aug. 9, 1999]

204.7203 Responsibilities of contracting officers.

(a) Assist offerors in obtaining the required CAGE codes.

(b) Do not deny a potential offeror a solicitation package because the offeror does not have a contractor identification code.

(c) Consider requesting a CAGE code at the time a potential 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.

[64 FR 43100, Aug. 9, 1999]

204.7204 Maintenance of the CAGE file.

(a) DLIS will accept written requests for changes to CAGE files, other than name changes, from the following entities:

(1) The entity identified by the code. The entity must use company letterhead to forward the request.

(2) The contracting office.

(3) The contract administration office.

(b) Submit requests for changes to CAGE files on DD Form 2051, or electronic equivalent, to—Defense Logistics Information Service, DLIS-SBB, Federal Center, 74 Washington Avenue, North, Battle Creek, MI 49017–3084. Telephone Numbers: toll-free (888) 352–9333, DSN 932–4725, commercial (616) 961–4725. Facsimile: (616) 961–4388, 4485.

(c) The contracting officer responsible for execution of a change-of-name agreement (see FAR subpart 42.12) must submit the agreement to DLIS-SBB. If there are no current contracts, each contracting and contract administration office receiving notification of changes from the commercial entity must forward a copy of the change notice annotated with the CAGE code to DLIS-SBB unless the change notice indicates that DLIS-SBB already has been notified.

(d) Additional guidance for maintaining CAGE codes is in Volume 7 of DoD 4100.39–M, Federal Logistics Information System (FLIS) Procedures Manual.

[64 FR 43100, Aug. 9, 1999; 64 FR 46474, Aug. 25, 1999, as amended at 65 FR 63804, Oct. 25, 2000]

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 (transferor).

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

(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.

[56 FR 36289, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

204.7206 Using CAGE codes to identify agents and brokers.

Authorized agents and brokers are entities and, as such, may be assigned CAGE 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; 62 FR 48182, Sept. 15, 1997]

204.7207 Solicitation provision.

Use the provision at 252.204–7001, Commercial and Government Entity (CAGE) Code Reporting, in solicitations when—

(a) The solicitation does not include the clause at FAR 52.204–7, Central Contractor Registration; and

(b) The CAGE codes for the potential offerors are not available to the contracting office.

[66 FR 47097, Sept. 11, 2001, as amended at 68 FR 64558, Nov. 14, 2003]

Subpart 204.73—Export–Controlled Items

SOURCE: 73 FR 42278, July 21, 2008, unless otherwise noted.

204.7300 Scope of subpart.

This subpart implements Section 890(a) of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

204.7301 Definitions.

As used in this subpart—

Applied research means the effort that—

(1) Normally follows basic research, but may not be severable from the related basic research;

(2) Attempts to determine and exploit the potential of scientific discoveries or improvements in technology, materials, processes, methods, devices, or techniques; and

(3) Attempts to advance the state of the art.

Export–controlled items is defined in the clauses at 252.204–7008 and 252.204–7009.

Fundamental research, as defined by National Security Decision Directive (NSDD) 189, means basic and applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. This is distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary or national security reasons.

204.7302 General.

Export control laws and regulations restrict the transfer, by any means, of certain types of items to unauthorized persons. The International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) establish these restrictions. See PGI 204.7302 for additional information.

204.7303 Policy.

(a) It is in the interest of both the Government and the contractor to have a common understanding of export–controlled items expected to be involved in contract performance.

(b) The requiring activity shall review each acquisition to determine if, during performance of the contemplated contract, the contractor is expected to generate or require access to export–controlled items.

204.7304 Procedures.

(a) Prior to issuance of a solicitation for research and development, the requiring activity shall notify the contracting officer in writing when—

(1) Export–controlled items are expected to be involved; or

(2) The work is fundamental research only, and export–controlled items are not expected to be involved.

(b) Prior to issuance of a solicitation for supplies or services, the requiring activity shall notify the contracting officer in writing when—

(1) Export–controlled items are expected to be involved; or

(2) The requiring activity is unable to determine that export-controlled items will not be involved. See PGI 204.7304 for guidance regarding this notification requirement.

204.7305 Contract clauses.

(a) Use the clause at 252.204–7008, Requirements for Contracts Involving Export–Controlled Items, in solicitations and contracts when the requiring activity provides the notification at 204.7304(a)(1) or (b)(1), indicating that export–controlled items are expected to be involved in the performance of the contract.

(b) Use the clause at 252.204–7009, Requirements Regarding Potential Access to Export–Controlled Items, in solicitations and contracts—

(1) For research and development, except when the clause at 252.204–7008 will be included; or

(2) For supplies and services, when the requiring activity provides the notification at 204.7304(b)(2).

SUBCHAPTER B—ACQUISITION PLANNING

PART 205—PUBLICIZING CONTRACT ACTIONS

Subpart 205.2—Synopses of Proposed Contract Actions

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

Subpart 205.3—Synopses of Contract Awards

205.301 General.
205.303 Announcement of contract awards.

Subpart 205.4—Release of Information

205.470 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 acquisitions being considered for historically black college and university and minority institution set-asides under 226.370—

(A) Cite the appropriate Numbered Note; and

(B) Include the notice at PGI 205.207(d)(i).

(ii) For broad agency announcement notices, see 235.016.

[69 FR 63328, Nov. 1, 2004, as amended at 70 FR 73149, Dec. 9, 2005]

Subpart 205.3—Synopses of Contract Awards

205.301 General.

(a)(S–70) *Synopsis of exceptions to domestic source requirements.*

(i) In accordance with 10 U.S.C. 2533a(k), contracting officers also must synopsize through the GPE, awards exceeding the simplified acquisition threshold that are for the acquisition of any clothing, fiber, yarn, or fabric items described in 225.7002–1(a)(2) through (10), if—

(A) The Secretary concerned has determined that domestic items are not available, in accordance with 225.7002–2(b); or

(B) The acquisition is for chemical warfare protective clothing, and the contracting officer has determined that an exception to domestic source requirements applies because the acquisition furthers an agreement with a qualifying country, in accordance with 225.7002–2(p).

(ii) The synopsis must be submitted in sufficient time to permit its publication not later than 7 days after contract award.

(iii) In addition to the information otherwise required in a synopsis of contract award, the synopsis must include one of the following statements as applicable:

(A) ''The exception at DFARS 225.7002–2(b) applies to this acquisition, because the Secretary concerned has determined that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in satisfactory quality and sufficient quantity at U.S. market prices.''

(B) ''The exception at DFARS 225.7002–2(p) applies to this acquisition, because the contracting officer has determined that this acquisition of chemical warfare protective clothing furthers an agreement with a qualifying country identified in DFARS 225.872.''

[71 FR 58536, Oct. 4, 2006]

205.303 Announcement of contract awards.

(a) *Public announcement.* (i) The threshold for DoD awards is $5.5 million. Report all contractual actions, including modifications, that have a face value, excluding unexercised options, of more than $5.5 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 $5.5 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 $5.5 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 $5.5 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; 71 FR 75892, Dec. 19, 2006]

Subpart 205.4—Release of Information

205.470 Contract clause.

Use the clause at 252.205–7000, Provision of Information to Cooperative Agreement Holders, in solicitations and contracts expected to exceed $100,000,000. This clause implements 10 U.S.C. 2416.

[69 FR 63328, Nov. 1, 2004, as amended at 70 FR 8537, Feb. 22, 2005]

Subpart 205.5—Paid Advertisements

205.502 Authority.

(a) *Newspapers.* Heads of contracting activities are delegated authority to approve the publication of paid advertisements in newspapers.

[69 FR 63328, Nov. 1, 2004]

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 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.
206.303–70 Acquisitions in support of operations in Iraq or Afghanistan.
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) As authorized by 10 U.S.C. 1091, contracts awarded to individuals using the procedures at 237.104(b)(ii) are exempt from the competitive requirements of FAR part 6.

(S–70) Also excepted from this part are follow-on production contracts for products developed pursuant to the ''other transactions'' authority of 10 U.S.C. 2371 for prototype projects when—

(1) The other transaction agreement includes provisions for a follow-on production contract;

(2) The contracting officer receives sufficient information from the agreements officer and the project manager for the prototype other transaction agreement, which documents that the conditions set forth in 10 U.S.C. 2371 note, subsections (f)(2) (A) and (B) (*see* 32 CFR 3.9(d)), have been met; and

(3) The contracting officer establishes quantities and prices for the follow-on production contract that do not exceed the quantities and target prices established in the other transaction agreement.

[70 FR 2361, Jan. 13, 2005]

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 shall identify the source to be excluded from the contract action. Include the information at PGI 206.202(b), as applicable, and any other information that may be pertinent, in the supporting documentation.

[69 FR 74991, Dec. 15, 2004]

206.203 Set-asides for small business concerns.

(b) Also no separate justification or determination and findings is required for contract actions processed as historically black college and university and minority institution set-asides (see 226.7003).

[63 FR 41973, Aug. 6, 1998]

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.

[56 FR 36303, July 31, 1991, as amended at 57 FR 14992, Apr. 23, 1992; 58 FR 28463, May 13, 1993; 69 FR 74991, Dec. 15, 2004]

206.302–2 Unusual and compelling urgency.

(b) *Application*. For guidance on circumstances under which use of this authority may be appropriate, see PGI 206.302–2(b).

[69 FR 74991, Dec. 15, 2004]

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 the head of the contracting activity prepares a document that 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.

[63 FR 67803, Dec. 9, 1998]

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 and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics).

(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; 65 FR 39704, June 27, 2000; 68 FR 7439, Feb. 14, 2003]

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.

206.303–70 Acquisitions in support of operations in Iraq or Afghanistan.

The justification and approval addressed in FAR 6.303 is not required for acquisitions conducted using a procedure specified in 225.7703–1(a).

[73 FR 53152, Sept. 15, 2008]

206.304 Approval of the justification.

(a)(4) The Under Secretary of Defense (Acquisition, Technology, and Logistics) 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; 65 FR 39704, June 27, 2000]

PART 207—ACQUISITION PLANNING

Subpart 207.1—Acquisition Plans

Sec.
207.102 Policy.
207.103 Agency-head responsibilities.
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207.500 Scope of subpart.
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207.7001 Definition.
207.7002 Authority to acquire additional quantities of end items.
207.7003 Limitation.

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.

(a)(1) See 212.102 regarding requirements for a written determination that the commercial item definition has been met when using FAR Part 12 procedures.

[73 FR 4114, Jan. 24, 2008]

207.103 Agency-head responsibilities.

(d)(i) 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 $10 million or more;

(B) Acquisitions for production or services when the total cost of all contracts for the acquisition program is estimated at $50 million or more for all years or $25 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 that covers all known present and future requirements. This exception does not apply to a multiyear contract or a contract with options or phases.

(e) Prepare written acquisition plans for acquisition programs meeting the thresholds of paragraphs (d)(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.

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

(h) For procurement of conventional ammunition, as defined in DoDD 5160.65, Single Manager for Conventional Ammunition (SMCA), the SMCA will review the acquisition plan to determine if it is consistent with retaining national technology and industrial base capabilities in accordance with 10 U.S.C. 2304(c)(3) and Section 806 of Public Law 105–261. The department or agency—

(i) Shall submit the acquisition plan to the address in PGI 207.103(h); and

(ii) Shall not proceed with the procurement until the SMCA provides written concurrence with the acquisition plan. In the case of a non-concurrence, the SMCA will resolve issues with the Army Office of the Executive Director for Conventional Ammunition.

[71 FR 53045, Sept. 8, 2006, as amended at 71 FR 58537, Oct. 4, 2006]

207.105 Contents of written acquisition plans.

In addition to the requirements of FAR 7.105, planners shall follow the procedures at PGI 207.105.

[71 FR 53045, Sept. 8, 2006]

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.

(S–70)(1) In accordance with Section 802(a) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and DoD policy requirements, acquisition plans for major weapon systems and subsystems of major weapon systems shall—

(i) Assess the long-term technical data and computer software needs of those systems and subsystems; and

(ii) Establish acquisition strategies that provide for the technical data deliverables and associated license rights needed to sustain those systems and subsystems over their life cycle. The strategy may include—

(A) The development of maintenance capabilities within DoD; or

(B) Competition for contracts for sustainment of the systems or subsystems.

(2) Assessments and corresponding acquisition strategies developed under this section shall—

(i) Be developed before issuance of a solicitation for the weapon system or subsystem;

(ii) Address the merits of including a priced contract option for the future delivery of technical data and computer software, and associated license rights, that were not acquired upon initial contract award;

(iii) Address the potential for changes in the sustainment plan over the life cycle of the weapon system or subsystem; and

(iv) Apply to weapon systems and subsystems that are to be supported by performance-based logistics arrangements as well as to weapon systems and subsystems that are to be supported by other sustainment approaches.

(S–71) See 209.570 for policy applicable to acquisition strategies that consider the use of lead system integrators.

[56 FR 36305, July 31, 1991, as amended at 72 FR 51188, Sept. 6, 2007; 73 FR 1824, Jan. 10, 2008]

207.170 Consolidation of contract requirements.

207.170–1 Scope.

This section implements 10 U.S.C. 2382.

[69 FR 55987, Sept. 17, 2004]

207.170–2 Definitions.

As used in this section—

Consolidation of contract requirements means the use of a solicitation to obtain offers for a single contract or a multiple award contract to satisfy two or more requirements of a department, agency, or activity for supplies or services that previously have been provided to, or performed for, that department, agency, or activity under two or more separate contracts.

Multiple award contract means–

(1) Orders placed using a multiple award schedule issued by the General Services Administration as described in FAR Subpart 8.4;

(2) A multiple award task order or delivery order contract issued in accordance with FAR Subpart 16.5; or

(3) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources for the same line item under the same solicitation.

[71 FR 14106, Mar. 21, 2006]

207.170–3 Policy and procedures.

(a) Agencies shall not consolidate contract requirements with an estimated total value exceeding $5.5 million unless the acquisition strategy includes—

(1) The results of market research;

(2) Identification of any alternative contracting approaches that would involve a lesser degree of consolidation; and

(3) A determination by the senior procurement executive that the consolidation is necessary and justified.

(i) Market research may indicate that consolidation of contract requirements is necessary and justified if the benefits of the acquisition strategy substantially exceed the benefits of each of the possible alternative contracting approaches. Benefits may include costs and, regardless of whether quantifiable in dollar amounts—

(A) Quality;

(B) Acquisition cycle;

(C) Terms and conditions; and

(D) Any other benefit.

(ii) Savings in administrative or personnel costs alone do not constitute a sufficient justification for a consolidation of contract requirements unless the total amount of the cost savings is expected to be substantial in relation to the total cost of the procurement.

(b) Include the determination made in accordance with paragraph (a)(3) of this section in the contract file.

[69 FR 55987, Sept. 17, 2004, as amended at 71 FR 14106, Mar. 21, 2006; 71 FR 75892, Dec. 19, 2006]

207.171 Component breakout.

207.171–1 Scope.

(a) This section provides policy for breaking out components of end items for future acquisitions so that the Government can purchase the components directly from the manufacturer or supplier and furnish them to the end item manufacturer as Government-furnished material.

(b) This section does not apply to—

(1) The initial decisions on Government-furnished equipment or contractor-furnished equipment that are made at the inception of an acquisition program; or

(2) Breakout of parts for replenishment (see Appendix E).

[71 FR 14102, Mar. 21, 2006]

207.171–2 Definition.

Component, as used in this section, includes subsystems, assemblies, subassemblies, and other major elements of an end item; it does not include elements of relatively small annual acquisition value.

[71 FR 14102, Mar. 21, 2006]

207.171–3 Policy.

DoD policy is to break out components of weapons systems or other major end items under certain circumstances.

(a) When it is anticipated that a prime contract will be awarded without adequate price competition, and the prime contractor is expected to acquire any component without adequate price competition, the agency shall break out that component if—

(1) Substantial net cost savings probably will be achieved; and

(2) Breakout action will not jeopardize the quality, reliability, performance, or timely delivery of the end item.

(b) Even when either or both the prime contract and the component will be acquired with adequate price competition, the agency shall consider breakout of the component if substantial net cost savings will result from—

(1) Greater quantity acquisitions; or

(2) Such factors as improved logistics support (through reduction in varieties of spare parts) and economies in operations and training (through standardization of design).

(c) Breakout normally is not justified for a component that is not expected to exceed $1 million for the current year's requirement.

[71 FR 14102, Mar. 21, 2006]

207.171–4 Procedures.

Agencies shall follow the procedures at PGI 207.171–4 for component breakout.

[71 FR 14102, Mar. 21, 2006]

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]

207.471 Funding requirements.

(a) Fund leases in accordance with DoD Financial Management Regulation (FMR) 7000.14–R, Volume 2A, Chapter 1.

(b) DoD leases are either capital leases or operating leases. See FMR 7000.14–R, Volume 4, Chapter 7, Section 070207.

(c) Use procurement funds for capital leases, as these are essentially installment purchases of property.

[64 FR 31732, June 14, 1999, as amended at 66 FR 55121, Nov. 1, 2001; 71 FR 53045, Sept. 8, 2006]

Subpart 207.5—Inherently Governmental Functions

SOURCE: 70 FR 14573, Mar. 23, 2005, unless otherwise noted.

207.500 Scope of subpart.

This subpart also implements 10 U.S.C. 2383.

207.503 Policy.

(e) The written determination required by FAR 7.503(e), that none of the functions to be performed by contract are inherently governmental—

(i) Shall be prepared using DoD Instruction 1100.22, Guidance for Determining Workforce Mix; and

(ii) Shall include a determination that none of the functions to be performed are exempt from private sector performance, as addressed in DoD Instruction 1100.22.

(S–70) *Contracts for acquisition functions.*

(1) In accordance with 10 U.S.C. 2383, the head of an agency may enter into a contract for performance of the acquisition functions closely associated with inherently governmental functions that are listed at FAR 7.503(d) only if—

(i) The contracting officer determines that appropriate military or civilian DoD personnel—

(A) Cannot reasonably be made available to perform the functions;

(B) Will oversee contractor performance of the contract; and

(C) Will perform all inherently governmental functions associated with the functions to be performed under the contract; and

(ii) The contracting officer ensures that the agency addresses any potential organizational conflict of interest of the contractor in the performance of the functions under the contract (see FAR Subpart 9.5).

(2) See related information at PGI 207.503(S–70).

[70 FR 14573, Mar. 23, 2005, as amended at 71 FR 14101, Mar. 21, 2006; 73 FR 1826, Jan. 10, 2008]

Subpart 207.70—Buy-to-Budget—Additional Quantities of End Items

SOURCE: 68 FR 43331, July 22, 2003, unless otherwise noted.

207.7001 Definition.

End item, as used in this subpart, means a production product assembled, completed, and ready for issue or deployment.

207.7002 Authority to acquire additional quantities of end items.

10 U.S.C. 2308 authorizes DoD to use funds available for the acquisition of an end item to acquire a higher quantity of the end item than the quantity specified in a law providing for the funding of that acquisition, if the head of an agency determines that—

(a) The agency has an established requirement for the end item that is expected to remain substantially unchanged throughout the period of the acquisition;

(b) It is possible to acquire the higher quantity of the end item without additional funding because of production efficiencies or other cost reductions;

(c) The amount of funds used for the acquisition of the higher quantity of the end item will not exceed the amount provided under that law for the acquisition of the end item; and

(d) The amount provided under that law for the acquisition of the end item is sufficient to ensure that each unit of the end item acquired within the higher quantity is fully funded as a complete end item.

207.7003 Limitation.

For noncompetitive acquisitions, the acquisition of additional quantities is limited to not more than 10 percent of the quantity approved in the justification and approval prepared in accordance with FAR part 6 for the acquisition of the end item.

PART 208—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.
208.002 Priorities for use of Government supply sources.

Subpart 208.4—Federal Supply Schedules

208.404 Use of Federal Supply Schedules.
208.405–70 Additional ordering procedures.
208.406 Ordering activity responsibilities.
208.406–1 Order placement.

Subpart 208.6—Acquisition From Federal Prison Industries, Inc.

208.602–70 Acquisition of items for which FPI has a significant market share.

Subpart 208.7—Acquisition From Nonprofit Agencies Employing People Who Are Blind or Severely Disabled

208.705 Procedures.

Subpart 208.70—Coordinated Acquisition

208.7000 Scope of subpart.
208.7001 Definitions.
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Subpart 208.71—Acquisition for National Aeronautics and Space Administration (NASA)

208.7100 Authorization.
208.7101 Policy.
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Subpart 208.72 [Reserved]

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.

Subpart 208.74—Enterprise Software Agreements

208.7400 Scope of subpart.
208.7401 Definitions.
208.7402 General.
208.7403 Acquisition procedures.

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

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

208.002 Priorities for use of Government supply sources.

(a)(1)(v) See Subpart 208.70, Coordinated Acquisition, and Subpart 208.74, Enterprise Software Agreements.

[71 FR 39004, July 11, 2006]

Subpart 208.4—Federal Supply Schedules

208.404 Use of Federal Supply Schedules.

(a)(i) Departments and agencies shall comply with the review, approval, and reporting requirements established in accordance with subpart 217.78 when placing orders for supplies or services in amounts exceeding the simplified acquisition threshold.

(ii) 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.

[56 FR 36306, July 31, 1991, as amended at 67 FR 65508, Oct. 25, 2002; 69 FR 63327, Nov. 1, 2004; 70 FR 29642, May 24, 2005; 71 FR 14103, 14107, Mar. 21, 2006]

208.405–70 Additional ordering procedures.

(a) This subsection—

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) for

the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services under Federal Supply Schedules, including orders under blanket purchase agreements established under Federal Supply Schedules; and

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD.

(b) Each order exceeding $100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405–6 and includes a written determination that—

(1) A statute expressly authorizes or requires that the purchase be made from a specified source; or

(2) One of the circumstances described at FAR 16.505(b)(2)(i) through (iii) applies to the order. Follow the procedures at PGI 216.505–70 if FAR 16.505(b)(2)(ii) or (iii) is deemed to apply.

(c) An order exceeding $100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to—

(1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements, and the contracting officer—

(i)(A) Receives offers from at least three contractors that can fulfill the requirements; or

(B) Determines in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and

(ii) Ensures all offers received are fairly considered; or

(2) All contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(d) See PGI 208.405–70 for additional information regarding fair notice to contractors and requirements relating to the establishment of blanket purchase agreements under Federal Supply Schedules.

[71 FR 14107, Mar. 21, 2006]

§ 208.406 Ordering activity responsibilities.

§ 208.406–1 Order placement.

Follow the procedures at PGI 208.406–1 when ordering from schedules.

[71 FR 14107, Mar. 21, 2006]

Subpart 208.6—Acquisition From Federal Prison Industries, Inc.

208.602–70 Acquisition of items for which FPI has a significant market share.

(a) *Scope*. This subsection implements Section 827 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181).

(b) *Definition. Item for which FPI has a significant market share*, as used in this subsection, means an item for which FPI's share of the DoD market for the federal supply class including that item is greater than 5 percent, as determined by DoD in consultation with the Office of Federal Procurement Policy. A list of the federal supply classes of items for which FPI has a significant market share is maintained at *http://www.acq.osd.mil/dpap/cpic/cp/specific_policy_areas.html#federal_prison*.

(c) *Policy*. (1) When acquiring an item for which FPI has a significant market share—

(i) Acquire the item using—

(A) Competitive procedures (e.g., the procedures in FAR 6.102, the set-aside procedures in FAR Subpart 19.5, or competition conducted in accordance with FAR Part 13); or

(B) The fair opportunity procedures in FAR 16.505, if placing an order under a multiple award delivery-order contract; and

(ii) Include FPI in the solicitation process, consider a timely offer from FPI, and make an award in accordance with the policy at FAR 8.602(a)(4)(ii) through (v).

(2) When acquiring an item for which FPI does not have a significant market share, acquire the item in accordance with the policy at FAR 8.602.

[73 FR 46817, Aug. 12, 2008]

Subpart 208.7—Acquisition From Nonprofit Agencies Employing People Who Are Blind or Severely Disabled

208.705 Procedures.

Follow the procedures at PGI 208.705 when placing orders with central nonprofit agencies.

[71 FR 39004, July 11, 2006]

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 PGI 208.7006); or

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

[56 FR 36306, July 31, 1991, as amended at 67 FR 77936, Dec. 20, 2002; 71 FR 39004, July 11, 2006]

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 Deputy Under Secretary of Defense (Logistics);

(2) To GSA, through agreement with GSA, by the Deputy Under Secretary of Defense (Logistics);

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

(4) For acquisitions to be made in the contiguous 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. 2311).

(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 Deputy Under Secretary of Defense (Logistics)—

(1) To the departments and agencies; and

(2) To GSA, through agreement with GSA.

[56 FR 36306, July 31, 1991, as amended at 64 FR 51075, Sept. 21, 1999; 70 FR 35544, June 21, 2005]

208.7002–1 Acquiring department responsibilities.

See PGI 208.7002–1 for the acquiring department's responsibilities.

[71 FR 39004, July 11, 2006]

208.7002–2 Requiring department responsibilities.

See PGI 208.7002–2 for the requiring department's responsibilities.

[71 FR 39004, July 11, 2006]

208.7003 Applicability.

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

(a) Acquire all items assigned for IMM 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) Follow the procedures at PGI 208.7003–1(b) when an item assigned for IMM is to be acquired by the requiring department in accordance with paragraph (a)(3) of this subsection.

[60 FR 61593, Nov. 30, 1995, as amended at 64 FR 51075, Sept. 21, 1999; 64 FR 61031, Nov. 9, 1999; 71 FR 39004, July 11, 2006]

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 8.002(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 2, 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; 64 FR 51075, Sept. 21, 1999; 71 FR 69489, Dec. 1, 2006]

208.7004 Procedures.

Follow the procedures at PGI 208.7004 for processing coordinated acquisition requirements.

[71 FR 39005, July 11, 2006]

208.7005 Military interdepartmental purchase requests.

Follow the procedures at—

(a) PGI 253.208–1 when using DD Form 448, Military Interdepartmental Purchase Request; and

(b) PGI 253.208–2 when using DD Form 448–2, Acceptance of MIPR.

[71 FR 39005, July 11, 2006]

208.7006 Coordinated acquisition assignments.

See PGI 208.7006 for coordinated acquisition assignments.

[71 FR 39005, July 11, 2006]

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 shall cooperate fully with NASA in making acquisition services, equipment, personnel, and facilities available on the basis of mutual agreement.

[71 FR 39005, July 11, 2006]

208.7102 Procedures.

Follow the procedures at PGI 208.7102 when contracting or performing services for NASA.

[71 FR 39005, July 11, 2006]

Subpart 208.72 [Reserved]

Subpart 208.73—Use of Government-Owned Precious Metals

208.7301 Definitions.

As used in this subpart—

Defense Supply Center, Philadelphia (DSCP) 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.

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.

[56 FR 36306, July 31, 1991, as amended at 65 FR 14398, Mar. 16, 2000; 65 FR 52951, Aug. 31, 2000; 65 FR 58607 Sept. 29, 2000; 71 FR 39005, July 11, 2006]

208.7302 Policy.

DoD policy is for maximum participation in the Precious Metals Recovery Program. DoD components shall furnish recovered precious metals contained in the DSCP 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.

[56 FR 36306, July 31, 1991, as amended at 65 FR 52951, Aug. 31, 2000; 71 FR 39005, July 11, 2006]

208.7303 Procedures.

Follow the procedures at PGI 208.7303 for use of the Precious Metals Recovery Program.

[71 FR 39005, July 11, 2006]

208.7304 Refined precious metals.

See PGI 208.7304 for a list of refined precious metals managed by DSCP.

[71 FR 39005, July 11, 2006]

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 DSCP;

(2) When the contracting officer knows that the items being acquired do not require precious metals in their manufacture; or

(3) For acquisitions at or below the simplified acquisition threshold.

(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 11, DoD 4160.21–M, Defense Materiel Disposition Manual.

[56 FR 36306, July 31, 1991, as amended at 64 FR 2596, Jan. 15, 1999; 65 FR 14398, Mar. 16, 2000; 65 FR 52952, Aug. 31, 2000]

Subpart 208.74—Enterprise Software Agreements

SOURCE: 67 FR 65511, Oct. 25, 2002, unless otherwise noted.

208.7400 Scope of subpart.

This subpart prescribes policy and procedures for acquisition of commercial software and software maintenance, including software and software maintenance that is acquired—

(a) As part of a system or system upgrade, where practicable;

(b) Under a service contract;

(c) Under a contract or agreement administered by another agency (*e.g.*, under an interagency agreement);

(d) Under a Federal Supply Schedule contract or blanket purchase agreement established in accordance with FAR 8.405 and 208.405–70; or

(e) By a contractor that is authorized to order From a Government supply source pursuant to FAR 51.101.

[67 FR 65511, Oct. 25, 2002, as amended at 71 FR 62559, Oct. 26, 2006]

208.7401 Definitions.

As used in this subpart—

Enterprise software agreement means an agreement or a contract that is used to acquire designated commercial software or related services such as software maintenance.

Enterprise Software Initiative means an initiative led by the DoD Chief Information Officer to develop processes for DoD-wide software asset management.

Software maintenance means services normally provided by a software company as standard services at established catalog or market prices, *e.g.*, the right to receive and use upgraded versions of software, updates, and revisions.

[67 FR 65511, Oct. 25, 2002, as amended at 71 FR 39005, July 11, 2006]

208.7402 General.

Departments and agencies shall fulfill requirements for commercial software and related services, such as software maintenance, in accordance with the DoD Enterprise Software Initiative (ESI) (see Web site at *http://www.donimit.navy.mil/esi).* ESI promotes the use of enterprise software agreements (ESAs) with contractors that allow DoD to obtain favorable terms and pricing for commercial software and related services. ESI does not dictate the products or services to be acquired.

208.7403 Acquisition procedures.

Follow the procedures at PGI 208.7403 when acquiring commercial software and related services.

[71 FR 39005, July 11, 2006]

PART 209—CONTRACTOR QUALIFICATIONS

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]

209.104 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 of $100,000 or

more 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 or the firm that owns 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)(1)(A), the Secretary of Defense may waive the prohibition in paragraph (g)(ii)(A) of this subsection upon determining that the waiver is essential to the national security interest 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 and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), 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.

(D) In accordance with 10 U.S.C. 2536(b)(1)(B), the Secretary of Defense may, in the case of a contract awarded for environmental restoration, remediation, or waste management at a DoD facility, waive the prohibition in paragraph (g)(ii)(A) of this subsection upon—

(*1*) Determining that—

(*i*) The waiver will advance the environmental restoration, remediation, or waste management objectives of DoD and will not harm the national security interests of the United States; and

(*ii*) The entity to which the contract is awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under section 144c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)); and

(*2*) Notifying Congress of the decision to grant the waiver. The contract may be awarded only after the end of the 45-day period beginning on the date the notification is received by the appropriate Congressional committees.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, 51132, Oct. 7, 1994; 60 FR 29497, June 5, 1995; 62 FR 34121, June 24, 1997; 63 FR 11851, Mar. 11, 1998; 63 FR 14837, Mar. 27, 1998; 65 FR 39704, June 27, 2000; 67 FR 4208, Jan. 29, 2002; 68 FR 7439, Feb. 14, 2003]

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.

(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. Any disclosure that the government of a terrorist country has a significant interest in an offeror or a subsidiary of an offeror shall be forwarded through the head of the agency to the Director of Defense Procurement and Acquisition Policy, ATTN: OUSD(AT&L)DPAP/(CPIC), 3060 Defense Pentagon, Washington, DC 20101–3060.

(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.

[58 FR 28464, May 13, 1993, as amended at 59 FR 51131, Oct. 7, 1994; 62 FR 34122, June 24, 1997; 63 FR 11851, Mar. 11, 1998; 63 FR 14837, Mar. 27, 1998; 65 FR 39704, June 27, 2000; 67 FR 4208, Jan. 29, 2002; 68 FR 7439, Feb. 14, 2003; 72 FR 30278, May 31, 2007]

209.105–1 Obtaining information.

For guidance on using the Excluded Parties List System, see PGI 209.105–1.

[71 FR 14100, Mar. 21, 2006]

209.105–2 Determinations and documentation.

(a) The contracting officer shall submit a copy of a determination of nonresponsibility to the appropriate debarring and suspending official listed in 209.403.

[71 FR 62559, Oct. 26, 2006]

209.106 Preaward surveys.

When requesting a preawared survey, follow the procedures at PGI 209.106.

[69 FR 65089, Nov. 10, 2004]

Subpart 209.2—Qualifications Requirements

209.202 Policy.

(a)(1) Except for aviation or ship critical safety items, obtain approval in accordance with PGI 209.202(a)(1) when establishing qualification requirements. See 209.270 for approval of qualification requirements for aviation or ship critical safety items.

[73 FR 1827, Jan. 10, 2008]

209.270 Aviation and ship critical safety items.

209.270–1 Scope.

This section—

(a) Implements—

(1) Section 802 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136); and

(2) Section 130 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364); and

(b) Prescribes policy and procedures for qualification requirements in the procurement of aviation and ship critical safety items and the modification, repair, and overhaul of those items.

[73 FR 1827, Jan. 10, 2008]

209.270–2 Definitions.

As used in this section—

Aviation critical safety item means a part, an assembly, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system if the part, assembly, or equipment contains a characteristic any failure, malfunction, or absence of which could cause—

(1) A catastrophic or critical failure resulting in the loss of or serious damage to the aircraft or weapon system;

(2) An unacceptable risk of personal injury or loss of life; or

(3) An uncommanded engine shutdown that jeopardizes safety.

Design control activity—(1) With respect to an aviation critical safety

item, means the systems command of a military department that is specifically responsible for ensuring the air worthiness of an aviation system or equipment in which an aviation critical safety item is to be used; and

(2) With respect to a ship critical safety item, means the systems command of a military department that is specifically responsible for ensuring the seaworthiness of a ship or ship equipment in which a ship critical safety item is to be used.

Ship critical safety item means any ship part, assembly, or support equipment containing a characteristic the failure, malfunction, or absence of which could cause—

(1) A catastrophic or critical failure resulting in loss of or serious damage to the ship; or

(2) An unacceptable risk of personal injury or loss of life.

[69 FR 55988, Sept. 17, 2004, as amended at 73 FR 1827, Jan. 10, 2008]

209.270–3 Policy.

(a) The head of the contracting activity responsible for procuring an aviation or ship critical safety item may enter into a contract for the procurement, modification, repair, or overhaul of such an item only with a source approved by the head of the design control activity.

(b) The approval authorities specified in this section apply instead of those otherwise specified in FAR 9.202(a)(1), 9.202(c), or 9.206–1(c), for the procurement, modification, repair, and overhaul of aviation or ship critical safety items.

[73 FR 1827, Jan. 10, 2008]

209.270–4 Procedures.

(a) The head of the design control activity shall—

(1) Identify items that meet the criteria for designation as aviation or ship critical safety items. See additional information at PGI 209.270–4;

(2) Approve qualification requirements in accordance with procedures established by the design control activity; and

(3) Qualify and identify aviation and ship critical safety item suppliers and products.

(b) The contracting officer shall—

(1) Ensure that the head of the design control activity has determined that a prospective contractor or its product meets or can meet the established qualification standards before the date specified for award of the contract;

(2) Refer any offers received from an unapproved source to the head of the design control activity for approval. The head of the design control activity will determine whether the offeror or its product meets or can meet the established qualification standards before the date specified for award of the contract; and

(3) Refer any requests for qualification to the design control activity.

(c) See 246.407 (S–70) and 246.504 for quality assurance requirements.

[69 FR 55988, Sept. 17, 2004, as amended at 70 FR 57190, Sept. 30, 2005; 73 FR 1827, Jan. 10, 2008]

Subpart 209.3 [Reserved]

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 and suspending 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
National Imagery and Mapping Agency—The General Counsel
Defense Threat Reduction Agency—The Director
National Security Agency—The Senior Acquisition Executive
Missile Defense Agency—The General Counsel
Overseas installations—as designated by the agency head

(2) Overseas debarring and suspending 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.

(3) The Defense Logistics Agency Special Assistant for Contracting Integrity is the exclusive representative of the Secretary of Defense to suspend and debar contractors from the purchase of Federal personal property under the Federal Property Management Regulations (41 CFR 101–45.6) and the Defense Materiel Disposition Manual (DoD 4160.21–M).

[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; 63 FR 11528, Mar. 9, 1998; 64 FR 51075, Sept. 21, 1999; 64 FR 62985, Nov. 18, 1999; 68 FR 7439, Feb. 14, 2003; 70 FR 14573, Mar. 23, 2005]

209.405 Effect of listing.

(a) Under 10 U.S.C. 2393(b), when a department or agency determines that a compelling reason exists for it to conduct business with a contractor that is debarred or suspended from procurement programs, it must provide written notice of the determination to the General Services Administration, Office of Acquisition Policy. Examples of compelling Reasons are—

(i) Only a debarred or suspended contractor can provide the supplies or services;

(ii) Urgency requires contracting with a debarred or suspended contractor;

(iii) The contractor and a department or agency have an agreement covering the same events that resulted in the debarment or suspension and the agreement includes the department or agency decision not to debar or suspend the contractor; or

(iv) The national defense requires continued business dealings with the debarred or suspended contractor.

(b)(i) The Procurement Cause and Treatment Code ''H'' annotation in the GSA List of Parties Excluded from Federal Procurement and Nonprocurement Programs identifies contractors that are declared ineligible for award of a contract or subcontract because of a violation of the Clean Air Act (42 U.S.C. 7606) or the Clean Water Act (33 U.S.C. 1368).

(ii) Under the authority of 40 CFR 32.215(b), the agency head may grant an exception permitting award to a Code ''H'' ineligible contractor if it is in the paramount interest of the United States.

(A) The agency head may delegate this exception authority to a level no lower than a general or flag officer or a member of the Senior Executive Service.

(B) The official granting the exception must provide written notice to the Environmental Protection Agency debarring official.

[65 FR 52955, Aug. 31, 2000]

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]

209.405–2 Restrictions on subcontracting.

(a) The contracting officer shall not consent to any subcontract with a firm, or a subsidiary of a firm, that is identified by the Secretary of Defense as being owned or controlled by the government of a terrorist country unless the agency head states in writing the compelling reasons for the subcontract.

[63 FR 14837, Mar. 27, 1998]

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 or its outlying areas that was not made in the United States or its outlying areas (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 and Acquisition Policy who will notify Congress within 30 days after the decision is made.

[58 FR 28464, May 13, 1993, as amended at 68 FR 7439, Feb. 14, 2003; 70 FR 35544, June 21, 2005]

§ 209.406–3 Procedures.

Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official. Follow the procedures at PGI 209.406–3.

[69 FR 74990, Dec. 15, 2004]

209.407 Suspension.

§ 209.407–3 Procedures.

Refer all matters appropriate for consideration by an agency debarring and suspending official as soon as practicable to the appropriate debarring and suspending official identified in 209.403. Any person may refer a matter to the debarring and suspending official. Follow the procedures at PGI 209.407–3.

[69 FR 74990, Dec. 15, 2004]

209.409 Solicitation provision and contract clause.

Use the clause at 252.209–7004, Subcontracting with Firms That Are Owned or Controlled by the Government of a Terrorist Country, in solicitations and contracts with a value of $100,000 or more.

[63 FR 14837, Mar. 27, 1998]

209.470 Reserve Officer Training Corps and military recruiting on campus.

209.470–1 Definition.

Institution of higher education, as used in this section, means an institution that meets the requirements of 20

U.S.C. 1001 and includes all subelements of such an institution.

[65 FR 2056, Jan. 13, 2000]

209.470–2 Policy.

(a) Except as provided in paragraph (b) of this subsection, 10 U.S.C. 983 prohibits DoD from providing funds by contract or grant to an institution of higher education if the Secretary of Defense determines that the institution has a policy or practice that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) at that institution;

(2) A student at that institution from enrolling in a unit of the senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Transportation from gaining entry to campuses, or access to students on campuses, for purposes of military recruiting; or

(4) Military recruiters from accessing certain information pertaining to students enrolled at that institution.

(b) The prohibition in paragraph (a) of this subsection does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (a) of this subsection; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

[65 FR 2056, Jan. 13, 2000]

209.470–3 Procedures.

If the Secretary of Defense determines that an institution of higher education is ineligible to receive DoD funds because of a policy or practice described in 209.470–2(a)—

(a) The Secretary of Defense will list the institution on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by General Services Administration (also see FAR 9.404 and 32 CFR part 216); and

(b) DoD components—

(1) Shall not solicit offers from, award contracts to, or consent to subcontracts with the institution;

(2) Shall make no further payments under existing contracts with the institution; and

(3) Shall terminate existing contracts with the institution.

[65 FR 2057, Jan. 13, 2000, as amended at 67 FR 49254, July 30, 2002]

209.470–4 Contract clause.

Use the clause at 252.209–7005, Reserve Officer Training Corps and Military Recruiting on Campus, in all solicitations and contracts with institutions of higher education.

[65 FR 2057, Jan. 13, 2000]

209.471 Congressional Medal of Honor.

In accordance with Section 8118 of Pub. L. 105–262, do not award a contract to, extend a contract with, or approve the award of a subcontract to any entity that, within the preceding 15 years, has been convicted under 18 U.S.C. 704 of the unlawful manufacture or sale of the Congressional Medal of Honor. Any entity so convicted will be listed as ineligible on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs published by the General Services Administration.

[64 FR 31733, June 14, 1999]

Subpart 209.5—Organizational and Consultant Conflicts of Interest

SOURCE: 73 FR 1824, Jan. 10, 2008, unless otherwise noted.

209.570 Limitations on contractors acting as lead system integrators.

209.570–1 Definitions.

Lead system integrator, as used in this section, is defined in the clause at 252.209–7007, Prohibited Financial Interests for Lead System Integrators. See PGI 209.570–1 for additional information.

209.570–2 Policy.

(a) Except as provided in paragraph (b) of this subsection, 10 U.S.C. 2410p prohibits any entity performing lead

system integrator functions in the acquisition of a major system by DoD from having any direct financial interest in the development or construction of any individual system or element of any system of systems.

(b) The prohibition in paragraph (a) of this subsection does not apply if—

(1) The Secretary of Defense certifies to the Committees on Armed Services of the Senate and the House of Representatives that—

(i) The entity was selected by DoD as a contractor to develop or construct the system or element concerned through the use of competitive procedures; and

(ii) DoD took appropriate steps to prevent any organizational conflict of interest in the selection process; or

(2) The entity was selected by a subcontractor to serve as a lower-tier subcontractor, through a process over which the entity exercised no control.

209.570–3 Procedures.

In making a responsibility determination before awarding a contract for the acquisition of a major system, the contracting officer shall—

(a) Determine whether the prospective contractor meets the definition of ''lead system integrator'';

(b) Consider all information regarding the prospective contractor's direct financial interests in view of the prohibition at 209.570–2(a); and

(c) Follow the procedures at PGI 209.570–3.

209.570–4 Solicitation provision and contract clause.

(a) Use the provision at 252.209–7006, Limitations on Contractors Acting as Lead System Integrators, in solicitations for the acquisition of a major system when the acquisition strategy envisions the use of a lead system integrator.

(b) Use the clause at 252.209–7007, Prohibited Financial Interests for Lead System Integrators—

(1) In solicitations that include the provision at 252.209–7006; and

(2) In contracts when the contractor will fill the role of a lead system integrator for the acquisition of a major system.

PART 210—MARKET RESEARCH

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

210.001 Policy.

(a) In addition to the requirements of FAR 10.001(a), agencies shall—

(i) Conduct market research appropriate to the circumstances before—

(A) Soliciting offers for acquisitions that could lead to a consolidation of contract requirements as defined in 207.170–2; or

(B) Issuing a solicitation with tiered evaluation of offers (Section 816 of Public Law 109–163); and

(ii) Use the results of market research to determine—

(A) Whether consolidation of contract requirements is necessary and justified in accordance with §207.170–3; or

(B) Whether the criteria in FAR part 19 are met for setting aside the acquisition for small business or, for a task or delivery order, whether there are a sufficient number of qualified small business concerns available to justify limiting competition under the terms of the contract. If the contracting officer cannot determine whether the criteria are met, the contracting officer shall include a written explanation in the contract file as to why such a determination could not be made (Section 816 of Public Law 109–163).

[71 FR 53043, Sept. 8, 2006]

PART 211—DESCRIBING AGENCY NEEDS

Sec.
211.002 Policy.
211.002–70 Contract clause.

Subpart 211.1—Selecting and Developing Requirements Documents

211.105 Items peculiar to one manufacturer.
211.107 Solicitation provision.

Subpart 211.2—Using and Maintaining Requirements Documents

211.201 Identification and availability of specifications.
211.204 Solicitation provisions and contract clauses.
211.270 [Reserved]

211.271 Elimination of use of class I ozone-depleting substances.
211.272 Alternate preservation, packaging, and packing.
211.273 Substitutions for military or Federal specifications and standards.
211.273–1 Definition.
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211.274 Item identification and valuation requirements.
211.274–1 General.
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211.275 Radio frequency identification.
211.275–1 Definitions.
211.275–2 Policy.
211.275–3 Contract clause.

Subpart 211.5—Liquidated Damages

211.503 Contract clauses.

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 defense technology and acquisition programs in DoD are subject to the policies and procedures in DoDD 5000.1, The Defense Acquisition System, and DoDI 5000.2, Operation of the Defense Acquisition System.

[71 FR 27641, May 12, 2006]

211.002–70 Contract clause.

Use the clause at 252.211–7000, Acquisition Streamlining, in all

Subpart 211.1—Selecting and Developing Requirements Documents

211.105 Items peculiar to one manufacturer.

Follow the publication requirements at PGI 211.105.

[70 FR 23804, May 5, 2005]

211.107 Solicitation provision.

(b) DoD uses the categorical method of reporting. Do not use the provision at FAR 52.211–7, Alternatives to Government-Unique Standards, in DoD solicitations.

[65 FR 6553, Feb. 10, 2000]

Subpart 211.2—Using and Maintaining Requirements Documents

211.201 Identification and availability of specifications.

Follow the procedures at PGI 211.201 for use of specifications, standards, and data item descriptions.

[71 FR 27641, May 12, 2006]

211.204 Solicitation provisions and contract clauses.

(c) When contract performance requires use of specifications, standards, and data item descriptions that are not listed in the Acquisition Streamlining and Standardization Information System database, use provisions, as appropriate, substantially the same as those at—

(i) 252.211–7001, Availability of Specifications, Standards, and Data Item Descriptions Not Listed in the Acquisition Streamlining and Standardization Information System (ASSIST), and Plans, Drawings, and Other Pertinent Documents; and

(ii) 252.211–7002, Availability for Examination of Specifications, Standards, Plans, Drawings, Data Item Descriptions, and Other Pertinent Documents.

[71 FR 27641, May 12, 2006]

211.270 [Reserved]

211.271 Elimination of use of class I ozone-depleting substances.

See subpart 223.8 for restrictions on contracting for ozone-depleting substances.

[70 FR 73150, Dec. 9, 2005]

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.

211.273 Substitutions for military or Federal specifications and standards.

211.273–1 Definition.

SPI process, as used in this section, is defined in the clause at 252.211–7005, Substitutions for Military or Federal Specifications and Standards.

[62 FR 44224, Aug. 20, 1997]

211.273–2 Policy.

(a) Under the Single Process Initiative (SPI), DoD accepts SPI processes in lieu of specific military or Federal specifications or standards that specify a management or manufacturing process.

(b) DoD acceptance of an SPI process follows the decision of a Management Council, which includes representatives of the contractor, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the military departments.

(c) In procurements of previously developed items, SPI processes that previously were accepted by the Management Council shall be considered valid replacements for military or Federal specifications or standards, absent a specific determination to the contrary.

[62 FR 44224, Aug. 20, 1997, as amended at 64 FR 14399, Mar. 25, 1999; 65 FR 52952, Aug. 31, 2000; 71 FR 27641, May 12, 2006]

211.273–3 Procedures.

Follow the procedures at PGI 211.273–3 for encouraging the use of SPI processes instead of military or Federal specifications and standards.

[71 FR 27641, May 12, 2006]

211.273–4 Contract clause.

Use the clause at 252.211–7005, Substitutions for Military or Federal Specifications and Standards, in solicitations and contracts exceeding the micro-purchase threshold, when procuring previously developed items.

[62 FR 44224, Aug. 20, 1997]

211.274 Item identification and valuation requirements.

211.274–1 General.

Unique item identification and valuation is a system of marking and valuing items delivered to DoD that will enhance logistics, contracting, and financial business transactions supporting the United States and coalition troops. Through unique item identification policy, which capitalizes on leading practices and embraces open standards, DoD can—

(a) Achieve lower life-cycle cost of item management and improve life-cycle property management;

(b) Improve operational readiness;

(c) Provide reliable accountability of property and asset visibility throughout the life cycle; and

(d) Reduce the burden on the workforce through increased productivity and efficiency.

[70 FR 20836, Apr. 22, 2005]

211.274–2 Policy for unique item identification.

(a) It is DoD policy that DoD unique item identification, or a DoD recognized unique identification equivalent, is required for-

(1) All delivered items for which the Government's unit acquisition cost is $5,000 or more;

(2) Items for which the Government's unit acquisition cost is less than $5,000, when identified by the requiring activity as serially managed, mission essential, or controlled inventory;

(3) Items for which the Government's unit acquisition cost is less than $5,000, when the requiring activity determines that permanent identification is required; and

(4) Regardless of value—

(i) Any DoD serially managed subassembly, component, or part embedded within a delivered item; and

(ii) The parent item (as defined in 252.211–7003(a)) that contains the embedded subassembly, component, or part.

(b) *Exceptions.* The Contractor will not be required to provide DoD unique item identification if—

(1) The items, as determined by the head of the agency, are to be used to support a contingency operation or to

facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack; or

(2) A determination and findings has been executed concluding that it is more cost effective for the Government requiring activity to assign, mark, and register the unique item identification after delivery of an item acquired from a small business concern or a commercial item acquired under FAR Part 12 or Part 8.

(i) The determination and findings shall be executed by—

(A) The Component Acquisition Executive for an acquisition category (ACAT) I program; or

(B) The head of the contracting activity for all other programs.

(ii) The DoD Unique Item Identification Program Office must receive a copy of the determination and findings required by paragraph (b)(2)(i) of this subsection. Send the copy to DPAP, SPEC ASST, 3060 Defense Pentagon, 3E1044, Washington, DC 20301–3060; or by facsimile to (703) 695–7596.

[70 FR 20836, Apr. 22, 2005]

211.274–3 Policy for valuation.

(a) It is DoD policy that contractors shall be required to identify the Government's unit acquisition cost (as defined in 252.211–7003(a)) for all items delivered, even if none of the criteria for placing a unique item identification mark applies.

(b) The Government's unit acquisition cost is—

(1) For fixed-price type line, subline, or exhibit line items, the unit price identified in the contract at the time of delivery;

(2) For cost-type or undefinitized line, subline, or exhibit line items, the contractor's estimated fully burdened unit cost to the Government at the time of delivery; and

(3) For items delivered under a time-and-materials contract, the contractor's estimated fully burdened unit cost to the Government at the time of delivery.

(c) The Government's unit acquisition cost of subassemblies, components, and parts embedded in delivered items need not be separately identified.

[70 FR 20836, Apr. 22, 2005]

211.274–4 Policy for item unique identification of Government property.

(a) It is DoD policy that DoD item unique identification, or a DoD-recognized unique identification equivalent, is required for tangible personal property in accordance with 211.274–2, for items—

(1) In the possession of the Government and furnished to a contractor for the performance of a contract; or

(2) Directly acquired by the Government and subsequently furnished to a contractor for the performance of a contract.

(b) The policy in paragraph (a) of this subsection does not apply to—

(1) Property under any statutory leasing authority;

(2) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(3) Software and intellectual property; or

(4) Real property.

[72 FR 52297, Sept. 13, 2007]

211.274–5 Contract clauses.

(a)(1) Use the clause at 252.211–7003, Item Identification and Valuation, in solicitations and contracts that—

(i) Require item identification or valuation, or both, in accordance with 211.274–2 and 211.274–3; or

(ii) Contain the clause at 252.211–7007.

(2) Complete paragraph (c)(1)(ii) of the clause with the contract line, subline, or exhibit line item number and description of any item(s) below $5,000 in unit acquisition cost for which DoD unique item identification or a DoD recognized unique identification equivalent is required in accordance with 211.274–2(a)(2) or (3).

(3) Complete paragraph (c)(1)(iii) of the clause with the applicable attachment number, when DoD unique item identification or a DoD recognized unique identification equivalent is required in accordance with 211.274–2(a)(4) for DoD serially managed subassemblies, components, or parts embedded within deliverable items.

(4) Use the clause with its Alternate I if—

(i) An exception in 211.274–2(b) applies; or

(ii) Items are to be delivered to the Government and none of the criteria for placing a unique item identification mark applies.

(b)(1) Use the clause at 252.211–7007, Item Unique Identification of Government Property, in solicitations and contracts that contain the clause at—

(i) FAR 52.245–1, Government Property; or

(ii) FAR 52.245–2, Government Property Installation Operation Services.

(2) Complete paragraph (b)(2)(ii) of the clause as applicable.

[72 FR 52298, Sept. 13, 2007]

211.275 Radio frequency identification.

211.275–1 Definitions.

Bulk commodities, case, palletized unit load, passive RFID tag, and radio frequency identification are defined in the clause at 252.211–7006, Radio Frequency Identification.

[70 FR 53968, Sept. 13, 2005]

211.275–2 Policy.

(a) Except as provided in paragraph (b) of this subsection, radio frequency identification (RFID), in the form of a passive RFID tag, is required for individual cases and palletized unit loads that—

(1) Contain items in any of the following classes of supply, as defined in DoD 4140.1–R, DoD Supply Chain Materiel Management Regulation, AP1.1.11:

(i) Subclass of Class I—Packaged operational rations.

(ii) Class II—Clothing, individual equipment, tentage, organizational tool kits, hand tools, and administrative and housekeeping supplies and equipment.

(iii) Class IIIP—Packaged petroleum, lubricants, oils, preservatives, chemicals, and additives.

(iv) Class IV—Construction and barrier materials.

(v) Class VI—Personal demand items (non-military sales items).

(vi) Subclass of Class VIII—Medical materials (excluding pharmaceuticals, biologicals, and reagents—suppliers should limit the mixing of excluded and non-excluded materials).

(vii) Class IX—Repair parts and components including kits, assemblies and subassemblies, reparable and consumable items required for maintenance support of all equipment, excluding medical-peculiar repair parts; and

(2) Will be shipped to one of the following locations:

(i) Defense Distribution Depot, Susquehanna, PA: DoDAAC W25G1U or SW3124.

(ii) Defense Distribution Depot, San Joaquin, CA: DoDAAC W62G2T or SW3224.

(iii) Defense Distribution Depot, Albany, GA: DoDAAC SW3121.

(iv) Defense Distribution Depot, Anniston, AL: DoDAAC W31G1Z or SW3120.

(v) Defense Distribution Depot, Barstow, CA: DoDAAC SW3215.

(vi) Defense Distribution Depot, Cherry Point, NC: DoDAAC SW3113.

(vii) Defense Distribution Depot, Columbus, OH: DoDAAC SW0700.

(viii) Defense Distribution Depot, Corpus Christi, TX: DoDAAC W45H08 or SW3222.

(ix) Defense Distribution Depot, Hill, UT: DoDAAC SW3210.

(x) Defense Distribution Depot, Jacksonville, FL: DoDAAC SW3122.

(xi) Defense Distribution Depot, Oklahoma City, OK: DoDAAC SW3211.

(xii) Defense Distribution Depot, Norfolk, VA: DoDAAC SW3117.

(xiii) Defense Distribution Depot, Puget Sound, WA: DoDAAC SW3216.

(xiv) Defense Distribution Depot, Red River, TX: DoDAAC W45G19 or SW3227.

(xv) Defense Distribution Depot, Richmond, VA: DoDAAC SW0400.

(xvi) Defense Distribution Depot, San Diego, CA: DoDAAC SW3218.

(xvii) Defense Distribution Depot, Tobyhanna, PA: DoDAAC W25G1W or SW3114.

(xviii) Defense Distribution Depot, Warner Robins, GA: DoDAAC SW3119.

(xix) Air Mobility Command Terminal, Charleston Air Force Base, Charleston, SC: Air Terminal Identifier Code CHS.

(xx) Air Mobility Command Terminal, Naval Air Station, Norfolk, VA: Air Terminal Identifier Code NGU.

(xxi) Air Mobility Command Terminal, Travis Air Force Base, Fairfield, CA: Air Terminal Identifier Code SUU.

(xxii) A location outside the contiguous United States when the shipment

has been assigned Transportation Priority 1.

(b) The following are excluded from the requirements of paragraph (a) of this subsection:

(1) Shipments of bulk commodities.

(2) Shipments to locations other than Defense Distribution Depots when the contract includes the clause at FAR 52.213–1, Fast Payment Procedures.

[72 FR 6483, Feb. 12, 2007]

211.275–3 Contract clause.

Use the clause at 252.211–7006, Radio Frequency Identification, in solicitations and contracts that will require shipment of items meeting the criteria at 211.275–2.

[70 FR 53968, Sept. 13, 2005]

Subpart 211.5—Liquidated Damages

211.503 Contract clauses.

(b) Use the clause at FAR 52.211–12, Liquidated Damages—Construction, in all construction contracts exceeding $550,000, 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 $550,000 or less is optional.

[60 FR 61594, Nov. 30, 1995. Redesignated at 66 FR 49861, Oct. 1, 2001; 71 FR 75892, Dec. 19, 2006]

Subpart 211.6—Priorities and Allocations

211.602 General.

DoD implementation of the Defense Priorities and Allocations System is in DoDD 4400.1, Defense Production Act Programs.

[64 FR 51075, Sept. 21, 1999]

PART 212—ACQUISITION OF COMMERCIAL ITEMS

Subpart 212.1—Acquisition of Commercial Items—General

Sec.

212.102 Applicability.

Subpart 212.2—Special Requirements for the Acquisition of Commercial Items

212.211 Technical data.
212.212 Computer software.
212.270 Major weapon systems as commercial items.

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.
212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

212.602 Streamlined evaluation of offers.

Subpart 212.70—Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority

212.7000 Scope.
212.7001 Definitions.
212.7002 Pilot program.
212.7002–1 Contracts under the program.
212.7002–2 Subcontracts under the program.
212.7003 Technical data and computer software.

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

SOURCE: 60 FR 61595, Nov. 30, 1995, unless otherwise noted.

Subpart 212.1—Acquisition of Commercial Items—General

SOURCE: 73 FR 4114, Jan. 24, 2008, unless otherwise noted.

212.102 Applicability.

(a)(i) When using FAR Part 12 procedures for acquisitions exceeding $1 million in value, the contracting officer shall—

(A) Determine in writing that the acquisition meets the commercial item definition in FAR 2.101; and

(B) Include the written determination in the contract file.

(ii) Follow the procedures at PGI 212.102(a) regarding file documentation.

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.

212.212 Computer software.

The DoD policy for acquiring commercial computer software is at 227.7202.

[69 FR 63330, Nov. 1, 2004]

212.270 Major weapon systems as commercial items.

The DoD policy for acquiring major weapon systems as commercial items is in Subpart 234.70.

[71 FR 58538, Oct. 4, 2006]

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) The following additional provisions and clauses apply to DoD solicitations and contracts for the acquisition of commercial items. If the offeror has completed the provisions listed in paragraph (f)(i) or (ii) of this section electronically as part of its annual representations and certifications at *https://orca.bpn.gov*, the contracting officer may consider this information instead of requiring the offeror to complete these provisions for a particular solicitation.

(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) 252.225–7020, Trade Agreements Certificate.

(C) 252.225–7035, Buy American Act—Free Trade Agreements—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 225.7603), indicate on an addendum that ''The certification in paragraph (b) of the provision at 252.212–7000 does not apply to this solicitation.''

(iii) Use the clause at 252.212–7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Use the provision at 252.209–7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104–70(a).

(v) Use the clause at 252.232–7009, Mandatory Payment by Government-wide Commercial Purchase Card, as prescribed in 232.1110.

(vi) Use the clause at 252.211–7003, Item Identification, as prescribed at 211.274–4.

(vii) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(viii) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(ix) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(x) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(xi) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(xii) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 50452, Sept. 26, 1996; 62 FR 34122, June 24, 1997; 63 FR 11528, Mar. 9, 1998; 63 FR 15317, Mar. 31, 1998; 64 FR 8728, Feb. 23, 1999; 64 FR 43101, Aug. 9, 1999; 65 FR 46625, July 31, 2000; 66 FR 49861, Oct. 1, 2001; 66 FR 55122, 55123, Nov. 1, 2001; 68 FR 7439, Feb. 14, 2003; 68 FR 15618, Mar. 31, 2003; 68 FR 58633, Oct. 10, 2003; 68 FR 75200, Dec. 30, 2003; 68 FR 64558, Nov. 14, 2003; 69 FR 1927, Jan. 13, 2004; 70 FR 20836, Apr. 22, 2005; 70 FR 23801, May 5, 2005; 70 FR 53968, Sept. 13, 2005; 71 FR 9269, Feb. 23, 2006; 71 FR 34828, June 16, 2006; 71 FR 39006, July 11, 2006; 71 FR 62563, Oct. 26, 2006; 71 FR 69492, Dec. 1, 2006; 72 FR 2636, Jan. 22, 2007; 72 FR 49205, Aug. 28, 2007; 73 FR 1823, Jan. 10, 2008; 73 FR 4115, Jan. 24, 2008]

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, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7019–2(b) (Section 8064 of Public Law 106–259).

(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 15.403–1(b)(3)).

[60 FR 61595, Nov. 30, 1995, as amended at 63 FR 11851, Mar. 11, 1998; 63 FR 55040, Oct. 14, 1998; 65 FR 77828, Dec. 13, 2000; 67 FR 4208, Jan. 29, 2002; 69 FR 65089, Nov. 10, 2004]

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) [Reserved]

(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)–(xxi) [Reserved]

(xxii) 10 U.S.C. 2631, Transportation of Supplies by Sea (except as provided in the clause at 252.247–7023, Transportation of Supplies by Sea).

(xxiii) Domestic Content Restrictions in the National Defense Appropriations Acts for Fiscal Years 1996 and Subsequent Years, unless the restriction specifically applies to commercial items. For the restriction that specifically applies to commercial ball or roller bearings as end items, see 225.7009–2(b) (Section 8064 of Public Law 106–259).

(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).

[60 FR 61595, Nov. 30, 1995, as amended at 61 FR 58488, Nov. 15, 1996; 62 FR 5780, Feb. 7, 1997; 65 FR 14401, Mar. 16, 2000; 65 FR 39704, June 27, 2000; 65 FR 77828, Dec. 13, 2000; 69 FR 63331, Nov. 1, 2004]

212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

[72 FR 63123, Nov. 8, 2007]

Subpart 212.6—Streamlined Procedures for Evaluation and Solicitation for Commercial Items

212.602 Streamlined evaluation of offers.

(b)(i) For the acquisition of transportation and transportation-related services, also consider evaluating offers in accordance with the criteria at 247.206(1).

(ii) For the acquisition of transportation in supply contracts that will include a significant requirement for transportation of items outside the contiguous United States, also evaluate offers in accordance with the criterion at 247.301–71.

(iii) For the direct purchase of ocean transportation services, also evaluate offers in accordance with the criteria at 247.573–2(c).

[65 FR 50143, Aug. 17, 2000, as amended at 70 FR 35544, June 21, 2005; 72 FR 49205, Aug. 28, 2007]

Subpart 212.70—Pilot Program for Transition to Follow-On Contracting After Use of Other Transaction Authority

SOURCE: 69 FR 63330, Nov. 1, 2004, unless otherwise noted.

212.7000 Scope.

This subpart establishes the pilot program authorized by Section 847 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136).

212.7001 Definitions.

As used in this subpart—

Nontraditional defense contractor means a business unit that—

(1) Has entered into an other transaction agreement with DoD; and

(2) Has not, for a period of at least 1 year prior to the date of the other transaction agreement, entered into or performed on—

(i) Any contract that is subject to full coverage under the cost accounting standards described in FAR Part 30; or

(ii) Any other contract exceeding $500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to the FAR.

Other transaction means a transaction that—

(1) Is other than a contract, grant, or cooperative agreement;

(2) Is not subject to the FAR or its supplements; and

(3) Is entered into in accordance with 32 CFR part 3.

212.7002 Pilot program.

212.7002–1 Contracts under the program.

(a) The contracting officer may use FAR part 12 procedures to award a contract for an item or process that does not meet the definition of ''commercial item,'' if the contract—

(1) Is awarded to a nontraditional defense contractor;

(2) Is a follow-on contract for the production of an item or process begun as a prototype project under an other transaction agreement;

(3) Does not exceed $50,000,000;

(4) Is awarded on or before September 30, 2013; and

(5) Is either—

(i) A firm-fixed-price contract; or

(ii) A fixed-price contract with economic price adjustment.

(b) See 212.7003 for special procedures pertaining to technical data and computer software.

[69 FR 63330, Nov. 1, 2004, as amended at 71 FR 18669, Apr. 12, 2006; 73 FR 21845, Apr. 23, 2008]

212.7002–2 Subcontracts under the program.

(a) A subcontract for an item or process that does not meet the definition of ''commercial item'' may be treated as a subcontract for a commercial item, if the subcontract—

(1) Is for the production of an item or process begun as a prototype project under an other transaction agreement;

(2) Does not exceed $50,000,000;

(3) Is awarded on or before September 30, 2013;

(4) Is awarded to a nontraditional defense contractor; and

(5) Is either—

(i) A firm-fixed-price subcontract; or

(ii) A fixed-price subcontract with economic price adjustment.

(b) See 212.7003 for special procedures pertaining to technical data and computer software.

[71 FR 18669, Apr. 12, 2006, as amended at 73 FR 21845, Apr. 23, 2008]

212.7003 Technical data and computer software.

For purposes of establishing delivery requirements and license rights for technical data under 227.7102 and for computer software under 227.7202, there shall be a rebuttable presumption that items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 were developed in part with Federal funds and in part at private expense (i.e., mixed funding).

(a) *Delivery requirements.* Acquire only the technical data and computer software that are necessary to satisfy agency needs. Follow the requirements at 227.7103–1 and 227.7103–2 for technical data, and 227.7203–1 and 227.7203–2 for computer software.

(b) *License rights.* Acquire only the license rights in technical data and computer software that are necessary to satisfy agency needs.

(1) For technical data, use the clauses at 252.227–7013, Rights in Technical Data—Noncommercial Items, and

252.227–7037, Validation of Restrictive Markings on Technical Data.

(2) For computer software, use the clauses at 252.227–7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, and 252.227–7019, Validation of Asserted Restrictions—Computer Software.

(3) Require the contractor to include the clauses prescribed by paragraphs (b)(1) and (2) of this section in subcontracts awarded in accordance with 212.7002–2.

(4) When the standard license rights for items or processes developed with mixed funding do not provide the minimum rights necessary to satisfy agency needs, negotiate for special license rights in accordance with 227.7103–5(d) and 227.7203–5(d).

[71 FR 18669, Apr. 12, 2006]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 213.1—Procedures

Sec.
213.101 General.
213.106–1–70 Soliciting competition—tiered evaluation of offers.

Subpart 213.2—Actions at or Below the Micro-Purchase Threshold

213.270 Use of the Governmentwide commercial purchase card.

Subpart 213.3—Simplified Acquisition Methods

213.301 Governmentwide commercial purchase card.
213.302 Purchase orders.
213.302–3 Obtaining contractor acceptance and modifying purchase orders.
213.302–5 Clauses.
213.303 Blanket purchase agreements (BPAs).
213.303–5 Purchases under BPAs.
213.305 Imprest funds and third party drafts.
213.305–3 Conditions for use.
213.306 SF 44, Purchase Order-Invoice-Voucher.
213.307 Forms.

Subpart 213.4—Fast Payment Procedure

213.402 Conditions for use.

Subpart 213.70—Simplified Acquisition Procedures Under the 8(a) Program

213.7001 Procedures.
213.7002 Purchase orders.

AUTHORITY: 48 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 64 FR 2596, Jan. 15, 1999, unless otherwise noted.

Subpart 213.1—Procedures

213.101 General.

Structure awards valued above the micro-purchase threshold (*e.g.*, contract line items, delivery schedule, and invoice instructions) in a manner that will minimize the generation of invoices valued at or below the micro-purchase threshold.

[65 FR 46625, July 31, 2000]

213.106–1–70 Soliciting competition—tiered evaluation of offers.

See limitations on the use of tiered evaluation of offers at 215.203–70.

[72 FR 42314, Aug. 2, 2007]

Subpart 213.2—Actions at or Below the Micro-Purchase Threshold

213.270 Use of the Governmentwide commercial purchase card.

Use the Governmentwide commercial purchase card as the method of purchase and/or method of payment for purchases valued at or below the micro-purchase threshold. This policy applies to all types of contract actions authorized by the FAR unless—

(a) The Deputy Secretary of Defense has approved an exception for an electronic commerce/electronic data interchange system or operational requirement that results in a more cost-effective payment process;

(b)(1) A general or flag officer or a member of the Senior Executive Service (SES) makes a written determination that—

(i) The source or sources available for the supply or service do not accept the purchase card; and

(ii) The contracting office is seeking a source that accepts the purchase card.

(2) To prevent mission delays, if an activity does not have a resident general or flag officer of SES member, delegation of this authority to the level of the senior local commander or director is permitted; or

(c) The purchase or payment meets one or more of the following criteria:

(1) The place of performance is entirely outside the United States and its outlying areas.

(2) The purchase is a Standard Form 44 purchase for aviation fuel or oil.

(3) The purchase is an overseas transaction by a contracting officer in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8).

(4) The purchase is a transaction in support of intelligence or other specialized activities addressed by Part 2.7 of Executive Order 12333.

(5) The purchase is for training exercises in preparation for overseas contingency, humanitarian, or peacekeeping operations.

(6) The payment is made with an accommodation check.

(7) The payment is for a transportation bill.

(8) The purchase is under a Federal Supply Schedule contract that does not permit use of the Governmentwide commercial purchase card.

(9) The purchase is for medical services and—

(i) It involves a controlled substance or narcotic;

(ii) It requires the submission of a Health Care Summary Record to document the nature of the care purchased;

(iii) The ultimate price of the medical care is subject to an independent determination that changes the price paid based on application of a mandatory CHAMPUS Maximum Allowable Charge determination that reduces the Government liability below billed charges;

(iv) The Government already has entered into a contract to pay for the services without the use of a purchase card;

(v) The purchaser is a beneficiary seeking medical care; or

(vi) The senior local commander or director of a hospital or laboratory determines that use of the purchase card is not appropriate or cost-effective. The Medical Prime Vendor Program and the DoD Medical Electronic Catalog Program are two examples where use of the purchase card may not be cost-effective.

[65 FR 46626, July 31, 2000, as amended at 70 FR 35544, June 21, 2005]

Subpart 213.3—Simplified Acquisition Methods

213.301 Governmentwide commercial purchase card.

(1) ''United States,'' as used in this section, means the 50 States and the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, Wake Island, Johnston Island, Canton Island, the outer Continental Shelf lands, and any other place subject to the jurisdiction of the United States (but not including leased bases).

(2) An individual appointed in accordance with 201.603–3(b) also may use the Governmentwide commercial purchase card to make a purchase that exceeds the micro-purchase threshold but does not exceed $25,000, if—

(i) The purchase—

(A) Is made outside the United States for use outside the United States; and

(B) Is for a commercial item; but

(C) Is not for work to be performed by employees recruited within the United States;

(D) Is not for supplies or services originating from, or transported from or through, sources identified in FAR Subpart 25.7;

(E) Is not for ball or roller bearings as end items;

(F) Does not require access to classified or Privacy Act information; and

(G) Does not require transportation of supplies by sea; and

(ii) The individual making the purchase—

(A) Is authorized and trained in accordance with agency procedures;

(B) Complies with the requirements of FAR 8.002 in making the purchase; and

(C) Seeks maximum practicable competition for the purchase in accordance with FAR 13.104(b).

(3) A contracting officer supporting a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8) also may use the Governmentwide commercial purchase card to make a purchase that exceeds the micro-purchase threshold but does not exceed the simplified acquisition threshold, if—

(i) The supplies or services being purchased are immediately available;

(ii) One delivery and one payment will be made; and

(iii) The requirements of paragraphs (2)(i) and (ii) of this section are met.

(4) Guidance on DoD purchase, travel, and fuel card programs is available at *http://www.acq.osd.mil/dpap/pcard/pcardguidebook.htm.* Additional guidance on the fuel card programs is available at *http://www.desc.dla.mil.*

[64 FR 56705, Oct. 21, 1999; 64 FR 63380, Nov. 19, 1999, as amended at 66 FR 55123, Nov. 1, 2001; 66 FR 56902, Nov. 13, 2001; 67 FR 38021, May 31, 2002; 68 FR 56561, Oct. 1, 2003; 70 FR 75411, Dec. 20, 2005; 72 FR 6484, Feb. 12, 2007]

213.302 Purchase orders.

213.302–3 Obtaining contractor acceptance and modifying purchase orders.

(1) Require written acceptance of purchase orders for classified acquisitions.

(2) See PGI 213.302–3 for guidance on the use of unilateral modifications.

(3) A supplemental agreement converts a unilateral purchase order to a bilateral agreement. If not previously included in the purchase order, incorporate the clause at 252.243–7001, Pricing of Contract Modifications, in the Standard Form 30, and obtain the contractor's acceptance by signature on the Standard Form 30.

[64 FR 2596, Jan. 15, 1999, as amended at 71 FR 3413, Jan. 23, 2006]

213.302–5 Clauses.

(a) Use the clause at 252.243–7001, Pricing of Contract Modifications, in all bilateral purchase orders.

(d) When using the clause at FAR 52.213–4, delete the reference to the clause at FAR 52.225–1, Buy American Act-Supplies. Instead, if the Buy American Act applies to the acquisition, use the clause at—

(i) 252.225–7001, Buy American Act and Balance of Payments Program, as prescribed at 225.1101(2); or

(ii) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, as prescribed at 225.1101(10).

[64 FR 24528, May 7, 1999, as amended at 65 FR 19850, Apr. 13, 2000; 65 FR 39704, June 27, 2000; 68 FR 56561, Oct. 1, 2003; 69 FR 1927, Jan. 13, 2004]

213.303 Blanket purchase agreements (BPAs).

213.303–5 Purchases under BPAs.

(b) Individual purchases for subsistence may be made at any dollar value; however, the contracting officer must satisfy the competition requirements of FAR Part 6 for any action not using simplified acquisition procedures.

213.305 Imprest funds and third party drafts.

213.305–3 Conditions for use.

(d)(i) On a very limited basis, installation commanders and commanders of other activities with contracting authority may be granted authority to establish imprest funds and third party draft (accommodation check) accounts. Use of imprest funds and third party drafts must comply with—

(A) DoD 7000.14–R, DoD Financial Management Regulation, Volume 5, Disbursing Policy and Procedures; and

(B) The Treasury Financial Manual, Volume I, Part 4, Chapter 3000.

(ii) Use of imprest funds requires approval by the Director for Financial Commerce, Office of the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller), except as provided in paragraph (d)(iii) of this subsection.

(iii) Imprest funds are authorized for use without further approval for—

(A) Overseas transactions at or below the micro-purchase threshold in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8); and

(B) Classified transactions.

[71 FR 3413, Jan. 23, 2006]

213.306 SF 44, Purchase Order-Invoice-Voucher.

(a)(1) The micro-purchase limitation applies to all purchases, except that purchases not exceeding the simplified

acquisition threshold may be made for—

(A) Aviation fuel and oil. The Aviation Into-plane Reimbursement (AIR) card may be used instead of an SF 44 for aviation fuel and oil (see *http://www.desc.dla.mil*);

(B) Overseas transactions by contracting officers in support of a contingency operation as defined in 10 U.S.C. 101(a)(13) or a humanitarian or peacekeeping operation as defined in 10 U.S.C. 2302(8); and

(C) Transactions in support of intelligence and other specialized activities addressed by Part 2.7 of Executive Order 12333.

[64 FR 2596, Jan. 15, 1999, as amended at 71 FR 3413, Jan. 23, 2006; 72 FR 6484, Feb. 12, 2007]

213.307 Forms.

See PGI 213.307 for procedures on use of forms for purchases made using simplified acquisition procedures.

[71 FR 3413, Jan. 23, 2006]

Subpart 213.4—Fast Payment Procedure

213.402 Conditions for use.

(a) Individual orders may exceed the simplified acquisition threshold for—

(i) Brand-name commissary resale subsistence; and

(ii) Medical supplies for direct shipment overseas.

Subpart 213.70—Simplified Acquisition Procedures Under the 8(a) Program

213.7001 Procedures.

For acquisitions that are otherwise appropriate to be conducted using procedures set forth in this part, and also eligible for the 8(a) Program, contracting officers may use—

(a)(1) For sole source purchase orders not exceeding the simplified acquisition threshold, the procedures in 219.804–2(2); or

(2) For other types of acquisitions, the procedures in Subpart 219.8, excluding the procedures in 219.804–2(2); or

(b) The procedures for award to the Small Business Administration in FAR Subpart 19.8.

[64 FR 2596, Jan. 15, 1999. Redesignated at 71 FR 3413, Jan. 23, 2006]

213.7002 Purchase orders.

The contracting officer need not obtain a contractor's written acceptance of a purchase order or modification of a purchase order for an acquisition under the 8(a) Program pursuant to 219.804–2(2).

[71 FR 3413, Jan. 23, 2006]

PART 214—SEALED BIDDING

Subpart 214.2—Solicitation of Bids

Sec.
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.
214.407 Mistakes in bids.
214.407–3 Other mistakes disclosed before award.

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.

(c) *Requirements of invitation for bids.* When brand name or equal purchase descriptions are used, use of the provision at FAR 52.211–6, Brand Name or Equal, satisfies this requirement.

[56 FR 36326, July 31, 1991, as amended at 63 FR 11528, Mar. 9, 1998; 64 FR 55633, Oct. 14, 1999; 69 FR 65090, Nov. 10, 2004]

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).

214.407 Mistakes in bids.

214.407–3 Other mistakes disclosed before award.

(e) Authority for making a determination under FAR 14.407–3(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) National Imagery and Mapping Agency: General Counsel, NIMA.

(vi) Defense Threat Reduction Agency: General Counsel, DTRA.

(vii) National Security Agency: Director of Procurement, NSA.

(viii) Missile Defense Agency: General Counsel, MDA.

(ix) Defense Contract Management Agency: General Counsel, DCMA.

[57 FR 42629, Sept. 15, 1992, as amended at 59 FR 27669, May 27, 1994; 61 FR 50452, Sept. 26, 1996. Redesignated and amended at 62 FR 34122, June 24, 1997; 64 FR 51076, Sept. 21, 1999; 68 FR 7439, Feb. 14, 2003; 69 FR 65090, Nov. 10, 2004]

PART 215—CONTRACTING BY NEGOTIATION

Subpart 215.2—Solicitation and Receipt of Proposals and Information.

Sec.

215.203–70 Requests for proposals—tiered evaluation of offers.

Subpart 215.3—Source Selection

215.303 Responsibilities.
215.304 Evaluation factors and significant subfactors.
215.305 Proposal evaluation.

Subpart 215.4—Contract Pricing

215.402 Pricing policy.
215.403 Obtaining cost or pricing data.
215.403–1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).
215.403–3 Requiring information other than cost or pricing data.
215.403–5 Instructions for submission of cost or pricing data or information other than cost or pricing data.
215.404 Proposal analysis.
215.404–1 Proposal analysis techniques.
215.404–2 Information to support proposal analysis.
215.404–3 Subcontract pricing considerations.
215.404–4 Profit.
215.404–70 DD Form 1547, Record of Weighted Guidelines Method Application.
215.404–71 Weighted guidelines method.
215.404–71–1 General.
215.404–71–2 Performance risk.
215.404–71–3 Contract type risk and working capital adjustment.
215.404–71–4 Facilities capital employed.
215.404–71–5 Cost efficiency factor.
215.404–72 Modified weighted guidelines method for nonprofit organizations other than FFRDCs.
215.404–73 Alternate structure approaches.
215.404–74 Fee requirements for cost-plus-award-fee contracts.
215.404–75 Fee requirements for FFRDCs.
215.404–76 Reporting profit and fee statistics.
215.406–1 Prenegotiation objectives.
215.406–3 Documenting the negotiation.
215.407–2 Make-or-buy programs.
215.407–3 Forward pricing rate agreements.
215.407–4 Should-cost review.
215.407–5 Estimating systems.
215.407–5–70 Disclosure, maintenance, and review requirements.
215.408 Slicitation provisions and contract clauses.
215.470 Estimated data prices.

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

SOURCE: 63 FR 55040, Oct. 14, 1998, unless otherwise noted.

Subpart 215.2—Solicitation and Receipt of Proposals and Information

215.203–70 Requests for proposals—tiered evaluation of offers.

(a) The tiered or cascading order of precedence used for tiered evaluation

of offers shall be consistent with FAR part 19.

(b) Consideration shall be given to the tiers of small businesses (*e.g.*, 8(a), HUBZone small business, service-disabled veteran-owned small business, small business) before evaluating offers from other than small business concerns.

(c) The contracting officer is prohibited from issuing a solicitation with a tiered evaluation of offers unless—

(1) The contracting officer conducts market research, in accordance with FAR Part 10 and Part 210, to determine—

(i) Whether the criteria in FAR part 19 are met for setting aside the acquisition for small business; or

(ii) For a task or delivery order, whether there are a sufficient number of qualified small business concerns available to justify limiting competition under the terms of the contract; and

(2) If the contracting officer cannot determine whether the criteria in paragraph (c)(1) of this section are met, the contracting officer includes a written explanation in the contract file as to why such a determination could not be made (Section 816 of Public Law 109–163).

[71 FR 53043, Sept. 8, 2006, as amended at 72 FR 42314, Aug. 2, 2007]

Subpart 215.3—Source Selection

215.303 Responsibilities.

(b)(2) For high-dollar value and other acquisitions, as prescribed by agency procedures, the source selection authority shall approve a source selection plan before the solicitation is issued. Follow the procedures at PGI 215.303(b)(2) for preparation of the source selection plan.

[71 FR 3414, Jan. 23, 2006]

215.304 Evaluation factors and significant subfactors.

(c)(i) In acquisitions that require use of the clause at FAR 52.219–9, Small Business Subcontracting Plan, other than those based on the lowest price technically acceptable source selection process (see FAR 15.101–2), the extent of participation of small businesses and historically black colleges or universities and minority institutions in performance of the contract shall be addressed in source selection. The contracting officer shall evaluate the extent to which offerors identify and commit to small business and historically black college or university and minority institution performance of the contract, whether as a joint venture, teaming arrangement, or subcontractor.

(A) See PGI 215.304(c)(i)(A) for examples of evaluation factors.

(B) Proposals addressing the extent of small business and historically black college or university and minority institution 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.

(C) When an evaluation assesses the extent that small businesses and historically black colleges or universities and minority institutions are specifically identified in proposals, the small businesses and historically black colleges or universities and minority institutions 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).

(ii) In accordance with 10 U.S.C. 2436, consider the purchase of capital assets (including machine tools) manufactured in the United States, in source selections for all major defense acquisition programs as defined in 10 U.S.C. 2430.

(iii) See 247.573–2(c) for additional evaluation factors required in solicitations for the direct purchase of ocean transportation services.

[71 FR 3414, Jan. 23, 2006, as amended at 71 FR 14109, Mar. 21, 2006; 72 FR 49205, Aug. 28, 2007]

215.305 Proposal evaluation.

(a)(2) *Past performance evaluation*. When a past performance evaluation is required by FAR 15.304, and the solicitation includes the clause at FAR 52.219–8, Utilization of Small Business Concerns, the evaluation factors shall include the past performance of

offerors in complying with requirements of that clause. When a past performance evaluation is required by FAR 15.304, and the solicitation includes the clause at FAR 52.219–9, Small Business Subcontracting Plan, the evaluation factors shall include the past performance of offerors in complying with requirements of that clause.

[71 FR 3414, Jan. 23, 2006]

Subpart 215.4—Contract Pricing

215.402 Pricing policy.

Follow the procedures at PGI 215.402 when conducting cost or price analysis, particularly with regard to acquisitions for sole source commercial items.

[72 FR 30278, May 31, 2007]

215.403 Obtaining cost or price data.

215.403–1 Prohibition on obtaining cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(b) *Exceptions to cost or pricing data requirements.* Follow the procedures at PGI 215.403–1(b).

(c) *Standards for exceptions from cost or pricing data requirements*—(1) *Adequate price competition.* For acquisitions under dual or multiple source programs:

(A) The determination of adequate price competition must be made on a case-by-case basis. Even when adequate price competition exists, in certain cases it may be appropriate to obtain additional information to assist in price analysis.

(B) 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 that are individually capable of producing the full quantity; and

(*ii*) The reasonableness of all prices awarded is clearly established on the basis of price analysis (see FAR 15.404–1(b)).

(3) *Commercial items.* (A) Follow the procedures at PGI 215.403–1(c)(3)(A) for pricing commercial items.

(B) By November 30th of each year, departments and agencies shall provide a report to the Director, Defense Procurement and Acquisition Policy (DPAP), ATTN: DPAP/CPF, of all contracting officer determinations that commercial item exceptions apply under FAR 15.403–1(b)(3), during the previous fiscal year, for any contract, subcontract, or modification expected to have a value of $15,000,000 or more. See PGI 215.403–1(c)(3)(B) for the format and guidance for the report. The Director, DPAP, will submit a consolidated report to the congressional defense committees.

(4) *Waivers.* (A) The head of the contracting activity may, without power of delegation, apply the exceptional circumstances authority when a determination is made that—

(*1*) The property or services cannot reasonably be obtained under the contract, subcontract, or modification, without the granting of the waiver;

(*2*) The price can be determined to be fair and reasonable without the submission of certified cost or pricing data; and

(*3*) There are demonstrated benefits to granting the waiver. Follow the procedures at PGI 215.403–1(c)(4)(A) for determining when an exceptional case waiver is appropriate, for approval of such waivers, for partial waivers, and for waivers applicable to unpriced supplies or services.

(B) By November 30th of each year, departments and agencies shall provide a report to the Director, DPAP, ATTN: DPAP/CPF, of all waivers granted under FAR 15.403–1(b)(4), during the previous fiscal year, for any contract, subcontract, or modification expected to have a value of $15,000,000 or more. See PGI 215.403–1(c)(4)(B) for the format and guidance for the report. The Director, DPAP, will submit a consolidated report to the congressional defense committees.

(C) DoD has waived the requirement for submission of cost or pricing data for the Canadian Commercial Corporation and its subcontractors.

(D) DoD has waived cost or pricing data requirements for nonprofit organizations (including education institutions) on cost-reimbursement-no-fee contracts. The contracting officer shall require—

(*1*) Submission of information other than cost or pricing data to the extent necessary to determine reasonableness and cost realism; and

(*2*) Cost or pricing data from subcontractors that are not nonprofit organizations when the subcontractor's proposal exceeds the cost or pricing data threshold at FAR 15.403–4(a)(1).

[63 FR 55040, Oct. 14, 1998, as amended at 71 FR 69493, Dec. 1, 2006; 72 FR 30278, May 31, 2007]

215.403–3 Requiring information other than cost or pricing data.

Follow the procedures at PGI 215.403–3.

[72 FR 30278, May 31, 2007]

215.403–5 Instructions for submission of cost or pricing data or information other than cost or pricing data.

When the solicitation requires contractor compliance with the Contractor Cost Data Reporting System, follow the procedures at PGI 215.403–5.

[71 FR 69494, Dec. 1, 2006]

215.404 Proposal analysis.

215.404–1 Proposal analysis techniques.

(1) Follow the procedures at PGI 215.404–1 for proposal analysis.

(2) For spare parts or support equipment, perform an analysis of—

(i) Those 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 based on reasonably available information;

(ii) Those line items where a comparison of the item description and the proposal price indicates a potential for overpricing;

(iii) Significant high-dollar-value items. If there are no obvious high-dollar-value items, include an analysis of a random sample of items; and

(iv) A random sample of the remaining low-dollar value items. Sample size may be determined by subjective judgment, e.g., experience with the offeror and the reliability of its estimating and accounting systems.

[63 FR 55040, Oct. 14, 1998, as amended at 71 FR 69494, Dec. 1, 2006; 72 FR 30278, May 31, 2007]

215.404–2 Information to support proposal analysis.

See PGI 215.404–2 for guidance on obtaining field pricing or audit assistance.

[71 FR 69494, Dec. 1, 2006]

215.404–3 Subcontract pricing considerations.

Follow the procedures at PGI 215.404–3 when reviewing a subcontractor's proposal.

[71 FR 69494, Dec. 1, 2006]

215.404–4 Profit.

(b) *Policy*. (1) Contracting officers shall use a structured approach for developing a prenegotiation profit or fee objective on any negotiated contract action when cost or pricing data is obtained, except for cost-plus-award-fee contracts (see 215.404–74, 216.405–2, and FAR 16.405–2) or contracts with Federally Funded Research and Development Centers (FFRDCs) (see 215.404–75). There are three structured approaches—

(A) The weighted guidelines method;

(B) The modified weighted guidelines method; and

(C) An alternate structured approach.

(c) *Contracting officer responsibilities.* (1) Also, do not perform a profit analysis when assessing cost realism in competitive acquisitions.

(2) When using a structured approach, the contracting officer—

(A) Shall use the weighted guidelines method (see 215.404–71), except as provided in paragraphs (c)(2)(B) and (c)(2)(C) of this subsection.

(B) Shall use the modified weighted guidelines method (see 215.404–72) on contract actions with nonprofit organizations other than FFRDCs.

(C) May use an alternate structured approach (see 215.404–73) when—

(*1*) The contract action is—

(*i*) At or below the cost or pricing data threshold (see FAR 15.403–4(a)(1));

(*ii*) For architect-engineer or construction work;

(*iii*) Primarily for delivery of material from subcontractors; or

(*iv*) A termination settlement; or

(*2*) 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.

(D) 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.

(E) Shall document the profit analysis in the contract file.

(5) 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—

(A) Present the details of its proposed profit amounts in the weighted guidelines format or similar structured approached; and

(B) Use the weighted guidelines method in developing profit objectives for negotiated subcontracts.

(6) 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).

(d) *Profit-analysis factors*—(1) *Common factors*. The common factors are embodied in the DoD structured approaches and need not be further considered by the contracting officer.

[63 FR 55040, Oct. 14, 1998, as amended at 63 FR 63799, Nov. 17, 1998; 65 FR 77829, Dec. 13, 2000; 66 FR 49863, Oct. 1, 2001; 71 FR 69494, Dec. 1, 2006]

215.404–70 DD Form 1547, Record of Weighted Guidelines Method Application.

Follow the procedures at PGI 215.404–70 for use of DD Form 1547 whenever a structured approach to profit analysis is required.

[71 FR 69494, Dec. 1, 2006]

215.404–71 Weighted guidelines method.

215.404–71–1 General.

(a) The weighted guidelines method focuses on four profit factors—

(1) Performance risk;

(2) Contract type risk;

(3) Facilities capital employed; and

(4) Cost efficiency.

(b) The contracting officer assigns values to each profit factor; the value multiplied by the base results in the profit objective for that factor. Except for the cost efficiency special 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 documentation, the contracting officer need not explain assignment of the normal value, but should address conditions that justify assignment of other than the normal value. The cost efficiency special factor has no normal value. The contracting officer shall exercise sound business judgment in selecting a value when this special factor is used (see 215.404–71–5).

[67 FR 20689, Apr. 26, 2002]

215.404–71–2 Performance risk.

(a) *Description*. This profit factor addresses the contractor's degree of risk in fulfilling the contract requirements. The factor consists of two parts:

(1) Technical—the technical uncertainties of performance.

(2) Management/cost control—the degree of management effort necessary—

(i) To ensure that contract requirements are met; and

(ii) 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 20)	Profit objective
21 ..	Technical	(1)	(2)	N/A	N/A
22 ..	Management/Cost Control	(1)	(2)	N/A	N/A
23 ..	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 two weights equals 100 percent.

(2) Select a value for each element from the list in paragraph (c) of this subsection using the evaluation criteria in paragraphs (d) and (e) of this subsection.

(3) Compute the composite as shown in the following example:

	Assigned weighting (percent)	Assigned value (percent)	Weighted value (percent)
Technical	60	5.0	3.0
Management/Cost Control	40	4.0	1.6
Composite Value	100	.....	4.6

(4) Insert the amount from Block 20 of the DD Form 1547. Block 20 is total contract costs, excluding facilities capital cost of money.

(5) Multiply (3) by (4).

(c) Values: Normal and designated ranges.

	Normal value (percent)	Designated range
Standard	5	3% to 7%
Technology Incentive	9	7% to 11%

(1) *Standard.* The standard designated range should apply to most contracts.

(2) *Technology incentive.* For the technical factor only, contracting officers may use the technology incentive range for acquisitions that include development, production, or application of innovative new technologies. The technology incentive range does not apply to efforts restricted to studies, analyses, or demonstrations that have a technical report as their primary deliverable.

(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) Items are being manufactured using specifications with stringent tolerance limits;

(B) The efforts require highly skilled personnel or require the use of state-of-the-art machinery;

(C) The services and analytical efforts are extremely important to the Government and must be performed to exacting standards;

(D) The contractor's independent development and investment has reduced the Government's risk or cost;

(E) The contractor has accepted an accelerated delivery schedule to meet DoD requirements; or

(F) The contractor has assumed additional risk through warranty provisions.

(ii) Extremely complex, vital efforts to overcome difficult technical obstacles that 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) Requirements are relatively simple;

(B) Technology is not complex;

(C) Efforts do not require highly skilled personnel;

(D) Efforts are routine;

(E) Programs are mature; or

(F) 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.

(4) *Technology incentive range.* (i) The contracting officer may assign values within the technology incentive range when contract performance includes the introduction of new, significant technological innovation. Use the technology incentive range only for the most innovative contract efforts. Innovation may be in the form of—

(A) Development or application of new technology that fundamentally changes the characteristics of an existing product or system and that results in increased technical performance, improved reliability, or reduced costs; or

(B) New products or systems that contain significant technological advances over the products or systems they are replacing.

(ii) When selecting a value within the technology incentive range, the contracting officer should consider the relative value of the proposed innovation to the acquisition as a whole. When the innovation represents a minor benefit, the contracting officer should consider using values less than the norm. For innovative efforts that will have a major positive impact on the product or program, the contracting officer may use values above the norm.

(e) *Evaluation criteria for management/cost control.* (1) The contracting officer should evaluate—

(i) 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) The management involvement expected on the prospective contract action;

(iii) The degree of cost mix as an indication of the types of resources applied and value added by the contractor;

(iv) The contractor's support of Federal socioeconomic programs;

(v) The expected reliability of the contractor's cost estimates (including the contractor's cost estimating system);

(vi) The adequacy of the contractor's management approach to controlling cost and schedule; and

(vii) Any other factors that affect the contractor's ability to meet the cost targets (e.g., foreign currency exchange rates and inflation rates).

(2) *Above normal conditions.* (i) The contracting officer may assign a higher than normal value when there is a high degree of management effort. 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;

(C) The contractor has a good record of past performance;

(D) The contractor has a substantial record of active participation in Federal socioeconomic programs;

(E) The contractor provides fully documented and reliable cost estimates;

(F) The contractor makes appropriate make-or-buy decisions; or

(G) The contractor has a proven record of cost tracking and control.

(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 minimal 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;

(F) The contractor does not cooperate in the evaluation and negotiation of the proposal;

(G) The contractor's cost estimating system is marginal;

(H) The contractor has made minimal effort to initiate cost reduction programs;

(I) The contractor's cost proposal is inadequate;

(J) The contractor has a record of cost overruns or another indication of unreliable cost estimates and lack of cost control; or

(K) The contractor has a poor record of past performance.

(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.

[67 FR 20689, Apr. 26, 2002, as amended at 67 FR 49254, July 30, 2002]

215.404–71–3 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 20)	Profit objective
24.	CONTRACT type risk		(1)	(2)	(3)
		Cost financed	Length factor	Interest rate	
25.	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 20, i.e., the total allowable costs excluding 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 (see *http://www.treasurydirect.gov/govt/rates/tcir/tcir__opdirsemi.htm*). 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)	5.0	4 to 6.
Firm-fixed-price, with performance-based payments	(6)	4.0	2.5 to 5.5
Firm-fixed-price, with progress payments	(2)	3.0	2 to 4.
Fixed-price incentive, no financing	(1)	3.0	2 to 4.
Fixed-price incentive, with performance-based payments	(6)	2.0	0.5 to 3.5.
Fixed-price with redetermination provision	(3)	.....	.....

Contract type	Notes	Normal value (percent)	Designated range (percent)
Fixed-price incentive, with progress payments	(2)	1.0	0 to 2.
Cost-plus-incentive-free	(4)	1.0	0 to 2.
Cost-plus-fixed-fee	(4)	0.5	0 to 1.
Time-and-materials (including overhaul contracts priced on time-and-materials basis)	(5)	0.5	0 to 1.
Labor-hour	(5)	0.5	0 to 1.
Firm-fixed-price, level-of-effort	(5)	0.5	0 to 1.

(1) ''No financing'' means either that the contract does not provide progress payments or performance-based payments, or that the contract provides them only on a limited basis, such as financing of first articles. Do not compute a working capital adjustment.

(2) When the contract contains provisions for progress payments, compute a working capital adjustment (Block 25).

(3) For the purposes of assigning profit values, treat a fixed-price contract with redetermination 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 25. However, they may receive higher than normal values within the designated range to the extent that portions of cost are fixed.

(6) When the contract contains provisions for performance-based payments, do not compute a working capital adjustment.

(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;

(vii) Risks associated with contracts for foreign military sales (FMS) that are not funded by U.S. appropriations; and

(viii) When the contract contains provisions for performance-based payments—

(A) The frequency of payments;

(B) The total amount of payments compared to the maximum allowable amount specified at FAR 32.1004(b)(2); and

(C) The risk of the payment schedule to the contractor.

(2) *Mandatory.* The contracting officer shall assess the extent to which costs have been incurred prior to the definitization of the contract action (also see 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 percent, 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) that place a high degree of risk on the contractor;

(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; or

(v) An aggressive performance-based payment schedule that increases risk.

(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) Relative short-term contracts;

(iii) Contractual provisions that substantially reduce the contractor's risk;

(iv) Incentive provisions that place a low degree of risk on the contractor;

(v) Performance-based payments totaling the maximum allowable amount(s) specified at FAR 32.1004(b)(2); or

(vi) A performance-based payment schedule that is routine with minimal risk.

(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 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 that the contractor finances is generally the portion not covered by progress payments, i.e., 100 percent minus the customary progress payment rate (see FAR 32.501). For example, if a contractor receives progress payments at 80 percent, the portion that the contractor finances is 20 percent. On contracts that provide 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.

[63 FR 55040, Oct. 14, 1998, as amended at 64 FR 61032, Nov. 9, 1999; 66 FR 63335, Dec. 6, 2001; 67 FR 20691, Apr. 26, 2002; 67 FR 49255, July 30, 2002; 72 FR 14239, Mar. 27, 2007]

215.404–71–4 Facilities capital employed.

(a) *Description.* This factor focuses on encouraging and rewarding 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) *Contract facilities capital estimates.* The contracting officer shall 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 (48 CFR 9904.414 and FAR 31.205–10); and

(2) DD Form 1861, Contract Facilities Capital Cost of Money.

(c) *Use of DD Form 1861.* See PGI 215.404–71–4(c) for obtaining field pricing support for preparing DD Form 1861.

(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—

(i) 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.

(ii) Is designed to record and compute the contract facilities capital cost of money and capital employed which is carried forward to DD Form 1547.

(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:

(i) 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.

(ii) 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.

(iii) 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.

(iv) Total contract facilities cost of money is the sum of the yearly amounts.

(v) 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.

(d) *Preaward facilities capital applications.* To establish cost and price objectives, apply the facilities capital cost of money and capital employed as follows:

(1) *Cost of Money.* (i) *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.

(ii) *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.

(2) *Facilities Capital Employed.* Assess and weight the profit objective for risk associated with facilities capital employed in accordance with the profit guidelines at 215.404–71–4.

(e) *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
26	Land	N/A	(2)	N/A
27	Buildings	N/A	(2)	N/A
28	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.

(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 20 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 20 at price (i.e., including G&A expenses and profit).

(3) Multiply (1) by (2).

(f) *Values: Normal and designated ranges.* These are the normal values and ranges. They apply to all situations.

Asset type	Normal value (percent)	Designated range
Land	0	N/A
Buildings	0	N/A
Equipment	17.5	10 to 25

(g) *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 that is derived from DoD; and

(iii) Should consider any contractual provisions that reduce the contractor's risk of investment recovery, such as termination protection clauses and capital investment indemnification.

(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 that reduce acquisition cost or yield other tangible benefits such as improved product quality or accelerated deliveries; or

(B) Investments in new equipment for research and development applications.

(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.

[63 FR 55040, Oct. 14, 1998, as amended at 67 FR 20691, Apr. 26, 2002; 67 FR 49255, July 30, 2002; 71 FR 69494, Dec. 1, 2006; 72 FR 14239, Mar. 27, 2007]

215.404–71–5 Cost efficiency factor.

(a) This special factor provides an incentive for contractors to reduce costs. To the extent that the contractor can demonstrate cost reduction efforts that benefit the pending contract, the contracting officer may increase the prenegotiation profit objective by an amount not to exceed 4 percent of total objective cost (Block 20 of the DD Form 1547) to recognize these efforts (Block 29).

(b) To determine if using this factor is appropriate, the contracting officer shall consider criteria, such as the following, to evaluate the benefit the contractor's cost reduction efforts will have on the pending contract:

(1) The contractor's participation in Single Process Initiative improvements;

(2) Actual cost reductions achieved on prior contracts;

(3) Reduction or elimination of excess or idle facilities;

(4) The contractor's cost reduction initiatives (e.g., competition advocacy programs, technical insertion programs, obsolete parts control programs, spare parts pricing reform, value engineering, outsourcing of functions such as information technology). Metrics developed by the contractor such as fully loaded labor hours (i.e., cost per labor hour, including all direct and indirect costs) or other productivity measures may provide the basis for assessing the effectiveness of the contractor's cost reduction initiatives over time;

(5) The contractor's adoption of process improvements to reduce costs;

(6) Subcontractor cost reduction efforts;

(7) The contractor's effective incorporation of commercial items and processes; or

(8) The contractor's investment in new facilities when such investments contribute to better asset utilization or improved productivity.

(c) When selecting the percentage to use for this special factor, the contracting officer has maximum flexibility in determining the best way to evaluate the benefit the contractor's cost reduction efforts will have on the pending contract. However, the contracting officer shall consider the impact that quantity differences, learning, changes in scope, and economic factors such as inflation and deflation will have on cost reduction.

[67 FR 20692, Apr. 26, 2002, as amended at 67 FR 49255, July 30, 2002]

215.404–72 Modified weighted guidelines method for nonprofit organizations other than FFRDCs.

(a) *Definition*. As used in this subpart, a nonprofit organization is a business entity—

(1) That 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) That is exempted from Federal income taxation under section 501 of the Internal Revenue Code.

(b) For nonprofit organizations that 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 215.404–71, with the following modifications:

(1) *Modifications to performance risk (Blocks 21–23 of the DD Form 1547).* (i) If the contracting officer assigns a value from the standard designated range (see 215.404–71–2(c)), reduce the fee objective by an amount equal to 1 percent of the costs in Block 20 of the DD Form 1547. Show the net (reduced) amount on the DD Form 1547.

(ii) Do not assign a value from the technology incentive designated range.

(2) *Modifications to contract type risk (Block 24 of the DD Form 1547).* Use a designated range of −1 percent to 0 percent instead of the values in 215.404–71–3. There is no normal value.

(c) For all other nonprofit organizations except FFRDCs, compute a fee objective for covered actions using the weighted guidelines method in 215.404–

71, modified as described in paragraph (b)(1) of this subsection.

[63 FR 63799, Nov. 17, 1998, as amended at 65 FR 77831, Dec. 13, 2000; 67 FR 20692, Apr. 26, 2002; 67 FR 49255, July 30, 2002]

215.404–73 Alternate structured approaches.

(a) The contracting officer may use an alternate structured approach under 215.404–4(c).

(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 amount of facilities capital cost of money under Cost Accounting Standard (CAS) 414, Cost of Money as an Element of the Cost of Facilities Capital (48 CFR 9904.414). Cost of money under CAS 417, Cost of Money as an Element of the Cost of Capital Assets Under Construction (48 CFR 9904.417), should not be used to reduce the overall prenegotiation profit objective. 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 (see 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 that allow facilities capital cost of money, similar adjustments shall be made to contracts that use alternate structured approaches.

[63 FR 55040, Oct. 14, 1998, as amended at 67 FR 20692, Apr. 26, 2002; 71 FR 69494, Dec. 1, 2006]

215.404–74 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 16.405–2 and 216.405–2;

(b) Not use the weighted guidelines method or alternate structured approach;

(c) Apply the offset policy in 215.404–73(b)(2) for facilities capital cost of money, i.e., reduce the base fee by the amount of facilities capital cost of money; and

(d) Not complete a DD Form 1547.

[63 FR 55040, Oct. 14, 1998, as amended at 67 FR 20692, Apr. 26, 2002]

215.404–75 Fee requirements for FFRDCs.

For nonprofit organizations that are FFRDCs, the contracting officer—

(a) Should consider whether any fee is appropriate. Considerations shall include the FFRDC's—

(1) Proportion of retained earnings (as established under generally accepted accounting methods) that relates to DoD contracted effort;

(2) Facilities capital acquisition plans;

(3) Working capital funding as assessed on operating cycle cash needs; and

(4) Provision for funding unreimbursed costs deemed ordinary and necessary to the FFRDC.

(b) Shall, when a fee is considered appropriate, establish the fee objective in accordance with FFRDC fee policies in the DoD FFRDC Management Plan.

(c) Shall not use the weighted guidelines method or an alternate structured approach.

[63 FR 63800, Nov. 17, 1998]

215.404–76 Reporting profit and fee statistics.

Follow the procedures at PGI 215.404–76 for reporting profit and fee statistics.

[71 FR 69494, Dec. 1, 2006]

215.406–1 Prenegotiation objectives.

Follow the procedures at PGI 215.406–1 for establishing prenegotiation objectives.

[71 FR 69494, Dec. 1, 2006]

215.406–3 Documenting the negotiation.

Follow the procedures at PGI 215.406–3 for documenting the negotiation.

[71 FR 69494, Dec. 1, 2006]

215.407–2 Make-or-buy programs.

(e) *Program requirements*—(1) *Items and work included.* The minimum dollar amount is $1 million.

215.407–3 Forward pricing rate agreements.

(b)(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.

215.407–4 Should-cost review.

See PGI 215.407–4 for guidance on determining whether to perform a program or overhead should-cost review.

[71 FR 69495, Dec. 1, 2006]

215.407–5 Estimating systems.

215.407–5–70 Disclosure, maintenance, and review requirements.

(a) *Definitions.* (1) *Acceptable estimating system* is defined in the clause at 252.215–7002, Cost Estimating System Requirements.

(2) *Contractor* means a business unit as defined in FAR 2.101.

(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 that is likely to consistently result in proposal estimates for total cost or a major cost element(s) that do not provide an acceptable basis for negotiation of fair and reasonable prices.

(b) *Applicability.* (1) DoD policy is that all contractors have acceptable estimating systems that consistently produce well-supported proposals that are acceptable as a basis for negotiation of fair and reasonable prices.

(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 totaling $50 million or more for which cost or pricing data were required; or

(ii) In its preceding fiscal year, the contractor received DoD prime contracts or subcontracts totaling $10 million or more (but less than $50 million) for which cost or pricing data were required and the contracting officer, with concurrence or at the request of the ACO, 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 requirements to other than large business contractors.

(2) The cognizant ACO, for contractors subject to paragraph (b)(2) of this subsection, shall—

(i) Determine the acceptability 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 acceptable system;

(ii) Describe its system to the ACO:

(iii) Provide timely notice of changes in the system; and

(iv) Correct system deficiencies identified by the ACO.

(d) *Characteristics of an acceptable estimating system*—(1) *General.* An acceptable 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 acceptability 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 acceptability 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 judgments 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.* Follow the procedures at PGI 215.407–5–70(e) for establishing and conducting estimating system reviews.

(f) *Disposition of survey team findings.* Follow the procedures at PGI 215.407–5–70(f) for disposition of the survey team findings.

(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., FPIF instead of 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 that 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;

(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.

[63 FR 55040, Oct. 14, 1998, as amended at 67 FR 49252, July 30, 2002; 71 FR 69495, Dec. 1, 2006]

215.408 Solicitation provisions and contract clauses.

(1) Use the clause at 252.215–7000, Pricing Adjustments, in solicitations and contracts that contain the clause at—

(i) FAR 52.215–11, Price Reduction for Defective Cost or Pricing Data—Modifications;

(ii) FAR 52.215–12, Subcontractor Cost or Pricing Data; or

(iii) FAR 52.215–13, Subcontractor Cost or Pricing Data—Modifications.

(2) Use the clause at 252.215–7002, Cost Estimating System requirements, in all solicitations and contracts to be award on the basis of cost or pricing data.

(3) Use the provision at 252.215–7003, Excessive Pass-Through Charges—Identification of Subcontract Effort, in solicitations (including task or delivery orders)—

(i) With a total value that exceeds the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, except when the resulting contract is expected to be—

(A) A firm-fixed-price contract awarded on the basis of adequate price competition;

(B) A fixed-price contract with economic price adjustment, awarded on the basis of adequate price competition;

(C) A firm-fixed-price contract for the acquisition of a commercial item; or

(D) A fixed-price contract with economic price adjustment, for the acquisition of a commercial item; or

(ii) With a total value at or below the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, when the contracting officer determines that inclusion of the provision is appropriate.

(4)(i) Use the clause at 252.215–7004, Excessive Pass-Through Charges, in solicitations and contracts (including task or delivery orders)—

(A) With a total value that exceeds the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, except for—

(1) Firm-fixed-price contracts awarded on the basis of adequate price competition;

(2) Fixed-price contracts with economic price adjustment, awarded on the basis of adequate price competition;

(3) Firm-fixed-price contracts for the acquisition of a commercial item; or

(4) Fixed-price contracts with economic price adjustment, for the acquisition of a commercial item; or

(B) With a total value at or below the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4, when the contracting officer determines that inclusion of the clause is appropriate.

(ii) Use the clause with its Alternate I when the contracting officer determines that the prospective contractor has demonstrated that its functions provide added value to the contracting effort and there are no excessive pass-through charges.

[63 FR 55040, Oct. 14, 1998, as amended at 72 FR 20760, Apr. 26, 2007; 73 FR 27472, May 13, 2008]

215.470 Estimated data prices.

(a) DoD 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, include DD Form 1423, Contract Data Requirements List, in the solicitation. See PGI 215.470(b) for guidance on the use of DD Form 1423.

(c) The contracting officer shall ensure that the contract does not include a requirement for data that the contractor has delivered or is obligated to deliver to the government under another contract or subcontract, and that the successful offeror identifies any such data 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.

[63 FR 55040, Oct. 14, 1998, as amended at 71 FR 69495, Dec. 1, 2006]

PART 216—TYPES OF CONTRACTS

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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

§216.104–70 Research and development.

Follow the procedures at PGI 216.104–70 for selecting the appropriate research and development contract type.

[71 FR 39007, July 11, 2006]

Subpart 216.2—Fixed-Price Contracts

216.203 Fixed-price contracts with economic price adjustment.

§ 216.203–4 Contract clauses.

(1) Generally, use the clauses at FAR 52.216–2, Economic Price Adjustment—Standard Supplies, FAR 52.216–3, Economic Price Adjustment—Semistandard Supplies, and FAR 52.216–4, Economic Price Adjustment—Labor and Material, only when—

(i) The total contract price exceeds the simplified acquisition threshold; and

(ii) Delivery or performance will not be completed within 6 months after contract award.

(2) Follow the procedures at PGI 216.203–4 when using an economic price adjustment clause based on cost indexes of labor or material.

[71 FR 39007, July 11, 2006]

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 exists for the particular product being acquired.

(2) The 10 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 on a basis other than ''established price'' (see Note 6 of the clause), that price must be verified.

(5) 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.

(c) *Price adjustment for wage rates or material prices controlled by a foreign government.* (1) The price adjustment clause at 252.216–7003, Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government, may be used in fixed-price supply and service contracts when—

(i) The contract is to be performed wholly or in part in a foreign country; and

(ii) A foreign government controls wage rates or material prices and may, during contract performance, impose a mandatory change in wages or prices of material.

(2) Verify the base wage rates and material prices prior to contract award and prior to making any adjustment in the contract price.

[56 FR 36340, July 31, 1991, as amended at 62 FR 34122, June 24, 1997; 62 FR 40472, July 29, 1997]

Subpart 216.3—Cost-Reimbursement Contracts

216.306 Cost-plus-fixed-fee contracts.

(c) *Limitations.* (i) Except as provided in paragraph (c)(ii) of this section, annual military construction appropriations acts prohibit 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 prohibition in paragraph (c)(i) of this section does not apply to contracts specifically approved in writing, setting forth the reasons therefor, in accordance with the following:

(A) The Secretaries of the military departments are authorized to approve such contracts that are for environmental work only, provided the environmental work is not classified as construction, as defined by 10 U.S.C. 2801.

(B) The Secretary of Defense or designee must approve such contracts that are not for environmental work only or are for environmental work classified as construction.

[62 FR 1058, Jan. 8, 1997; 62 FR 1817, Jan. 13, 1997; 62 FR 49305, Sept. 19, 1997; 71 FR 39007, July 11, 2006]

Subpart 216.4—Incentive Contracts

216.402 Application of predetermined, formula-type incentives.

216.402–2 Technical performance incentives.

See PGI 216.402–2 for guidance on establishing performance incentives.

[71 FR 39007, July 11, 2006]

216.403 Fixed-price incentive contracts.

216.403–2 Fixed-price incentive (successive targets) contracts.

See PGI 216.403–2 for guidance on the use of fixed-price incentive (successive targets) contracts.

[71 FR 39007, July 11, 2006]

216.405 Cost-reimbursement incentive contracts.

216.405–1 Cost-plus-incentive-fee contracts.

See PGI 216.405–1 for guidance on the use of cost-plus-incentive-fee contracts.

[71 FR 39007, July 11, 2006]

216.405–2 Cost-plus-award-fee contracts.

(b) *Application*. The cost-plus-award-fee (CPAF) contract may include provisional award fee payments. A provisional award fee payment is a payment made within an evaluation period prior to a final evaluation for that period. The contracting officer may include provisional award fee payments in a CPAF contract on a case-by-case basis, provided those payments—

(i) Are made no more frequently than monthly;

(ii) Are limited to no more than—

(A) For the initial award fee evaluation period, 50 percent of the award fee available for that period; and

(B) For subsequent award fee evaluation periods, 80 percent of the evaluation score for the prior evaluation period times the award fee available for the current period, e.g., if the contractor received 90 percent of the award fee available for the prior evaluation period, provisional payments for the current period shall not exceed 72 percent (90 percent x 80 percent) of the award fee available for the current period;

(iii) Are superseded by an interim or final award fee evaluation for the applicable evaluation period. If provisional payments have exceeded the payment determined by the evaluation score for the applicable period, the contracting officer shall collect the debt in accordance with FAR 32.606; and

(iv) May be discontinued, or reduced in such amounts deemed appropriate by the contracting officer, when the contracting officer determines that the contractor will not achieve a level of performance commensurate with the provisional payment. The contracting officer shall notify the contractor in writing of any discontinuance or reduction in provisional award fee payments.

(c) *Limitations.*

(i) The CPAF contract shall not be used—

(A) To avoid—

(*1*) Establishing cost-plus-fixed-fee contracts when the criteria for cost-plus-fixed-fee contracts apply; or

(*2*) Developing objective targets so a cost-plus-incentive-fee contract can be used; or

(B) For either engineering development or operational system development acquisitions that 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—

(*1*) It is more advantageous; and

(*2*) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(ii) Do not apply the weighted guidelines method to CPAF contracts for either the base (fixed) fee or the award fee.

(iii) The base fee shall not exceed 3 percent of the estimated cost of the contract exclusive of the fee.

(S–70) See PGI 216.405–2 for guidance on the use of CPAF contracts.

[71 FR 39007, July 11, 2006]

216.470 Other applications of award fees.

See PGI 216.470 for guidance on other applications of award fees.

[71 FR 39008, July 11, 2006]

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; 63 FR 11529, Mar. 9, 1998]

216.501–1 Definitions.

Multiple award contract, as used in this subpart, means—

(1) A multiple award task order contract entered into in accordance with FAR 16.504(c); or

(2) Any other indefinite-delivery, indefinite-quantity contract that an agency enters into with two or more sources under the same solicitation.

[67 FR 56608, Oct. 25, 2002]

216.501–2 General.

(a) *See* 217.204(e) for limitations on the period for task order or delivery order contracts awarded by DoD pursuant to 10 U.S.C. 2304a.

[69 FR 13478, Mar. 23, 2004]

216.505 Ordering.

(1) Departments and agencies shall comply with the review, approval, and reporting requirements established in accordance with Subpart 217.78 when placing orders under non-DoD contracts in amounts exceeding the simplified acquisition threshold.

(2) Orders placed under indefinite-delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

[63 FR 11529, Mar. 9, 1998, as amended at 70 FR 29642, May 24, 2005; 71 FR 14103, Mar. 21, 2006]

§ 216.505–70 Orders under multiple award contracts.

(a) This subsection—

(1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107) for the acquisition of services, and establishes similar policy for the acquisition of supplies;

(2) Applies to orders for supplies or services exceeding $100,000 placed under multiple award contracts;

(3) Also applies to orders placed by non-DoD agencies on behalf of DoD; and

(4) Does not apply to orders for architect-engineer services, which shall be placed in accordance with the procedures in FAR Subpart 36.6.

(b) Each order exceeding $100,000 shall be placed on a competitive basis in accordance with paragraph (c) of this subsection, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405–6 and includes a written determination that—

(1) A statute expressly authorizes or requires that the purchase be made from a specified source; or

(2) One of the circumstances described at FAR 16.505(b)(2)(i) through (iv) applies to the order. Follow the procedures at PGI 216.505–70 if FAR 16.505(b)(2)(ii) or (iii) is deemed to apply.

(c) An order exceeding $100,000 is placed on a competitive basis only if the contracting officer—

(1) Provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to all contractors offering the required supplies or services under the multiple award contract; and

(2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(d) When using the procedures in this subsection—

(1) The contracting officer should keep contractor submission requirements to a minimum;

(2) The contracting officer may use streamlined procedures, including oral presentations;

(3) The competition requirements in FAR part 6 and the policies in FAR Subpart 15.3 do not apply to the ordering process, but the contracting officer shall consider price or cost under each order as one of the factors in the selection decision; and

(4) The contracting officer should consider past performance on earlier orders under the contract, including quality, timeliness, and cost control.

[71 FR 14108, Mar. 21, 2006]

216.506 Solicitation provisions and 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.

[63 FR 11529, Mar. 9, 1998]

Subpart 216.6—Time-And-Materials, Labor-Hour, and Letter Contracts

216.601 Time-and-materials contracts.

(e) *Solicitation provisions.* Use the provision at FAR 52.216–29, Time-and-Materials/Labor-Hour Proposal Requirements—Non-Commercial Item Acquisition with Adequate Price Competition, with 252.216–7002, Alternate A, in solicitations contemplating the use of a time-and-materials or labor-hour contract type for non-commercial items if the price is expected to be based on adequate competition.

[71 FR 74471, Dec. 12, 2006]

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 217.7405(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 217.7405(b), instead of the clause at FAR 52.216–25, Contract Definitization.

[61 FR 7743, Feb. 29, 1996, as amended at 71 FR 58537, Oct. 4, 2006; 72 FR 69159, Dec. 7, 2007]

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 5 years.

(d) *Orders.* Follow the procedures at PGI 216.703(d) for issuing orders under basic ordering agreements.

[71 FR 39008, July 11, 2006]

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—Mulityear Contracting

SOURCE: 63 FR 11529, Mar. 9, 1998, unless otherwise noted.

217.103 Definitions.

As used in this subpart—

Advance procurement means an exception to the full funding policy that allows acquisition of long lead time items (advance long lead acquisition) or economic order quantities (EOQ) of items (advance EOQ acquisition) in a fiscal year in advance of that in which the related end item is to be acquired. Advance procurements may include

materials, parts, components, and effort that must be funded in advance to maintain a planned production schedule.

Military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense (10 U.S.C. 2801(c)(2)).

[68 FR 43332, July 22, 2003]

217.170 General.

(a) Before awarding a multiyear contract, the head of the agency must compare the cost of that contract to the cost of an annual procurement approach, using a present value analysis. Do not award the multiyear contract unless the analysis shows that the multiyear contract will result in the lower cost (10 U.S.C. 2306b(l)(7); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts).

(b) The head of the agency must provide written notice to the congressional defense committees at least 10 days before termination of any multiyear contract (10 U.S.C. 2306b(l)(6); 10 U.S.C. 2306c(d)(3); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts).

(c) Every multiyear contract must comply with FAR 17.104(c), unless an exception is approved through the budget process in coordination with the cognizant comptroller.

(d)(1) DoD must receive authorization from, or provide notification to, Congress before entering into a multiyear contract for certain procurements, including those expected to—

(i) Exceed $500 million for supplies (see 217.172(c) and 217.172(e)(4)) or $572.5 million for services (see 217.171(a)(6));

(ii) Employ economic order quantity procurement in excess of $20 million in any one year (see 217.174(a)(1));

(iii) Employ an unfunded contingent liability in excess of $20 million (see 217.171(a)(4)(i) and 217.172(d)(1));

(iv) Involve a contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of $20 million in any one year (see 217.174(a)(2)); or

(v) Include a cancellation ceiling in excess of $100 million (see 217.171(a)(4)(ii) and 217.172(d)(2)).

(2) A DoD component must submit a request for authority to enter into multiyear contracts described in paragraphs (d)(1)(i) through (iv) of this section as part of the component's budget submission for the fiscal year in which the multiyear contract will be initiated. DoD will include the request, for each candidate it supports, as part of the President's Budget for that year and in the Appendix to that budget as part of proposed legislative language for the appropriations bill for that year (Section 8008(b) of Public Law 105–56).

(3) If the advisability of using a multiyear contract becomes apparent too late to satisfy the requirements in paragraph (d)(2) of this section, the request for authority to enter into a multiyear contract must be—

(i) Formally submitted by the President as a budget amendment; or

(ii) Made by the Secretary of Defense, in writing, to the congressional defense committees. (Section 8008(b) of Public Law 105–56)

(4) Agencies must establish reporting procedures to meet the congressional notification requirements of paragraph (d)(1) of this section. The head of the agency must submit a copy of each notice to the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)DPAP), and to the Deputy Under Secretary of Defense (Comptroller) (Program/Budget) (OUSD (C) (P/B)).

[66 FR 63337, Dec. 6, 2001, as amended at 68 FR 7439, Feb. 14, 2003; 70 FR 24324, May 9, 2005; 71 FR 75892, Dec. 19, 2006]

217.171 Multiyear contracts for services.

(a) *10 U.S.C. 2306c.* (1) The head of the agency may enter into a multiyear contract for a period of not more than 5 years for the following types of services (and items of supply relating to such services), even though funds are limited by statute to obligation only

during the fiscal year for which they were appropriated:

(i) Operation, maintenance, and support of facilities and installations.

(ii) Maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment.

(iii) Specialized training requiring high quality instructor skills (*e.g.*, training for pilots and aircrew members or foreign language training).

(iv) Base services (*e.g.*, ground maintenance, in-plane refueling, bus transportation, and refuse collection and disposal).

(v) Environmental remediation services for—

(A) An active military installation;

(B) A military installation being closed or realigned under a base closure law as defined in 10 U.S.C. 2667(h)(2); or

(C) A site formerly used by DoD.

(2) The head of the agency must be guided by the following principles when entering into a multiyear contract for services:

(i) The portion of the cost of any plant or equipment amortized as a cost of contract performance should not exceed the ratio between the period of contract performance and the anticipated useful commercial life of the plant or equipment. As used in this section, ''useful commercial life'' means the commercial utility of the facilities rather than the physical life, with due consideration given to such factors as the location, specialized nature, and obsolescence of the facilities.

(ii) Consider the desirability of obtaining an option to extend the term of the contract for a reasonable period not to exceed 3 years at prices that do not include charges for plant, equipment, or other nonrecurring costs already amortized.

(iii) Consider the desirability of reserving the right to take title, under the appropriate circumstances, to the plant or equipment upon payment of the unamortized portion of the cost.

(3) Before entering into a multiyear contract for services, the head of the agency must make a written determination that—

(i) There will be a continuing requirement for the services consistent with current plans for the proposed contract period;

(ii) Furnishing the services will require—

(A) A substantial initial investment in plant or equipment; or

(B) The incurrence of substantial contingent liabilities for the assembly, training, or transportation of a specialized work force; and

(iii) Using a multiyear contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operations.

(4) The head of the agency must provide written notice to the congressional defense committees at least 30 days before award of a multiyear contract for services that include—

(i) An unfunded contingent liability in excess of $20 million (Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts); or

(ii) A cancellation ceiling in excess of $100 million.

(5) If the budget for a contract that contains a cancellation ceiling in excess of $100 million does not include proposed funding for the costs of contract cancellation up to the cancellation ceiling established in the contract—

(i) The notification required by paragraph (a)(4) of this section shall include—

(A) The cancellation ceiling amounts planned for each program year in the proposed multiyear contract, together with the reasons for the amounts planned;

(B) The extent to which costs of contract cancellation are not included in the budget for the contract; and

(C) A financial risk assessment of not including budgeting for costs of contract cancellation (10 U.S.C. 2306c(d)); and

(ii) The head of the agency shall provide copies of the notification to the Office of Management and Budget at least 14 days before contract award in accordance with the procedures at PGI 217.1.

(6) The head of the agency must not initiate a multiyear contract for services exceeding $572.5 million unless a law specifically provides authority for the contract.

(b) *10 U.S.C. 2829.* (1) The head of the agency 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 from annual appropriations for that year.

(2) The head of the agency may use this authority only if the term of the contract does not exceed 4 years.

[66 FR 63337, Dec. 6, 2001, as amended at 68 FR 43333, July 22, 2003; 70 FR 24324, May 9, 2005; 71 FR 75892, Dec. 19, 2006]

217.172 Multiyear contracts for supplies.

(a) This section applies to all multiyear contracts for supplies, including weapon systems and other multiyear acquisitions specifically authorized by law. For additional policies that apply only to multiyear contracts for weapon systems, see 217.173.

(b) The head of the agency may enter into a multiyear contract for supplies if, in addition to the conditions listed in FAR 17.105–1(b), the use of such a contract will promote the national security of the United States (10 U.S.C. 2306b(a)(6)).

(c) The head of the agency must not enter into or extend a multiyear contract that exceeds $500 million (when entered into or when extended) until the Secretary of Defense identifies the contract and any extension in a report submitted to the congressional defense committees (10 U.S.C. 2306b(l)(5)).

(d) The head of the agency must provide written notice to the congressional defense committees at least 30 days before award of a multiyear contract that includes—

(1) An unfunded contingent liability in excess of $20 million (10 U.S.C. 2306b(l)(1)(B)(i)(II); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts); or

(2) A cancellation ceiling in excess of $100 million (10 U.S.C. 2306b(g)).

(e) The head of the agency shall ensure that the following conditions are satisfied before awarding a multiyear contract under the authority described in paragraph (b) of this section:

(1) The multiyear exhibits required by DoD 7000.14–R, Financial Management Regulation, are included in the agency's budget estimate submission and the President's budget request.

(2) The Secretary of Defense certifies to Congress that the current 5-year defense program fully funds the support costs associated with the multiyear program (10 U.S.C. 2306b(i)(1)(A)).

(i) The head of the agency shall submit information supporting this certification to USD(C)(P/B) for transmission to Congress through the Secretary of Defense.

(ii) In the case of a contract with a cancellation ceiling in excess of $100 million, if the budget for the contract does not include proposed funding for the costs of contract cancellation up to the cancellation ceiling established in the contract—

(A) The head of the agency shall, as part of this certification, give written notification to the congressional defense committees of—

(*1*) The cancellation ceiling amounts planned for each program year in the proposed multiyear contract, together with the reasons for the amounts planned;

(*2*) The extent to which costs of contract cancellation are not included in the budget for the contract; and

(*3*) A financial risk assessment of not including the budgeting for costs of contract cancellation (10 U.S.C. 2306b(g)); and

(B) The head of the agency shall provide copies of the notification to the Office of Management and Budget at least 14 days before contract award in accordance with the procedures at PGI 217.1.

(3) The proposed multiyear contract provides for production at not less than minimum economic rates, given the existing tooling and facilities (10 U.S.C. 2306b(i)(1)(B)). The head of the agency shall submit to USD(C)(P/B) information supporting the agency's determination that this requirement has been met.

(4) If the value of a multiyear contract for a particular system or component exceeds $500 million, use of a multiyear contract is specifically authorized by—

(i) An appropriations act (10 U.S.C. 2306b(l)(3)); and

(ii) A law other than an appropriations act (10 U.S.C. 2306b(i)(3)).

(5) The contract is for the procurement of a complete and usable end item (10 U.S.C. 2306b(i)(4)(A)).

(6) Funds appropriated for any fiscal year for advance procurement are obligated only for the procurement of those long-lead items that are necessary in order to meet a planned delivery schedule for complete major end items that are programmed under the contract to be acquired with funds appropriated for a subsequent fiscal year (including an economic order quantity of such long-lead items when authorized by law (10 U.S.C. 2306b(i)(4)(b)).

(7) All other requirements of law are met and there are no other statutory restrictions on using a multiyear contract for the specific system or component (10 U.S.C. 2306b(i)(2)). One such restriction may be the achievement of specified cost savings. If the agency finds, after negotiations with the contractor(s), that the specified savings cannot be achieved, the head of the agency shall assess the savings that, nevertheless, could be achieved by using a multiyear contract. If the savings are substantial, the head of the agency may request relief from the law's specific savings requirement. The request shall—

(i) Quantify the savings that can be achieved;

(ii) Explain any other benefits to the Government of using the multiyear contract;

(iii) Include details regarding the negotiated contract terms and conditions; and

(iv) Be submitted to OUSD (AT&L) DPAP for transmission to Congress via the Secretary of Defense and the President.

(f) The Secretary of Defense may instruct the head of the agency proposing a multiyear contract to include in that contract negotiated priced options for varying the quantities of end items to be procured over the life of the contract (10 U.S.C. 2306b(j)).

(g) The head of an agency shall not award a multiyear contract using fiscal year 2005 appropriated funds unless—

(1) The Secretary of Defense has submitted to Congress a budget request for full funding of units to be procured through the contract;

(2) Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract; and

(3) The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units (Section 8008 of Pub. L. 108–287).

(h) Do not award a multiyear contract using fiscal year 2005 appropriated funds that provides for a price adjustment based on a failure to award a follow-on contract (Section 8008 of Public Law 108–287).

[66 FR 63338, Dec. 6, 2001, as amended at 68 FR 50475, Aug. 21, 2003; 70 FR 24324, May 9, 2005]

217.173 Multiyear contracts for weapon systems.

As authorized by 10 U.S.C. 2306b(h) and subject to the conditions in 217.172(e), the head of the agency may enter into a multiyear contract for—

(a) A weapon system and associated items, services, and logistics support for a weapon system; and

(b) Advance procurement of components, parts, and materials necessary to manufacture a weapon system, including advance procurement to achieve economic lot purchases or more efficient production rates (see 217.174 regarding economic order quantity procurement).

[70 FR 24325, May 9, 2005]

217.174 Multiyear contracts that employ economic order quantity procurement.

(a) The head of the agency must provide written notice to the congressional defense committees at least 30 days before awarding—

(1) A multiyear contract providing for economic order quantity procurement in excess of $20 million in any one year (10 U.S.C. 2306b(l)(1)(B)(i)(I)); or

(2) A contract for advance procurement leading to a multiyear contract that employs economic order quantity procurement in excess of $20 million in any one year (10 U.S.C.

2306b(l)(1)(B)(ii); Section 8008(a) of Public Law 105–56 and similar sections in subsequent DoD appropriations acts).

(b) Before initiating an advance procurement, the contracting officer must verify that it is consistent with DoD policy (e.g., Chapter 2 of DoD 5000.2–R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs, and the full funding policy in Volume 2A, Chapter 1, of DoD 7000.14–R, Financial Management Regulation).

(c) See 217.172(e)(6) for additional provisions regarding procurement of economic order quantities of long-lead items.

[66 FR 63338, Dec. 6, 2001, as amended at 68 FR 50475, Aug. 21, 2003; 70 FR 24325, May 9, 2005]

Subpart 217.2—Options

217.202 Use of options.

See PGI 217.202 for guidance on the use of options.

[71 FR 27642, May 12, 2006]

217.204 Contracts.

(e)(i) Notwithstanding FAR 17.204(e), the ordering period of a task order or delivery order contract (including a contract for information technology) awarded by DoD pursuant to 10 U.S.C. 2304a—

(A) May be for any period up to 5 years;

(B) May be subsequently extended for one or more successive periods in accordance with an option provided in the contract or a modification of the contract; and

(C) Shall not exceed 10 years unless the head of the agency determines in writing that exceptional circumstances require a longer ordering period.

(ii) DoD must submit a report to Congress, annually through fiscal year 2009, when an ordering period is extended beyond 10 years in accordance with paragraph (e)(i)(C) of this section. Follow the procedures at PGI 217.204(e) for reporting requirements.

(iii) Paragraph (e)(i) of this section does not apply to the following:

(A) Contracts, including task or delivery order contracts, awarded under other statutory authority.

(B) Advisory and assistance service task order contracts (authorized by 10 U.S.C. 2304b that are limited by statute to 5 years, with the authority to extend an additional 6 months (see FAR 16.505(c)).

(C) Definite-quantity contracts.

(D) GSA schedule contracts.

(E) Multi-agency contracts awarded by agencies other than NASA, DoD, or the Coast Guard.

(iv) Obtain approval from the senior procurement executive before issuing an order against a task or delivery order contract subject to paragraph (e)(i) of this section, if performance under the order is expected to extend more than 1 year beyond the 10-year limit or extended limit described in paragraph (e)(i)(C) of this section (see FAR 37.106 for funding and term of service contracts).

[70 FR 73152, Dec. 9, 2005]

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. 2305(a)(5)). This limitation also applies to sealed bid solicitations for the contracts excluded by FAR 17.200.

[63 FR 11529, Mar. 9, 1998, as amended at 71 FR 27642, May 12, 2006]

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 capability production planning, 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 to ensure adequate quantities are available to meet item requirements.

(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.

[63 FR 11529, Mar. 9, 1998, as amended at 71 FR 27642, May 12, 2006]

Subpart 217.5—Interagency Acquisitions Under the Economy Act

SOURCE: 63 FR 11530, Mar. 9, 1998, unless otherwise noted.

217.500 Scope of subpart.

(b) Unless more specific statutory authority exists, the procedures in FAR Subpart 17.5, this subpart, and DODI 4000.19 apply to all purchases, except micro-purchases, made for DoD by another agency. This includes orders under a task or delivery order contract entered into by the other agency. (Pub. L. 105–261, Section 814.)

[64 FR 14400, Mar. 25, 1999]

217.504 Ordering procedures.

(a) When the requesting agency is within DoD, a copy of the executed D&F shall be furnished to the servicing agency as an attachment to the order. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order.

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 that fall within one of the generic categories listed in DoD 4140.1–R, DoD Materiel Management Regulation, Chapter 6.2, Exchange or Sale of Nonexcess Personal Property.

[56 FR 36345, July 31, 1991, as amended at 65 FR 39705, June 27, 2000]

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) DoD 4140.1–R, Chapter 6.2.

[56 FR 36345, July 31, 1991, as amended at 65 FR 39705, June 27, 2000]

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 DoD 4140.1–R, Chapter 6.2.

(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).

[56 FR 36345, July 31, 1991, as amended at 65 FR 39705, June 27, 2000]

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 contiguous United States. Allow at least 21 calendar days outside the contiguous United States.

[70 FR 35544, June 21, 2005]

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 or its outlying areas, which—

(1) Request ship repair work; and

(2) 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 and its outlying areas.

(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.

[56 FR 36345, July 31, 1991, as amended at 70 FR 35544, June 21, 2005]

217.7103 Master agreements and job orders.

217.7103–1 Content and format of master agreements.

Follow the procedures at PGI 217.7103–1 for preparation of master agreements.

[71 FR 27642, May 12, 2006]

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 or its outlying areas 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) Follow the procedures at PGI 217.7103–3 when preparing solicitations for job orders.

[56 FR 36345, July 31, 1991, as amended at 63 FR 55052, Oct. 14, 1998; 63 FR 56290, Oct. 21, 1998; 70 FR 35545, June 21, 2005; 71 FR 27642, May 12, 2006]

217.7103–4 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) Follow the procedures at PGI 217.7103–4 when processing this type of undefinitized contract action.

[56 FR 36345, July 31, 1991. Redesignated and amended at 71 FR 27643, May 12, 2006]

217.7103–5 Repair costs not readily ascertainable.

Follow the procedures at PGI 217.7103–5 if the nature of any repairs is such that their extent and probable cost cannot be ascertained readily.

[71 FR 27643, May 12, 2006]

217.7103–6 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.

[63 FR 11529, Mar. 9, 1998. Redesignated at 71 FR 27643, May 12, 2006]

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 [Reserved]

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 contracts that are—

(1) For commercial items; or

(2) Valued at or below the simplified acquisition threshold.

[56 FR 36345, July 31, 1991, as amended at 64 FR 2597, Jan. 15, 1999]

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 that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the action (this date may be extended but may not exceed the date that 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; 63 FR 67803, Dec. 9, 1998]

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—

(1) A contingency operation; or

(2) A humanitarian or peacekeeping operation.

[60 FR 29498, June 5, 1995, as amended at 63 FR 67804, Dec. 9, 1998; 71 FR 27643, May 12, 2006]

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 contracting activity 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.

[56 FR 36345, July 31, 1991, as amended at 71 FR 27643, May 12, 2006]

217.7405 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 15.403–1, 15.403–2, or 15.403–3 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, as amended at 63 FR 55052, Oct. 14, 1998. Redesignated at 71 FR 27643, May 12, 2006]

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.

[56 FR 36345, July 31, 1991, as amended at 71 FR 27643, May 12, 2006]

217.7501 Definition.

Replenishment parts, as used in this subpart, means repairable or consumable parts acquired after the initial provisioning process.

[71 FR 27643, May 12, 2006]

217.7502 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 PGI 217.7504.

(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. See 209.270 for requirements applicable to replenishment parts for aviation or ship critical safety items.

(c) Shall follow the limitations on price increases in 217.7505.

[56 FR 36345, July 31, 1991, as amended at 69 FR 55989, Sept. 17, 2004. Redesignated and amended at 71 FR 27643, May 12, 2006; 73 FR 1827, Jan. 10, 2008]

217.7503 Spares acquisition integrated with production.

Follow the procedures at PGI 217.7503 for acquiring spare parts concurrently with the end item.

[71 FR 27643, May 12, 2006]

217.7504 Acquisition of parts when data is not available.

Follow the procedures at PGI 217.7504 when acquiring parts for which the Government does not have the necessary data.

[71 FR 27643, May 12, 2006]

217.7505 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 at or below the simplified acquisition threshold.

(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.

[56 FR 36345, July 31, 1991, as amended at 64 FR 2598, Jan. 15, 1999. Redesignated at 71 FR 27643, May 12, 2006]

217.7506 Spare parts breakout program.

See PGI 217.7506 and DoD 4140.1–R, DoD Supply Chain Materiel Management Regulation, Chapter 8, Section

C8.3, for spare parts breakout requirements.

[71 FR 27643, May 12, 2006]

Subpart 217.76—Contracts with Provisioning Requirements

217.7601 Provisioning.

(a) Follow the procedures at PGI 217.7601 for contracts with provisioning requirements.

(b) For technical requirements of provisioning, see DoD 4140.1–R, DoD Supply Chain Materiel Management Regulation, Chapter 2, Section C2.2.

[71 FR 27643, May 12, 2006]

Subpart 217.77—Over and Above Work

217.7701 Procedures.

Follow the procedures at PGI 217.7701 when acquiring over and above work.

[71 FR 27643, May 12, 2006]

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.

Subpart 217.78—Contracts or Delivery Orders Issued by a Non-DoD Agency

SOURCE: 70 FR 29642, May 24, 2005, unless otherwise noted.

217.7800 Scope of subpart.

This subpart—

(a) Implements Section 854 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108–375); and

(b) Prescribes policy for the acquisition of supplies and services through the use of contracts or orders issued by non-DoD agencies.

217.7801 Definitions.

As used in this subpart—

Assisted acquisition means a contract awarded or a task or delivery order placed on behalf of DoD by a non-DoD agency.

Direct acquisition means a task or delivery order placed by a DoD official under a contract awarded by a non-DoD agency.

217.7802 Policy.

Departments and agencies shall establish and maintain procedures for reviewing and approving orders placed for supplies and services under non-DoD contracts, whether through direct acquisition or assisted acquisition, when the amount of the order exceeds the simplified acquisition threshold. These procedures shall include—

(a) Evaluating whether using a non-DoD contract for the acquisition is in the best interest of DoD. Factors to be considered include—

(1) Satisfying customer requirements;

(2) Schedule;

(3) Cost effectiveness (taking into account discounts and fees); and

(4) Contract administration (including oversight);

(b) Determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used;

(c) Reviewing funding to ensure that it is used in accordance with appropriation limitations;

(d) Providing unique terms, conditions, and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DoD-unique statutes, regulations, directives, and other requirements; and

(e) Collecting and reporting data on the use of assisted acquisition for analysis. Follow the reporting requirements at PGI 217.7802.

[70 FR 29642, May 24, 2005, as amended at 71 FR 14104, Mar. 21, 2006]

PART 218—EMERGENCY ACQUISITIONS

Subpart 218.1—Available Acquisition Flexibilities

Sec.
218.170 Additional acquisition flexibilities.

Subpart 218.2—Emergency Acquisition Flexibilities

218.201 Contingency operation.

218.202 Defense or recovery from certain attacks.
218.203 Incidents of national significance, emergency declaration, or major disaster declaration.

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

SOURCE: 72 FR 2632, Jan. 22, 2007, unless otherwise noted.

Subpart 218.1—Available Acquisition Flexibilities

218.170 Additional acquisition flexibilities.

Additional acquisition flexibilities available to DoD are as follows:

(a) *Circumstances permitting other than full and open competition.* Use of the authority at FAR 6.302–2, Unusual and compelling urgency, may be appropriate under certain circumstances. See PGI 206.302–2.

(b) *Use of advance Military Interdepartmental Purchase Request (MIPR).* For urgent requirements, the advance MIPR may be transmitted electronically. See PGI 208.7004–3.

(c) *Use of the Governmentwide commercial purchase card.* Governmentwide commercial purchase cards do not have to be used for purchases valued at or below the micro-purchase threshold if the place of performance is entirely outside the United States. See 213.270(c)(1).

(d) *Master agreement for repair and alteration of vessels.* The contracting officer, without soliciting offers, may issue a written job order for emergency work to a contractor that has previously executed a master agreement, when delay would endanger a vessel, its cargo or stores, or when military necessity requires immediate work on a vessel. See 217.7103–4, 252.217–7010, and PGI 217.7103–4.

(e) *Spare parts breakout program.* An urgent immediate buy need not be delayed if an evaluation of the additional information cannot be completed in time to meet the required delivery date. See PGI 217.7506, paragraph 1–105(e).

(f) *Storage and disposal of toxic and hazardous materials.* Under certain emergency situations, exceptions apply with regard to the prohibition on storage or disposal of non-DoD-owned toxic or hazardous materials on DoD installations. See 223.7102(a)(3) and (7).

(g) *Authorization Acts, Appropriations Acts, and other statutory restrictions on foreign acquisition.* Acquisitions in the following categories are not subject to the restrictions of 225.7002, Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools: (1) Acquisitions at or below the simplified acquisition threshold; (2) Acquisitions outside the United States in support of combat operations; (3) Acquisitions of perishable foods by or for activities located outside the United States for personnel of those activities; (4) Acquisitions of food, specialty metals, or hand or measuring tools in support of contingency operations, or for which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302–2; (5) Emergency acquisitions by activities located outside the United States for personnel of those activities; and (6) Acquisitions by vessels in foreign waters. See 225.7002–2.

(h) *Rights in technical data.* The agency head may notify a person asserting a restriction that urgent or compelling circumstances (e.g., emergency repair or overhaul) do not permit the Government to continue to respect the asserted restriction. See 227.7102–2; 227.7103–5; 227.7103–13; 227.7104; 227.7203–13; 252.227–7013; 252.227–7014; 252.227–7015; 252.227–7018; and 252.227–7037.

(i) *Tax exemption in Spain.* If copies of a contract are not available and duty-free import of equipment or materials is urgent, the contracting officer may send the Joint United States Military Group copies of the Letter of Intent or a similar document indicating the pending award. See PGI 229.7001.

(j) *Electronic submission and processing of payment requests.* Contractors do not have to submit payment requests in electronic form for awards made to foreign vendors for work performed outside the United States or for purchases to support unusual or compelling needs of the type described in FAR 6.302–2. See 232.7002(a)(2) and (5).

(k) *Mortuary services.* In an epidemic or other emergency, the contracting activity may obtain services beyond

the capacity of the contractor's facilities from other sources. See 237.7003(b) and 252.237–7003.

Subpart 218.2—Emergency Acquisition Flexibilities

218.201 Contingency operation.

(1) *Selection, appointment, and termination of appointment.* Contracting officer qualification requirements pertaining to a baccalaureate degree and 24 semester credit hours of business related courses do not apply to DoD employees or members of the armed forces who are in a contingency contracting force. See 201.603–2(2).

(2) *Policy for unique item identification.* Contractors will not be required to provide DoD unique item identification if the items, as determined by the head of the agency, are to be used to support a contingency operation. See 211.274–2(b).

(3) *Use of the Governmentwide commercial purchase card.* Governmentwide commercial purchase cards do not have to be used for purchases valued at or below the micro-purchase threshold if the purchase or payment is for an overseas transaction by a contracting officer in support of a contingency operation, or for training exercises in preparation for overseas contingency, humanitarian, or peacekeeping operations. See 213.270(c)(3) and (5).

(4) *Governmentwide commercial purchase card.* A contracting office supporting a contingency operation or a humanitarian or peacekeeping operation may use the Governmentwide commercial purchase card to make a purchase that exceeds the micro-purchase threshold but does not exceed the simplified acquisition threshold if certain conditions are met. See 213.301(3).

(5) *Imprest funds and third party drafts.* Imprest funds are authorized for use without further approval for overseas transactions at or below the micro-purchase threshold in support of a contingency operation or a humanitarian or peacekeeping operation. See 213.305–3(d)(iii)(A).

(6) *Standard Form (SF) 44, Purchase Order-Invoice-Voucher.* SF 44s may be used for purchases not exceeding the simplified acquisition threshold for overseas transactions by contracting officers in support of a contingency operation or a humanitarian or peacekeeping operation. See 213.306(a)(1)(B).

(7) *Undefinitized contract actions.* The head of the agency may waive certain limitations for undefinitized contract actions if the head of the agency determines that the waiver is necessary to support a contingency operation or a humanitarian or peacekeeping operation. See 217.7404–5(b).

(8) *Prohibited sources.* DoD personnel are authorized to make emergency acquisitions in direct support of U.S. or allied forces deployed in military contingency, humanitarian, or peacekeeping operations in a country or region subject to economic sanctions administered by the Department of the Treasury, Office of Foreign Assets Control. See 225.701–70.

(9) *Authorization Acts, Appropriations Acts, and other statutory restrictions on foreign acquisition.* Acquisitions in the following categories are not subject to the restrictions of 225.7002, Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools: (1) Acquisitions at or below the simplified acquisition threshold; (2) Acquisitions outside the United States in support of combat operations; (3) Acquisitions of perishable foods by or for activities located outside the United States for personnel of those activities; (4) Acquisitions of food, specialty metals, or hand or measuring tools in support of contingency operations, or for which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302–2; (5) Emergency acquisitions by activities located outside the United States for personnel of those activities; and (6) Acquisitions by vessels in foreign waters. See 225.7002–2.

(10) *Electronic submission and processing of payment requests.* Contractors do not have to submit payment requests in electronic form for contracts awarded by deployed contracting officers in the course of military operations, including contingency operations or humanitarian or peacekeeping operations. See 232.7002(a)(4).

218.202 Defense or recovery from certain attacks.

Policy for unique item identification. Contractors will not be required to provide DoD unique item identification if the items, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack. See 211.274–2(b).

218.203 Incidents of national significance, emergency declaration, or major disaster declaration.

(1) *Establishing or maintaining alternative sources.* PGI contains a sample format for Determination and Findings citing the authority of FAR 6.202(a), regarding exclusion of a particular source in order to establish or maintain an alternative source or sources. Alternate 2 of the sample format addresses having a supplier available for furnishing supplies or services in case of a national emergency. See PGI 206.202.

(2) *Electronic submission and processing of payment requests.* Contractors do not have to submit payment requests in electronic form for contracts awarded by contracting officers in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies. See 232.7002(a)(4).

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 219—SMALL BUSINESS PROGRAMS

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219.7104 Developmental assistance costs eligible for reimbursement or credit.
219.7105 Reporting.
219.7106 Performance reviews.

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—

(1) Is applicable to DoD through fiscal year 2009; and

(2) Establishes goals for awards to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs). See 226.370 for policy on contracting with HBCU/MIs.

[72 FR 20762, Apr. 26, 2007]

219.001 Definitions.

Small disadvantaged business concern is defined:

(1) At FAR 52.219–23(a) (i.e., a firm is considered a small disadvantaged business (SDB) concern by receiving certification by the Small Business Administration and meeting the other listed criteria), except as specified in paragraph (2) of this definition.

(2) At FAR 52.219–23(a) or 52.219–1(b)(2) for the following purposes (i.e., a firm is considered an SDB concern by either receiving certification by the Small Business Administration and meeting the other listed criteria or self-representing its status for general statistical purposes):

(i) A higher customary progress payment rate for SDB concerns (see 232.501–1(a)(i) and 252.232–7004(c)).

(ii) A lower threshold for inclusion of customary progress payments in contracts with SDB concerns (see 232.502–1).

(iii) The prompt payment policy for SDB concerns in 232. 903 and 232.905(2).

(iv) Reporting contract actions with SDB concerns (''Type of Business'' on the DD Form 350, Individual Contracting Action Report (see 253.204–70(d)(5)(i)(A)) or ''Small Disadvantaged Business (SDB) Actions'' on the DD Form 1057, Monthly Contracting Summary of Actions $25,000 or Less (see 253.204–71(g)(2)).

[63 FR 64429, Nov. 20, 1999]

Subpart 219.2—Policies

219.201 General policy.

(d) For the defense agencies, the director of the Office of Small Business Programs must be appointed by, be responsible to, and report directly to the director or deputy director of the defense agency.

(8) The responsibility for assigning small business technical advisors is delegated to the head of the contracting activity.

(10) Contracting activity small business specialists perform this function by—

(A) Reviewing and making recommendations for all acquisitions (including orders placed against Federal Supply Schedule contracts) over $10,000, except those under $100,000 that are totally set aside for small business concerns in accordance with FAR 19.502–2. Follow the procedures at PGI 219.201(d)(10) regarding such reviews;

(B) Making the review before issuance of the solicitation or contract modification and documenting it on DD Form 2579, Small Business Coordination Record; and

(C) Referring recommendations that have been rejected by the contracting officer to the Small Business Administration (SBA) procurement center representative. If an SBA procurement center representative is not assigned, see FAR 19.402(a).

(11) Also conduct annual reviews to assess—

(A) The extent of consolidation of contract requirements that has occurred (see 207.170); and

(B) The impact of those consolidations on the availability of small business concerns to participate in procurements as both contractors and subcontractors.

(e) For information on the appointment and functions of small business specialists, see PGI 219.201(e).

(f) The Directors, Office of Small Business Programs, of the military departments and defense agencies are responsible for determining whether use of the price evaluation adjustment to achieve a small disadvantaged business goal has caused non-SDB firms in a particular North American Industry Classification System Industry Subsector to bear an undue burden or other inappropriate effect. A copy of each determination shall be forwarded to the Office of Small Business Programs, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), simultaneously with submittal to

the Office of Federal Procurement Policy.

[56 FR 36353, July 31, 1991, as amended at 63 FR 41973, Aug. 6, 1998; 64 FR 2598, Jan. 15, 1999; 65 FR 39705, June 27, 2000; 65 FR 50149, Aug. 17, 2000; 65 FR 63807, Oct. 25, 2000; 69 FR 55987, Sept. 17, 2004; 71 FR 44927, Aug. 8, 2006; 73 FR 46813, Aug. 12, 2008]

219.202 Specific policies.

219.202–5 Data collection and reporting requirements.

Determine the premium percentage to be entered in Item D4C of the Individual Contracting 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 price evaluation adjustment awards (see FAR Subpart 19.11), divide the difference between the low responsive offer and the award price by the low responsive offer.

(3) For partial small business set-asides with preferential consideration for small disadvantaged business concerns, 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.

[56 FR 36353, July 31, 1991, as amended at 63 FR 41973, Aug. 6, 1998; 65 FR 63804, Oct. 25, 2000]

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

219.502 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 $300,000 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 $300,000 or more.

[58 FR 28465, May 13, 1993, as amended at 69 FR 31909, June 8, 2004]

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 $2.5 million;

(ii) Dredging under $1 million; and

(iii) Architect-engineer services for military construction or family housing projects of under $300,000.

[58 FR 28465, May 13, 1993, as amended at 69 FR 31909, June 8, 2004; 71 FR 75892, Dec. 19, 2006]

219.502–3 Partial set-asides.

(c)(1) If the North American Industry Classification System Industry Subsector of the acquisition is one in which use of a price evaluation adjustment for small disadvantaged business concerns is currently authorized (*see* FAR 19.201(b)), apply the adjustment to the non-set-aside portion.

[65 FR 50149, Aug. 17, 2000]

219.505 Rejecting Small Business Administration recommendations.

(b) The designee shall be at a level no lower than chief of the contracting office.

Subpart 219.6—Certificates of Competency and Determinations of Responsibility

219.602 Procedures.

When making a nonresponsibility determination for a small business concern, follow the procedures at PGI 219.602.

[72 FR 20762, Apr. 26, 2007]

Subpart 219.7—The Small Business Subcontracting Program

219.702 Statutory requirements.

(1) Section 834 of Public Law 101–189, as amended (15 U.S.C. 637 note), requires 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. See PGI 219.702 for the requirements of the test program.

(2) Comprehensive subcontracting plans shall not be subject to application of liquidated damages during the period of the test program (Section 402, Pub. L. 101–574).

[72 FR 20762, Apr. 26, 2007]

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 to participate in the program as a result of 10 U.S.C. 2410d and Section 9077 of Pub. L. 102–396 and similar sections in subsequent Defense appropriations acts. Under this authority, subcontracts awarded to such entities may be counted toward the prime contractor's small business subcontracting goal.

(2)(A) To be eligible as an SDB subcontractor, a concern must meet the definition in 219.001.

(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 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 or other severely disabled approved by the Committee for Purchase from People Who Are Blind or Severely Disabled.

[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; 63 FR 11530, Mar. 9, 1998; 63 FR 41974, Aug. 6, 1998; 64 FR 51076, Sept. 21, 1999; 64 FR 62986, Nov. 18, 1999; 72 FR 20762, Apr. 26, 2007]

219.704 Subcontracting plan requirements.

(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.

(2) In those subcontracting plans which specifically identify small businesses, prime contractors shall notify the administrative contracting officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified 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.

(3) See 215.304 for evaluation of offers in acquisitions that require a subcontracting plan.

[72 FR 20762, Apr. 26, 2007]

219.705 Responsibilities of the contracting officer under the subcontracting assistance program.

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 historically black colleges and universities or minority institutions. A small disadvantaged business goal of less than five percent must be approved one level above the contracting officer.

[56 FR 36353, July 31, 1991, as amended at 63 FR 41974, Aug. 6, 1998; 69 FR 67855, Nov. 22, 2004]

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 Contract clauses.

(b)(1)(A) Use the clause at 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), in solicitations and contracts that contain the clause at FAR 52.219–9, Small Business Subcontracting Plan.

(B) In contracts with contractors that have comprehensive subcontracting plans approved under the test program described in 219.702, use the clause at 252.219–7004, Small Business Subcontracting Plan (Test Program), instead of the clauses at 252.219–7003, Small Business Subcontracting Plan (DoD Contracts), and FAR 52.219–9, Small Business Subcontracting Plan.

(2) In contracts with contractors that 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—Subcontracting Plan.

(c)(1) Do not use the clause at FAR 52.219–10, Incentive Subcontracting Program, in contracts with contractors that 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; 63 FR 64429, Nov. 20, 1998; 65 FR 52952, Aug. 31, 2000; 72 FR 20762, Apr. 26, 2007]

Subpart 219.8—Contracting With the Small Business Administration (The 8(a) Program)

219.800 General.

(a) By Partnership Agreement (PA) between the Small Business Administration (SBA) and the Department of Defense (DoD), the SBA has delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics) its authority under paragraph 8(a)(1)(A) of the Small Business Act (15 U.S.C. 637(a)) to enter into 8(a) prime contracts, and its authority under 8(a)(1)(B) of the Small Business Act to award the performance of those contracts to eligible 8(a) Program participants. However, the SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. The SBA delegates only the authority to sign contracts on its behalf. Consistent with the provisions of the PA, this authority is hereby redelegated to DoD contracting officers. A copy of the PA, which includes the PA's expiration date, is available at PGI 219.800.

(b) Contracts awarded under the PA may be awarded directly to the 8(a) participant on either a sole source or competitive basis. An SBA signature on the contract is not required.

(c) Notwithstanding the PA, the contracting officer may elect to award a contract pursuant to the provisions of FAR Subpart 19.8.

[67 FR 11436, Mar. 14, 2002, as amended at 72 FR 20762, Apr. 26, 2007]

219.803 Selecting acquisitions for the 8(a) Program.

When selecting acquisitions for the 8(a) Program, follow the procedures at PGI 219.803.

[72 FR 20762, Apr. 26, 2007]

219.804 Evaluation, offering, and acceptance.

When processing requirements under the PA, follow the procedures at PGI 219.804.

[72 FR 20762, Apr. 26, 2007]

219.804–1 Agency evaluation.

(f) The 8(a) firms should be offered the opportunity to give a technical presentation.

[63 FR 41974, Aug. 6, 1998]

219.805 Competitive 8(a).

219.805–1 General.

(b)(2)(A) For acquisitions that exceed the competitive threshold, the SBA also may accept the requirement for a sole source 8(a) award on behalf of a small business concern owned by a Native Hawaiian Organization (Section 8020 of Pub. L. 109–148).

(B) *Native Hawaiian Organization*, as used in this subsection and as defined by 15 U.S.C. 637(a)(15) and 13 CFR 124.3, means any community service organization serving Native Hawaiians in the State of Hawaii—

(*1*) That is a not-for-profit organization chartered by the State of Hawaii;

(*2*) That is controlled by Native Hawaiians; and

(*3*) Whose business activities will principally benefit such Native Hawaiians.

[70 FR 43073, July 26, 2005, as amended at 71 FR 34832, June 16, 2006]

219.805–2 Procedures.

When processing requirements under the PA, follow the procedures at PGI 219.805–2 for requesting eligibility determinations.

[72 FR 20762, Apr. 26, 2007]

219.806 Pricing the 8(a) contract.

For requirements processed under the PA cited in 219.800—

(1) The contracting officer shall obtain cost or pricing data from the 8(a) contractor, if required by FAR subpart 15.4; and

(2) SBA concurrence in the negotiated price is not required. However, except for purchase orders not exceeding the simplified acquisition threshold, the contracting officer shall notify the SBA prior to withdrawing a requirement from the 8(a) Program due to failure to agree on price or other terms and conditions.

[63 FR 33588, June 19, 1998, as amended at 67 FR 11437, Mar. 14, 2002; 67 FR 49256, July 30, 2002]

219.808 Contract negotiations.

219.808–1 Sole source.

For sole source requirements processed under the PA, follow the procedures at PGI 219.808–1.

[72 FR 20762, Apr. 26, 2007]

219.811 Preparing the contracts.

When preparing awards under the PA, follow the procedures at PGI 219.811.

[72 FR 20762, Apr. 26, 2007]

219.811–3 Contract clauses.

(1) Use the clause at 252.219–7009, Section 8(a) Direct Award, instead of the clauses at FAR 52.219–11, Special 8(a) Contract Conditions, FAR 52.219–12, Special 8(a) Subcontract Conditions, and FAR 52.219–17, Section 8(a) Award, in solicitations and contracts processed in accordance with the PA cited in 219.800.

(2) Use the clause at FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, with 252.219–7010, Alternate A, in solicitations and contracts processed in accordance with the PA cited in 219.800.

(3) Use the clause at 252.219–7011, Notification to Delay Performance, in solicitations and purchase orders issued under the PA cited in 219.800.

[63 FR 33588, June 19, 1998, as amended at 67 FR 11437, Mar. 14, 2002; 72 FR 20762, Apr. 26, 2007]

Subpart 219.10—Small Business Competitiveness Demonstration Program

219.1005 Applicability.

(a)(i) 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—

(A) Be reviewed for possible award under the 8(a) Program regardless of dollar value.

(B) Not be set aside for small business if the estimated value is $300,000 or more (including indefinite delivery-indefinite quantity contracts if the value of all anticipated orders exceeds $300,000).

(C) Be considered for ESB set-aside if the estimated value is both less than the emerging small business reserve amount and less than $300,000.

(D) Be considered for small business set-aside if the estimated value is less than $300,000, 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.

(ii) 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 in FAR subpart 19.10.

(b) The targeted industry categories for DoD are:

North American Industry Classification System (NAICS) Description	NAICS Code
(1) Pharmaceutical Preparation Manufacturing	325412
(2) Ammunition (except Small Arms) Manufacturing	332993
(3) Other Ordnance and Accessories Manufacturing	332995
(4) Turbine and Turbine Generator Set Unit Manufacturing	333611
(5) Aircraft Engine and Engine Parts Manufacturing (including Research and Development)	336412
(6) Guided Missile and Space Vehicle Manufacturing (including Research and Development)	336414
(7) Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (including Research and Development)	336419
(8) Military Armored Vehicle, Tank and Tank Component Manufacturing	336992
(9) Search and Navigation System and Instrument Manufacturing	334511
(10) (i) Cellular and Other Wireless Telecommunications	517212
(ii) Satellite Telecommunications	517410
(iii) Other Telecommunications	517910

[56 FR 36353, July 31, 1991, as amended at 59 FR 27670, May 27, 1994; 62 FR 34122, June 24, 1997; 63 FR 41974, Aug. 6, 1998; 65 FR 50149, Aug. 17, 2000; 66 FR 49861, Oct. 1, 2001; 68 FR 50476, Aug. 21, 2003; 69 FR 31909, June 8, 2004]

219.1007 Procedures.

(a)(2) When it is not practical to mark the face page of an award document, alternative means may be used to identify the contract as an award under the Small Business Competitiveness Demonstration Program.

(b)(1) The Director, Small Business Programs, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)), will determine whether reinstatement of small business set-asides is necessary to meet the agency goal and will recommend reinstatement to the Director of Defense Procurement and Acquisition Policy (OUSD(AT&L)). Military departments and defense agencies shall not reinstate small business set-asides unless directed by the Director of Defense Procurement and Acquisition Policy.

(d) Reporting requirements are at 204.670–2.

[65 FR 39705, June 27, 2000, as amended at 68 FR 7439, Feb. 14, 2003; 70 FR 6374, Feb. 7, 2005; 73 FR 46813, Aug. 12, 2008]

Subpart 219.11—Price Evaluation Adjustment for Small Disadvantaged Business Concerns

219.1101 General.

The determination to use or suspend the price evaluation adjustment for DoD acquisitions can be found at *http://www.acq.osd.mil/dpap/dars/classdev/index.htm.*

[72 FR 20763, Apr. 26, 2007]

219.1102 Applicability.

(b) The price evaluation adjustment also shall not be used in acquisitions that are for commissary or exchange resale.

(c) Also, do not use the price evaluation adjustment in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns.

[63 FR 41974, Aug. 6, 1998, as amended at 71 FR 53043, Sept. 8, 2006]

Subpart 219.12—Small Disadvantaged Business Participation Program

SOURCE: 63 FR 64429, Nov. 20, 1998, unless otherwise noted.

219.1203 Incentive subcontracting with small disadvantaged business concerns.

The contracting officer shall encourage increased subcontracting opportunities for SDB concerns in negotiated acquisitions by providing monetary incentives in the North American Industry Classification System Industry Subsectors for which use of an evaluation factor or subfactor for participation of SDB concerns is currently authorized (see FAR 19.201(b)). Incentives for exceeding SDB subcontracting targets shall be paid only if an SDB subcontracting target was exceeded as a result of actual subcontract awards to SDBs, and not a result of developmental assistance credit under the Pilot Mentor-Protégé Program (see Subpart 219.71).

[63 FR 64429, Nov. 20, 1998, as amended at 65 FR 50149, Aug. 17, 2000]

219.1204 Solicitation provisions and contract clauses.

(c) The contracting officer shall, when contracting by negotiation, insert in solicitations and contracts containing the clause at FAR 52.219–25, Small Disadvantaged Business Participation Program-Disadvantaged Status and Reporting, a clause substantially the same as the clause at FAR 52.219–26, Small Disadvantaged Business Participation Program-Incentive Subcontracting, when authorized (see FAR 19.1203). The contracting officer may include an award fee provision in lieu of the incentive; in such cases, however, the contracting officer shall not use the clause at FAR 52.219–26. Do not use award fee provisions in contracts with contractors that have comprehensive subcontracting plans approved under the test program described in 219.702(a).

Subpart 219.13—Historically Underutilized Business Zone (HUBZone) Program

219.1307 Price evaluation preference for HUBZone small business concerns.

(a) Also, do not use the price evaluation preference in acquisitions that use tiered evaluation of offers, until a tier is reached that considers offers from other than small business concerns.

[71 FR 53043, Sept. 8, 2006]

Subpart 219.70 [Reserved]

Subpart 219.71—Pilot Mentor-Protege Program

SOURCE: 65 FR 6555, Feb. 10, 2000, unless otherwise noted.

219.7100 Scope.

This subpart implements the Pilot Mentor-Protégé Program (hereafter referred to as the ''Program'') established under Section 831 of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101–510; 10 U.S.C. 2302 note). The purpose of the Program is to provide incentives for DoD contractors to assist protege firms in enhancing their capabilities and to increase participation of such firms in Government and commercial contracts.

[66 FR 47108, Sept. 11, 2001, as amended at 69 FR 74995, Dec. 15, 2004]

219.7101 Policy.

DoD policy and procedures for implementation of the Program are contained in Appendix I, Policy and Procedures for the DoD Pilot Mentor-Protege Program.

219.7102 General.

The Program includes—

(a) Mentor firms that are prime contractors with at least one active subcontracting plan negotiated under FAR Subpart 19.7 or under the DoD Comprehensive Subcontracting Test Program.

(b) Protege firms that are—

(1)(i) small disadvantaged business concerns as defined at 219.001(1);

(ii) Business entities owned and controlled by an Indian tribe;

(iii) business entities owned and controlled by a Native Hawaiian Organization;

(iv) Qualified organizations employing the severely disabled;

(v) Women-owned small business concerns;

(vi) Service-disabled veteran-owned small business concerns; or

(vii) HUBZone small business concerns;

(2) Eligible for receipt of Federal contracts; and

(3) Selected by the mentor firm.

(c) Mentor-protege agreements that establish a developmental assistance program for a protege firm.

(d) Incentives that DoD may provide to mentor firms, including—

(1) Reimbursement for developmental assistance costs through—

(i) A separately priced contract line item on a DoD contract; or

(ii) A separate contract, upon written determination by the cognizant Component Director, Small Business Programs (SBP), that unusual circumstances justify reimbursement using a separate contract; or

(2) Credit toward applicable subcontracting goals, established under a subcontracting plan negotiated under FAR Subpart 19.7 or under the DoD Comprehensive Subcontracting Test Program, for developmental assistance costs that are not reimbursed.

[65 FR 6555, Feb. 10, 2000; 65 FR 30191, May 10, 2000, as amended at 66 FR 47108, Sept. 11, 2001; 69 FR 74995, Dec. 15, 2004; 70 FR 29645, May 24, 2005; 73 FR 46813, Aug. 12, 2008]

219.7103 Procedures.

219.7103–1 General.

The procedures for application, acceptance, and participation in the Program are in Appendix I, Policy and Procedures for the DoD Pilot Mentor-Protégé Program. The Director, SBP, of each military department or defense agency has the authority to approve contractors as mentor firms, approve mentor-protégé agreements, and forward approved mentor-protégé agreements to the contracting officer when funding is available.

[69 FR 74995, Dec. 15, 2004, as amended by 73 FR 46813, Aug. 12, 2008]

219.7103–2 Contracting officer responsibilities.

Contracting officers must—

(a) Negotiate an advance agreement on the treatment of developmental assistance costs for either credit or reimbursement 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 a mentor firm provides advance payments 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 protege firms in accordance with FAR 32.504(c) if a mentor firm provides such payments 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 if—

(1) A DoD program manager or the cognizant Component Director, SBP, has made funds available for that purpose; and

(2) The contractor has an approved mentor-protégé agreement.

(e) Negotiate and award a separate contract for reimbursement of developmental assistance costs only if—

(1) Funds are available for that purpose;

(2) The contractor has an approved mentor-protégé agreement; and

(3) The cognizant Component Director, SBP, has made a determination in accordance with 219.7102(d)(1)(ii).

(f) Not authorize reimbursement for costs of assistance furnished to a protégé firm in excess of $1,000,000 in a fiscal year unless a written determination from the cognizant Component Director, SBP, is obtained.

(g) Advise contractors of reporting requirements in Appendix I.

(h) Provide a copy of the approved Mentor-Protege agreement to the Defense Contract Management Agency administrative contracting officer responsible for conducting the annual performance review (see appendix I, section I–113).

[65 FR 6555, Feb. 10, 2000; 65 FR 30191, May 10, 2000, as amended at 65 FR 50150, Aug. 17, 2000; 66 FR 47109, Sept. 11, 2001; 69 FR 74995, Dec. 15, 2004; 73 FR 46814, Aug. 12, 2008]

219.7104 Developmental assistance costs eligible for reimbursement or credit.

(a) Developmental assistance provided under an approved mentor-protege agreement is distinct from, and must not duplicate, any effort that is the normal and expected product of the award and administration of the mentor firm's subcontracts. The mentor firm must accumulate and charge costs associated with the latter in accordance with its approved accounting practices. Mentor firm costs that are eligible for reimbursement are set forth in appendix I.

(b) Before incurring any costs under the Program, mentor firms must 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, the mentor firm must incur the costs before October 1, 2013.

(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, 2013, that are eligible for crediting under the Program, may be credited toward subcontracting plan goals as set forth in appendix I.

[65 FR 6555, Feb. 10, 2000; 65 FR 30191, May 10, 2000, as amended at 67 FR 77937, Dec. 20, 2002; 70 FR 29645, May 24, 2005]

219.7105 Reporting.

Mentor and protege firms must report on the progress made under mentor-protege agreements as indicated in appendix I, section I–112.

[65 FR 6555, Feb. 10, 2000, as amended at 69 FR 74996, Dec. 15, 2004]

219.7106 Performance reviews.

The Defense Contract Management Agency will conduct annual performance reviews of all mentor-protege agreements as indicated in appendix I, section I–113. The determinations made in these reviews should be a major factor in determinations of amounts of reimbursement, if any, that the mentor firm is eligible to receive in the remaining years of the Program participation term under the agreement.

[65 FR 50150, Aug. 17, 2000, as amended at 69 FR 74996, Dec. 15, 2004]

PART 222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Sec.

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222.1003 Applicability.
222.1003–1 General.
222.1008 Procedures for obtaining wage determinations.
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222.1305 Waivers.
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222.7000 Scope of subpart.
222.7001 Definition.
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Subpart 222.73—Limitations Applicable to Contracts Performed on Guam

222.7300 Scope of subpart.
222.7301 Prohibition on use of nonimmigrant aliens.
222.7302 Contract clause.

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

SOURCE: 56 FR 36358, July 31, 1991, unless otherwise noted.

222.001 Definitions.

Labor advisor, as used in this part, means the departmental or agency headquarters labor advisor.

[56 FR 36358, July 31, 1991, as amended at 72 FR 20763, Apr. 26, 2007]

Subpart 222.1—Basic Labor Policies

222.101 Labor relations.

222.101–1 General.

Follow the procedures at PGI 222.101–1 for referral of labor relations matters to the appropriate authorities.

[71 FR 18670, Apr. 12, 2006]

222.101–3 Reporting labor disputes.

Follow the procedures at PGI 222.101–3 for reporting labor disputes.

[71 FR 18670, Apr. 12, 2006]

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. For guidance on determining the degree of impact, see PGI 222.101–3–70(a).

(b) Each contracting activity shall obtain and develop data reflecting the impact of a labor dispute on its requirements and programs. Upon determining that the impact of the labor dispute is significant, the head of the contracting activity shall submit a report of findings and recommendations to the labor advisor in accordance with departmental procedures. This reporting requirement is assigned Report Control Symbol DD–AT&L(AR)1153 and must include the information specified at PGI 222.101–3–70(b).

[71 FR 18670, Apr. 12, 2006]

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 in the request the information specified at PGI 222.101–4(a)(ii).

(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.

[56 FR 36358, July 31, 1991, as amended at 71 FR 18670, Apr. 12, 2006]

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) Direct all inquiries from contractors or contractor employees regarding the applicability or interpretation of Occupational Safety and Health Act (OSHA) regulations to the Department of Labor.

(2) Upon request, provide the address of the appropriate field office of the Occupational Safety and Health Administration of the Department of Labor.

(3) Do not initiate any application for the suspension or relaxation of labor requirements without prior coordination with the labor advisor. Any requests for variances or alternative means of compliance with OSHA requirements must be approved by the Occupational Safety and Health Administration of the Department of Labor.

[71 FR 18670, Apr. 12, 2006]

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) Follow the procedures at PGI 222.404–2(c)(5) when seeking clarification of the proper application of construction wage rate schedules.

[72 FR 20764, Apr. 26, 2007]

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) Before beginning an investigation, the investigator shall inform the contractor of the general scope of the investigation, and that the investigation will include examining pertinent records and interviewing employees. In conducting the investigation, follow the procedures at PGI 222.406–8(a).

(c) *Contractor notification.*

(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.* Forward a detailed enforcement report or summary report to the agency head in accordance with agency procedures. Include in the report, as a minimum, the information specified at PGI 222.406–8(d).

[56 FR 36358, July 31, 1991, as amended at 71 FR 18670, Apr. 12, 2006]

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.

Subpart 222.6—Walsh-Healey Public Contracts Act

222.604 Exemptions.

222.604–2 Regulatory exemptions.

(b) Submit all applications for such exemptions through contracting channels to the labor advisor.

[56 FR 36358, July 31, 1991, as amended at 65 FR 14398, Mar. 16, 2000]

Subpart 222.8—Equal Employment Opportunity

222.806 Inquiries.

(b) Refer inquiries through the labor advisor.

222.807 Exemptions.

(c) Follow the procedures at PGI 222.807(c) when submitting a request for an exemption.

[71 FR 18670, Apr. 12, 2006]

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.

222.1008 Procedures for obtaining wage determinations.

222.1008–1 Obtaining wage determinations.

Follow the procedures at PGI 222.1008–1 regarding use of the Service Contract Act Directory of Occupations when preparing the e98.

[72 FR 20764, Apr. 26, 2007]

Subpart 222.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

SOURCE: 71 FR 18670, Apr. 12, 2006, unless otherwise noted.

222.1305 Waivers.

(c) Follow the procedures at PGI 222.1305(c) for submission of waiver requests.

222.1308 Complaint procedures.

The contracting officer shall—

(1) Forward each complaint received as indicated in FAR 22.1308; 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.

222.1310 Solicitation provision and contract clauses.

(a)(1) Use of the clause at FAR 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, with its paragraph (c), Listing Openings, also satisfies the requirement of 10 U.S.C. 2410k.

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 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.

[71 FR 18671, Apr. 12, 2006]

Subpart 222.17—Combating Trafficking in Persons

SOURCE: 71 FR 62563, Oct. 26, 2006, unless otherwise noted.

222.1703 Policy.

See PGI 222.1703 for additional information regarding DoD policy for combating trafficking in persons outside the United States.

[73 FR 4115, Jan. 24, 2008]

222.1704 Violations and remedies.

Follow the procedures at PGI 222.1704 for notifying the Combatant Commander if a violation occurs.

[73 FR 4115, Jan. 24, 2008]

Subpart 222.70—Restrictions on the Employment of Personnel for Work on Construction and Service Contracts in Noncontiguous States

SOURCE: 65 FR 14403, Mar. 16, 2000, unless otherwise noted.

222.7000 Scope of subpart.

(a) This subpart implements Section 8071 of the Fiscal Year 2000 Defense Appropriations Act, Public Law 106–79, 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 a noncontiguous State; and

(2) When the unemployment rate in the noncontiguous State is in excess of the national average rate of unemployment as determined by the Secretary of Labor.

222.7001 Definition.

''Noncontiguous State,'' as used in this subpart, means Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Island.

[65 FR 50151, Aug. 17, 2000]

222.7002 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 noncontiguous State, individuals who are residents of that noncontiguous State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills to perform this contract.

222.7003 Waivers.

The head of the agency may waive the requirements of 222.7002 on a case-by-case basis in the interest of national security.

[65 FR 50151, Aug. 17, 2000]

222.7004 Contract clause.

Use the clause at 252.222–7000, Restrictions on Employment of Personnel, in all solicitations and contracts subject to this subpart. Insert the name of the appropriate noncontiguous State in paragraph (a) of the clause.

Subpart 222.71—Right of First Refusal of Employment

SOURCE: 57 FR 52593, Nov. 4, 1992, unless otherwise noted.

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.

Subpart 222.72—Compliance with Labor Laws of Foreign Governments

222.7201 Contract clauses.

(a) Use the clause at 252.222–7002, Compliance with Local Labor Laws (Overseas), in solicitations and contracts for services or construction to be performed outside the United States and its outlying areas.

(b) Use the clause at 252.222–7003, Permit from Italian Inspectorate of Labor, in solicitations and contracts for porter, janitorial, or ordinary facility and equipment maintenance services to be performed in Italy.

(c) Use the clause at 252.222–7004, Compliance with Spanish Social Security Laws and Regulations, in solicitations and contracts for services or construction to be performed in Spain.

[62 FR 34122, June 24, 1997, as amended at 70 FR 35545, June 21, 2005]

Subpart 222.73—Limitations Applicable to Contracts Performed on Guam

SOURCE: 64 FR 52672, Sept. 30, 1999, unless otherwise noted.

222.7300 Scope of subpart.

This subpart—

(a) Implements Section 390 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105–85); and

(b) Applies to contracts for base operations support on Guam that—

(1) Are awarded as a result of a competition conducted under OMB Circular A–76; and

(2) Are entered into or modified on or after November 18, 1997.

[72 FR 20764, Apr. 26, 2007]

222.7301 Prohibition on use of nonimmigrant aliens.

(a) Any alien who is issued a visa or otherwise provided nonimmigrant status under Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)) is prohibited from performing work under a contract for base operations support on Guam.

(b) Lawfully admitted citizens of the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau are not subject to the prohibition in paragraph (a) of this section.

[64 FR 52672, Sept. 30, 1999, as amended at 72 FR 20764, Apr. 26, 2007]

222.7302 Contract clause.

Use the clause at 252.222–7005, Prohibition on Use of Nonimmigrant Aliens—Guam, in solicitations and contracts subject to this subpart.

[72 FR 20764, Apr. 26, 2007]

PART 223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 223.3—Hazardous Material Identification and Material Safety Data

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223.370–1 Scope.
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Subpart 223.4—Use of Recovered Materials

223.405 Procedures.

Subpart 223.5—Drug-Free Workplace

223.570 Drug-free work force.
223.570–1 Policy.
223.570–2 Contract clause.

Subpart 223.8—Ozone-Depleting Substances

223.803 Policy.

Subpart 223.70 [Reserved]

Subpart 223.71—Storage and Disposal of Toxic and Hazardous Materials

223.7100 Policy.
223.7101 Procedures.
223.7102 Exceptions.
223.7103 Contract clause.

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 223.3—Hazardous Material Identification and Material Safety Data

223.302 Policy.

(e) The contracting officer shall also provide hazard warning labels, that are received from apparent successful offerors, to the cognizant safety officer.

[70 FR 73150, Dec. 9, 2005]

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.

(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.

[56 FR 36365, July 31, 1991, as amended at 70 FR 73150, Dec. 9, 2005]

223.370–4 Procedures.

Follow the procedures at PGI 223.370–4.

[70 FR 73151, Dec. 9, 2005]

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

223.405 Procedures.

Follow the procedures at PGI 223.405.

[70 FR 73151, Dec. 9, 2005]

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 Policy.

DoD policy is to ensure that its contractors maintain a program for achieving a drug-free work force.

[57 FR 32737, July 23, 1992. Redesignated at 70 FR 73151, Dec. 9, 2005]

223.570–2 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—

(1) For commercial items;

(2) When performance or partial performance will be outside the United States and its outlying areas, unless the contracting officer determines such inclusion to be in the best interest of the Government; or

(3) When the value of the acquisition is at or below the simplified acquisition threshold.

[57 FR 32737, July 23, 1992, as amended at 64 FR 2598, Jan. 15, 1999; 70 FR 35545, June 21, 2005. Redesignated at 70 FR 73151, Dec. 9, 2005]

Subpart 223.8—Ozone-Depleting Substances

223.803 Policy.

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 a 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). This restriction is in addition to any imposed by the Clean Air Act and applies after June 1, 1993, to all DoD contracts, regardless of place of performance.

[71 FR 75892, Dec. 19, 2006]

Subpart 223.70 [Reserved]

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 Instruction 4715.6, Environmental Compliance, implements 10 U.S.C. 2692.

[58 FR 28466, May 13, 1993, as amended at 67 FR 61516, Oct. 1, 2002]

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 Instruction 4715.6 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; 67 FR 61516, Oct. 1, 2002]

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

Subpart 224.1—Protection of Individual Privacy

Sec.
224.103 Procedures.

Subpart 224.2—Freedom of Information Act

224.203 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

224.103 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

224.203 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.

[56 FR 36367, July 31, 1991. Redesignated at 62 FR 34122, June 24, 1997]

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

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

225.001 General.

For guidance on evaluating offers of foreign end products, see PGI 225.001.

[70 FR 73154, Dec. 9, 2005]

225.003 Definitions.

As used in this part—

(1) *Caribbean Basin country end product* includes petroleum or any product derived from petroleum.

(2) *Defense equipment* means any equipment, item of supply, component, or end product purchased by DoD.

(3) *Domestic concern* means—

(i) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is a foreign concern; or

(ii) An unincorporated concern having its principal place of business in the United States.

(4) *Domestic end product* has the meaning given in the clauses at 252.225–7001, Buy American Act and Balance of Payments Program; and 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the meaning in FAR 25.003.

(5) *Eligible product* means, instead of the definition in FAR 25.003—

(i) A foreign end product that—

(A) Is in a category listed in 225.401–70; and

(B) Is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition;

(ii) A foreign construction material that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition; or

(iii) A foreign service that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition.

(6) *Foreign concern* means any concern other than a domestic concern.

(7) *Nonqualifying country* means a country other than the United States or a qualifying country.

(8) *Nonqualifying country component* means a component mined, produced, or manufactured in a nonqualifying country.

(9) *Qualifying country* means a country with a memorandum of understanding or international agreement with the United States. Qualifying countries are listed in 225.872–1.

(10) *Qualifying country component* and *qualifying country end product* are defined in the clauses at 252.225–7001, Buy American Act and Balance of Payments Program; and 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program. *Qualifying country end product* is also defined in the clause at 252.225–7021, Trade Agreements.

(11) *Qualifying country offer* means an offer of a qualifying country end product, including the price of transportation to destination.

(12) *Source,* when restricted by words such as foreign, domestic, or qualifying country, means the actual manufacturer or producer of the end product or component.

[68 FR 15618, Mar. 31, 2003, as amended at 69 FR 1927, Jan. 13, 2004; 70 FR 73153, Dec. 9, 2005]

225.004 Reporting of acquisition of end products manufactured outside the United States.

Follow the procedures at PGI 225.004 for entering the data upon which the report required by FAR 25.004 will be based.

[71 FR 62559, Oct. 26, 2006]

Subpart 225.1—Buy American Act—Supplies

SOURCE: 68 FR 15618, Mar. 31, 2003, unless otherwise noted.

225.101 General.

(a) For DoD, the following two-part test determines whether a manufactured end product is a domestic end product:

(i) The end product is manufactured in the United States; and

(ii) The cost of its U.S. and qualifying country components exceeds 50 percent of the cost of all its components. This test is applied to end products only and not to individual components.

(c) Additional exceptions that allow the purchase of foreign end products are listed at 225.103.

225.103 Exceptions.

(a)(i)(A) Public interest exceptions for certain countries are in 225.872.

(B) For procurements covered by the World Trade Organization Government Procurement Agreement, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that it is inconsistent with the public interest to apply the Buy American Act to end products that are substantially transformed in the United States.

(ii)(A) Normally, use the evaluation procedures in Subpart 225.5, but consider recommending a public interest exception if 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 a domestic end product; or

(*ii*) In order not to impair integration of the military and commercial industrial base.

(B) Except as provided in PGI 225.872–4, process a determination for a public interest exception after consideration of the factors in 10 U.S.C. 2533—

(*1*) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(*2*) By the head of the contracting activity for acquisitions with a value greater than the simplified acquisition threshold 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 when domestic offers are insufficient to meet the requirement and award is to be made on other than a qualifying country or eligible end product.

(ii) Except as provided in FAR 25.103(b)(3), the determination shall be approved—

(A) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(B) By the chief of the contracting office for acquisitions with a value greater than the simplified acquisition threshold but less than $1,000,000; or

(C) By the head of the contracting activity or immediate deputy for acquisitions valued at $1,000,000 or more.

(iii) A separate determination as to whether an article is reasonably available is not required for the following articles. DoD has already determined that these articles are not reasonably available from domestic sources:

(A) End products or components listed in 225.104(a).

(B) Spare or replacement parts that must be acquired from the original foreign manufacturer or supplier.

(C) Foreign drugs acquired by the Defense Supply Center, Philadelphia, when the Director, Pharmaceuticals Group, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements.

(iv) Under coordinated acquisition (see Subpart 208.70), the determination is the responsibility of the requiring department when the requiring department specifies acquisition of a foreign end product.

(c) The cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under Subpart 225.5.

[68 FR 15618, Mar. 31, 2003, as amended at 70 FR 2362, Jan. 13, 2005; 73 FR 4113, Jan. 24, 2008]

225.104 Nonavailable articles.

(a) DoD has determined that the following articles also are nonavailable in accordance with FAR 25.103(b):

(i) Aluminum clad steel wire.

(ii) Sperm oil.

225.105 Determining reasonableness of cost.

(b) Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).

225.170 Acquisition from or through other Government agencies.

Contracting activities must apply the evaluation procedures in Subpart 225.5 when using Federal supply schedules.

Subpart 225.2—Buy American Act—Construction Materials

225.202 Exceptions.

(a)(2) A nonavailability determination is not required for construction materials listed in FAR 25.104(a) or in 225.104(a). For other materials, a nonavailability determination shall be approved at the levels specified in 225.103(b)(ii). Use the estimated value of the construction materials to determine the approval level.

[65 FR 19851, Apr. 13, 2000, as amended at 68 FR 15619, Mar. 31, 2003]

225.206 Noncompliance.

(c)(4) Prepare any report of noncompliance in accordance with the procedures at 209.406–3 or 209.407–3.

[64 FR 62986, Nov. 18, 1999]

Subpart 225.3—Contracts Performed Outside the United States

SOURCE: 73 FR 16774, Mar. 31, 2008, unless otherwise noted.

225.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

225.301–1 Scope.

(a) *Performance in a designated operational area,* as used in this section, means performance of a service or construction, as required by the contract. For supply contracts, the term includes services associated with the acquisition of supplies (e.g., installation or maintenance), but does not include production of the supplies or associated overhead functions.

(c) For DoD, this section also applies to all personal services contracts.

225.301–4 Contract clause.

(1) Use the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in accordance with the prescription at FAR 25.301–4, except that—

(i) The clause shall also be used in personal services contracts with individuals; and

(ii) The clause shall not be used when all contractor personnel performing outside the United States will be covered by the clause at 252.225–7040.

(2) When using the clause at FAR 52.225–19, the contracting officer shall inform the contractor that the Synchronized Predeployment and Operational Tracker (SPOT) is the appropriate automated system to use for the list of contractor personnel required by paragraph (g) of the clause. Information on the SPOT system is available at *http://www.dod.mil/bta/products/spot.html.*

Subpart 225.4—Trade Agreements

SOURCE: 65 FR 19852, Apr. 13, 2000, unless otherwise noted.

225.401 Exceptions.

(a)(2) 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 and Acquisition Policy (OUSD(AT&L)DPAP). Approval by OUSD(AT&L)DPAP is not required if—

(A) Purchase from foreign sources is restricted by statute (see Subpart 225.70);

(B) Another exception in FAR 25.401 applies to the acquisition; or

(C) Competition from foreign sources is restricted under Subpart 225.71.

[68 FR 15619, Mar. 31, 2003]

225.401–70 End products subject to trade agreements.

Acquisitions of end products in the following Federal supply groups (FSG) are covered by trade agreements if the value of the acquisition is at or above the applicable trade agreement threshold and no exception applies. If an end product is not in one of the listed groups, the trade agreements do not apply. The definition of Caribbean Basin country end products in FAR 25.003 excludes those end products that are not eligible for duty-free treatment under 19 U.S.C. 2703(b). Therefore certain watches, watch parts, and luggage from certain Caribbean Basin countries are not eligible products. However, 225.003 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum, in accordance with Section 8094 of Pub. L. 103–139.

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
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 25.003 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
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)
83	Pins, needles, and sewing kits (only part of 8315) and flag staffs, flagpoles, and flagstaff trucks (only part of 8345)
84	Luggage (only 8460)—See FAR 25.003 for exclusion of luggage for Caribbean Basin countries
85	Toiletries
87	Agricultural supplies
88	Live animals
89	Tobacco products (only 8975)
91	Fuels, oils, and waxes
93	Nonmetallic fabricated materials
94	Nonmetallic crude materials
96	Ores, minerals, and their primary products
99	Miscellaneous

[65 FR 19852, Apr. 13, 2000, as amended at 68 FR 15619, Mar. 31, 2003; 69 FR 1927, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005; 70 FR 73154, Dec. 9, 2005; 71 FR 9270, Feb. 23, 2006]

225.401–71 Products or services in support of operations in Iraq or Afghanistan.

When acquiring products or services, other than small arms, in support of operations in Iraq or Afghanistan using a procedure specified in 225.7703–1(a), the purchase restriction at FAR 25.403(c) does not apply with regard to products or services from Iraq.

[73 FR 53152, Sept. 15, 2008]

225.402 General.

To estimate the value of the acquisition, use the total estimated value of end products covered by trade agreements (*see* 225.401–70).

[70 FR 2363, Jan. 13, 2005]

225.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(c) For acquisitions of supplies covered by the World Trade Organization Government Procurement Agreement, acquire only U.S.-made, qualifying country, or designated country end products unless—

(i) The contracting officer determines that offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either—

(A) Not received; or

(B) Insufficient to fill the Government's requirements. In this case, accept all responsive, responsible offers of U.S.-made, qualifying country, and eligible products before accepting any other offers; or

(ii) A national interest waiver under 19 U.S.C. 2512(b)(2) is granted on a case-by-case basis. Except as delegated in paragraphs (c)(i)(A) and (B) of this section, submit any request for a national interest waiver to the Director of Defense Procurement and Acquisition Policy in accordance with department or agency procedures. Include supporting rationale with the request.

(A) The head of the contracting activity may approve a national interest waiver for a purchase by an overseas purchasing activity, if the waiver is supported by a written statement from the requiring activity that the products being acquired are critical for the support of U.S. forces stationed abroad.

(B) The Commander or Director, Defense Energy Support Center, may approve national interest waivers for purchases of fuel for use by U.S. forces overseas.

[68 FR 15619, Mar. 31, 2003, as amended at 70 FR 2363, Jan. 13, 2005]

225.408 Procedures.

(a)(4) The requirements of FAR 25.408(a)(4), on submission of offers in U.S. dollars, do not apply to overseas acquisitions or to Defense Energy Support Center post, camp, or station overseas requirements.

[70 FR 73154, Dec. 9, 2005]

Subpart 225.5—Evaluating Foreign Offers—Supply Contracts

SOURCE: 68 FR 15620, Mar. 31, 2003, unless otherwise noted.

225.502 Application.

(b) Use the following procedures instead of the procedures in FAR 25.502(b) for acquisitions subject to the World Trade Organization Government Procurement Agreement:

(i) Consider only offers of U.S.-made, qualifying country, or designated country end products, except as permitted by 225.403 or 225.7703–1.

(ii) If price is the determining factor, award on the low offer.

(c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American Act or the Balance of Payments Program:

(i)(A) If the acquisition is subject only to the Buy American Act or the Balance of Payments Program, then only qualifying country end products are exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.

(B) If the acquisition is also subject to a Free Trade Agreement, then eligible products of the applicable Free Trade Agreement country are also exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.

(ii) If price is the determining factor, use the following procedures:

(A) If the low offer is a domestic offer, award on that offer.

(B) If there are no domestic offers, award on the low offer (see example in 225.504(1)).

(C) If the low offer is a foreign offer that is exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, award on that offer. (If the low offer is a qualifying country offer from a country listed at 225.872–1(b), execute a determination in accordance with 225.872–4.)

(D) If the low offer is a foreign offer that is not exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, and there is another foreign offer that is exempt and is lower than the lowest domestic offer, award on the low foreign offer (see example in 225.504(2)).

(E) Otherwise, apply the 50 percent evaluation factor to the low foreign offer.

(*1*) If the price of the low domestic offer is less than the evaluated price of the low foreign offer, award on the low domestic offer (see example in 225.504(3)).

(*2*) If the evaluated price of the low foreign offer remains less than the low domestic offer, award on the low foreign offer (see example in 225.504(4)).

(iii) If price is not the determining factor, use the following procedures:

(A) If there are domestic offers, apply the 50 percent Buy American Act or Balance of Payments Program evaluation factor to all foreign offers unless an exemption applies.

(B) Evaluate in accordance with the criteria of the solicitation.

(C) If these procedures will not result in award on a domestic offer, reevaluate offers without the 50 percent factor. If this will result in award on an offer to which the Buy American Act or Balance of Payments Program applies, but evaluation in accordance with paragraph (c)(ii) of this section would result in award on a domestic offer, proceed with award only after execution of a determination in accordance with 225.103(a)(ii)(B), that domestic preference would be inconsistent with the public interest.

(iv) If the solicitation includes the provision at 252.225–7023, Preference for Products or Services from Iraq or Afghanistan, use the evaluation procedures at 225.7703–3.

[68 FR 15620, Mar. 31, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 69 FR 74992, Dec. 15, 2004; 70 FR 2363, Jan. 13, 2005; 73 FR 53152, Sept. 15, 2008]

225.503 Group offers.

Evaluate group offers in accordance with FAR 25.503, but apply the evaluation procedures of 225.502.

225.504 Evaluation examples.

For examples that illustrate the evaluation procedures in 225.502(c)(ii), see PGI 225.504.

[70 FR 73154, Dec. 9, 2005]

Subpart 225.7—Prohibited Sources

225.701 Restrictions.

See 209.104–1(g) for restrictions on contracting with firms owned or controlled by foreign governments.

[70 FR 73154, Dec. 9, 2005]

225.701–70 Exception.

DoD personnel are authorized to make emergency acquisitions in direct support of U.S. or allied forces deployed in military contingency, humanitarian, or peacekeeping operations in a country or region subject to economic sanctions administered by the Department of the Treasury, Office of Foreign Assets Control.

[68 FR 7441, Feb. 14, 2003]

225.770 Prohibition on acquisition of United States Munitions List items from Communist Chinese military companies.

This section implements Section 1211 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163). See PGI 225.770 for additional information relating to this statute, the terms used in this section, and the United States Munitions List.

[71 FR 53046, Sept. 8, 2006]

225.770–1 Definitions.

As used in this section—

(a) *Communist Chinese military company* and *United States Munitions List* are defined in the clause at 252.225–7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies.

(b) *Component* means an item that is useful only when used in conjunction with an end item (22 CFR 121.8).

(c) *Part* means any single unassembled element of a major or minor component, accessory, or attachment, that is not normally subject to disassembly without the destruction or impairment of design use (22 CFR 121.8).

[71 FR 53046, Sept. 8, 2006]

225.770–2 Prohibition.

Do not acquire supplies or services covered by the United States Munitions List (USML) (22 CFR part 121), through a contract or subcontract at any tier, from any Communist Chinese military company. This prohibition does not apply to components and parts of covered items unless the components and parts are themselves covered by the USML.

[71 FR 53046, Sept. 8, 2006]

225.770–3 Exceptions.

The prohibition in 225.770–2 does not apply to supplies or services acquired—

(a) In connection with a visit to the People's Republic of China by a vessel or an aircraft of the U.S. armed forces;

(b) For testing purposes; or

(c) For the purpose of gathering intelligence.

[71 FR 53046, Sept. 8, 2006]

225.770–4 Identifying USML items.

(a) Before issuance of a solicitation, the requiring activity shall notify the contracting officer in writing whether the items to be acquired are covered by the USML. The notification shall identify any covered item(s) and shall provide the pertinent USML reference(s) from 22 CFR Part 121.

(b) The USML includes defense articles and defense services that fall into 21 categories. Since not all USML items are themselves munitions (*e.g.*, protective personnel equipment, military training equipment), the requiring activity should consult the USML before concluding that an item is or is not covered by the USML.

[71 FR 53046, Sept. 8, 2006]

225.770–5 Waiver of prohibition.

(a) The prohibition in 225.770–2 may be waived, on a case-by-case basis, if an official identified in paragraph (b) of this subsection determines that a waiver is necessary for national security purposes.

(b) The following officials are authorized, without power of delegation, to make the determination specified in paragraph (a) of this subsection:

(1) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(2) The Secretaries of the military departments.

(3) The Component Acquisition Executive of the Defense Logistics Agency.

(c) The official granting a waiver shall notify the congressional defense committees within 30 days after the date of the waiver.

[71 FR 53046, Sept. 8, 2006]

Subpart 225.8—Other International Agreements and Coordination

SOURCE: 68 FR 15621, Mar. 31, 2003, unless otherwise noted.

225.802 Procedures.

(b) Information on memoranda of understanding and other international agreements is available at PGI 225.802(b).

[70 FR 73154, Dec. 9, 2005]

225.802–70 Contracts for performance outside the United States and Canada.

Follow the procedures at PGI 225.802–70 when placing a contract requiring performance outside the United States and Canada. Also see Subpart 225.74, Defense Contractors Outside the United States.

[70 FR 23801, May 5, 2005]

225.802–71 End use certificates.

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to indicate that

the Armed Forces of the United States is the end user of the item, and that the U.S. Government will not transfer the item 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 Use Certificates, for guidance.

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 office of the U.S. Government. The Canadian Government has waived notice of any change or modification that may be made, from time to time, in these commitments, obligations, or covenants.

(b) For production planning purposes, Canada is part of the defense industrial base (see 225.870–2(b)).

(c) The Canadian Commercial Corporation will award and administer contracts with contractors located in Canada, except for—

(1) Negotiated acquisitions for experimental, developmental, or research work under projects other than the Defense Development Sharing Program;

(2) Acquisitions of unusual or compelling urgency;

(3) Acquisitions at or below the simplified acquisition threshold; or

(4) Acquisitions made by DoD activities located in Canada.

(d) For additional information on production rights, data, and information; services provided by Canadian Commercial Corporation; audit; and inspection, see PGI 225.870–1(d).

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73154, Dec. 9, 2005]

225.870–2 Solicitation of Canadian contractors.

(a) If requested, furnish a solicitation to the Canadian Commercial Corporation even if no Canadian firm is solicited.

(b) Handle acquisitions at or below the simplified acquisition threshold directly with Canadian firms and not through the Canadian Commercial Corporation.

[68 FR 15621, Mar. 31, 2003, as amended at 72 FR 20758, Apr. 26, 2007]

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 and 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.

(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 date for receipt of offers, the Corporation may permit Canadian firms to submit offers directly. However, the contracting officer shall receive the Canadian Commercial Corporation's endorsement before contract award.

(c) The Canadian Commercial Corporation will submit all sealed bids 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, the Canadian Commercial Corporation normally will submit offers and quotations 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—

(1) Shall 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) Except for contracts described in 225.870–1(c)(1) through (4), award individual contracts covering purchases from suppliers located in Canada to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ottawa, 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 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—

(1) Quote the contract price in terms of Canadian dollars and identify the amount by the initials ''CN'', *e.g.*, $1,647.23CN; and

(2) Clearly indicate on the face of the contract the U.S./Canadian conversion rate at the time of award and the U.S. dollar equivalent of the Canadian dollar contract amount.

225.870–5 Contract administration.

Follow the contract administration procedures at PGI 225.870–5.

[70 FR 73155, Dec. 9, 2005]

225.870–6 Termination procedures.

When contract termination is necessary, follow the procedures at 249.7000.

[71 FR 27645, May 12, 2006]

225.870–7 Acceptance of Canadian supplies.

For information on the acceptance of Canadian supplies, see PGI 225.870–7.

[70 FR 73155, Dec. 9, 2005]

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.

This section implements 22 U.S.C. 2767 and 10 U.S.C. 2350b.

[70 FR 73155, Dec. 9, 2005]

225.871–2 Definitions.

As used in this section—

(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 NATO 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 and agencies, that have authority to do so, may enter into cooperative project agreements with NATO or with one or more member countries of NATO under DoDD 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 are authorized 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 the waiver—

(1) Is required by the terms of a written cooperative project agreement;

(2) Will significantly further NATO standardization, rationalization, and interoperability; and

(3) Is approved by the appropriate DoD official.

225.871–4 Statutory waivers.

(a) For contracts or subcontracts placed outside the United States, the Deputy Secretary of Defense may waive any provision of law that specifically prescribes—

(1) Procedures for the formation of contracts;

(2) Terms and conditions for inclusion in contracts;

(3) Requirements or preferences for—

(i) Goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities; or

(ii) 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) To request a waiver under a cooperative project, follow the procedures at PGI 225.871–4.

(d) Obtain the approval of the Deputy Secretary of Defense before committing to make a waiver in an agreement or a contract.

[68 FR 15621, Mar. 31, 2003, as amended at 71 FR 62565, Oct. 26, 2006]

225.871–5 Directed Subcontracting.

(a) The Director of Defense Procurement and Acquisition Policy 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. However, the agreement shall clearly state the general provisions for work sharing at the prime and subcontract level. For additional information on cooperative project agreements, see PGI 225.871–5.

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005]

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, without regard to any laws of the United States applicable to the disposal of property owned by the United States.

[70 FR 73155, Dec. 9, 2005]

225.871–7 Congressional notification.

(a) Congressional notification is required when DoD makes a determination to award a contract or subcontract to a particular entity, if the determination was not part of the certification made under 22 U.S.C. 2767(f) before finalizing the cooperative agreement.

(1) Departments and agencies shall provide a proposed Congressional notice to the Director of Defense Procurement and Acquisition Policy in sufficient time to forward to Congress before the time of contract award.

(2) The proposed notice shall include the reason it is necessary to use the authority to designate a particular contractor or subcontractor.

(b) Congressional notification is also required each time a statutory waiver under 225.871–4 is incorporated in a contract or a contract modification, if such information was not provided in the certification to Congress before finalizing the cooperative agreement.

225.872 Contracting with qualifying country sources.

225.872–1 General.

(a) As a result of memoranda of understanding and other international agreements, DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act or the Balance of Payments Program to the acquisition of qualifying country end products from the following qualifying countries:

Australia

Belgium
Canada
Denmark
Egypt
Federal Republic of Germany
France
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
Turkey
United Kingdom of Great Britain and Northern Ireland

(b) Individual acquisitions of qualifying country end products from the following qualifying countries may, on a purchase-by-purchase basis (see 225.872–4), be exempted from application of the Buy American Act and the Balance of Payments Program as inconsistent with the public interest:

Austria
Finland

(c) The determination in paragraph (a) of this subsection does not limit the authority of the Secretary concerned to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source when considered necessary for national defense reasons.

[68 FR 15621, Mar. 31, 2003, as amended at 69 FR 8116, Feb. 23, 2004]

225.872–2 Applicability.

(a) This section applies to all acquisitions of supplies except those restricted by—

(1) U.S. National Disclosure Policy, DoDD 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 Under Secretary of Defense (Industrial Affairs);

(3) Other 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.

225.872–3 Solicitation procedures.

(a) Except for items developed under the U.S./Canadian Development Sharing Program, use the criteria for soliciting and awarding contracts to small business concerns under FAR Part 19 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 concerns.

(b) Send solicitations directly to qualifying country sources. Solicit Canadian sources through the Canadian Commercial Corporation in accordance with 225.870.

(c) Use international air mail if solicitation destinations are outside the United States and security classification permits such use.

(d) 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.

(e) Do not automatically exclude qualifying country sources from submitting offers because their supplies have not been tested and evaluated by the department or 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 tested and evaluated by the department or agency shall consider supplies from qualifying country sources that have been tested and accepted by the qualifying country for service use.

(2) The department or agency may perform a confirmatory test, if necessary.

(3) Apply U.S. test and evaluation standards, policies, and procedures when the department or agency decides that confirmatory tests of qualifying country end products are necessary.

(4) If it appears that these provisions might adversely delay service programs, obtain the concurrence of the Under Secretary of Defense (Acquisition, Technology, and Logistics), before excluding the qualifying country source from consideration.

(f) Permit industry representatives from a qualifying country to attend symposia, program briefings, prebid conferences (see FAR 14.207 and 15.201(c)), 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.

[68 FR 15621, Mar. 31, 2003, as amended at 72 FR 20758, Apr. 26, 2007]

225.872–4 Individual determinations.

If the offer of an end product from a qualifying country source listed in 225.872–1(b), as evaluated, is low or otherwise eligible for award, prepare a determination and findings exempting the acquisition from the Buy American Act and the Balance of Payments Program as inconsistent with the public interest, unless another exception such as the Trade Agreements Act applies. Follow the procedures at PGI 225.872–4.

[70 FR 73155, Dec. 9, 2005]

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 and Acquisition Policy (Contract Policy and International Contracting), ((703) 697–9351, DSN 227–9351).

(b) Follow the contract administration procedures at PGI 225.872–5(b).

(c) Information on quality assurance delegations to foreign governments is in Subpart 246.4, Government Contract Quality Assurance.

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005; 72 FR 30278, May 31, 2007]

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 and Acquisition Policy (Contract Policy and International Contracting), ((703) 697–9351, DSN 227–9351).

(c) Handle requests for audits in qualifying countries in accordance with 215.404–2(c), but follow the additional procedures at PGI 225.872–6(c).

[68 FR 15621, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005; 72 FR 30278, May 31, 2007]

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 SECNAV Instruction 5510.1H; for the Air Force by AFI 31–601; for the Defense Information Systems Agency by DCA Instruction 240–110–8; and for the National Imagery and Mapping Agency by NIMA Instruction 5220.22).

225.872–8 Subcontracting with qualifying country sources.

In reviewing contractor subcontracting procedures, the contracting officer shall ensure that the 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. For U.K. levies to be waived, the offeror or contractor shall identify the levies and the contracting officer shall request a waiver before award of the contract or subcontract under which the levies are charged.

225.873–2 Procedures.

When an offeror or a contractor identifies a levy included in an offered or contract price, follow the procedures at PGI 225.873–2.

[70 FR 73155, Dec. 9, 2005]

Subpart 225.9—Customs and Duties

SOURCE: 68 FR 15626, Mar. 31, 2003, unless otherwise noted.

225.901 Policy.

Unless the supplies are entitled to duty-free treatment under a special category in the Harmonized Tariff Schedule of the United States (*e.g.*, the Caribbean Basin Economic Recovery Act or a Free Trade Agreement), or unless the supplies already have entered into the customs territory of the United States and the contractor already has paid the duty, DoD will issue duty-free entry certificates for—

(1) Qualifying country supplies (end products and components);

(2) Eligible products (end products but not components) under contracts covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; and

(3) Other foreign supplies for which the contractor estimates that duty will exceed $200 per shipment into the customs territory of the United States.

[68 FR 15626, Mar. 31, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005]

225.902 Procedures.

Follow the entry and release procedures at PGI 225.902.

[70 FR 73155, Dec. 9, 2005]

225.903 Exempted supplies.

(b)(i) For an explanation of the term ''supplies,'' see PGI 225.903(b)(i).

(ii) The duty-free certificate shall be printed, stamped, or typed on the face of, or attached to, Customs Form 7501. A duly designated officer or civilian official of the appropriate department or agency shall execute the certificate in the format provided at PGI 225.903(b)(ii).

[70 FR 73155, Dec. 9, 2005]

Subpart 225.10—Additional Foreign Acquisition Regulations

225.1070 Clause deviations in overseas contracts.

See 201.403(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.

[65 FR 19856, Apr. 13, 2000]

Subpart 225.11—Solicitation Provisions and Contract Clauses

SOURCE: 68 FR 16526, Mar. 31, 2003, unless otherwise noted.

225.1100 Scope of subpart.

This subpart prescribes the clauses that implement Subparts 225.1 through 225.10. The clauses that implement Subparts 225.70 through 225.75 are prescribed within those subparts.

225.1101 Acquisition of supplies.

(1) Use the provision at 252.225–7000, Buy American Act—Balance of Payments Program Certificate, instead of the provision at FAR 52.225–2, Buy American Act Certificate. Use the provision in any solicitation that includes the clause at 252.225–7001, Buy American Act and Balance of Payments Program.

(2) Use the clause at 252.225–7001, Buy American Act and Balance of Payments Program, instead of the clause at FAR 52.225–1, Buy American Act—Supplies, in solicitations and contracts unless-

(i) All line items will be acquired from a particular source or sources under the authority of FAR 6.302–3;

(ii) All line items must be domestic or qualifying country end products in accordance with Subpart 225.70. (However, the clause may still be required if Subpart 225.70 requires manufacture of the end product in the United States or in the United States or Canada, without a corresponding requirement for use of domestic components);

(iii) An exception to the Buy American Act or Balance of Payments Program applies (see FAR 25.103, 225.103, and 225.7501);

(iv) One or both of the following clauses will apply to all line items in the contract:

(A) 252.225–7021, Trade Agreements.

(B) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program; or

(v) All line items will be acquired using a procedure specified in 225.7703–1(a).

(3) Use the clause at 252.225–7002, Qualifying Country Sources as Subcontractors, in solicitations and contracts that include one of the following clauses:

(i) 252.225–7001, Buy American Act and Balance of Payments Program.

(ii) 252.225–7021, Trade Agreements.

(iii) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(4) Use the clause at 252.225–7013, Duty-Free Entry, instead of the clause at FAR 52.225–8. Do not use the clause for acquisitions of supplies that will not enter the customs territory of the United States.

(5) Except as provided in paragraph (7) of this section, use the provision at 252.225–7020, Trade Agreements Certificate, instead of the provision at FAR 52.225–6, Trade Agreements Certificate, in solicitations that include the clause at 252.225–7021, Trade Agreements.

(6)(i) Use the clause at 252.225–7021, Trade Agreements, instead of the clause at FAR 52.225–5, Trade Agreements, if the Trade Agreements Act applies.

(ii) Use the clause with its Alternate I in solicitations and contracts that include the clause at 252.225–7024, Requirement for Products or Services from Iraq or Afghanistan, unless the clause at 252.225–7024 has been modified to provide a preference only for the products of Afghanistan.

(iii) Do not use the clause if—

(A) Purchase from foreign sources is restricted, unless the contracting officer anticipates a waiver of the restriction; or

(B) The clause at 252.225–7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan, is included in the solicitation and contract.

(iv) The acquisition of eligible and noneligible products under the same contract may result in the application of trade agreements to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Trade Agreements clause.

(7) Use the provision at 252.225–7022, Trade Agreements Certificate—Inclusion of Iraqi End Products, instead of the provision at FAR 52.225–6, Trade Agreements Certificate, in solicitations that include the clause at 252.225–7021, Trade Agreements, with its Alternate I.

(8) Use the provision at 252.225–7032, Waiver of United Kingdom Levies-Evaluation of Offers, in solicitations if a U.K. firm is expected to—

(i) Submit an offer; or

(ii) Receive a subcontract exceeding $1 million.

(9) Use the clause at 252.225–7033, Waiver of United Kingdom Levies, in solicitations and contracts if a U.K. firm is expected to—

(i) Submit an offer; or

(ii) Receive a subcontract exceeding $1 million.

(10) Use the provision at 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate, instead of the provision at FAR 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in solicitations that include the clause at 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program. Use the provision with its Alternate I

when the clause at 252.225–7036 is used with its Alternate I.

(11)(i) Except as provided in paragraph (10)(ii) of this section, use the clause at 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act, in solicitations and contracts for the items listed at 225.401–70, when the estimated value equals or exceeds $25,000, but is less than $194,000, and a Free Trade Agreement applies to the acquisition.

(A) Use the basic clause when the estimated value equals or exceeds $67,826.

(B) Use the clause with its Alternate I when the estimated value equals or exceeds $25,000 but is less than $67,826.

(ii) Do not use the clause if—

(A) Purchase from foreign sources is restricted (see 225.401(a)(2)), unless the contracting officer anticipates a waiver of the restriction

(B) Acquiring information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), and the same provision in subsequent appropriations acts).

(iii) The acquisition of eligible and noneligible products under the same contract may result in the application of a Free Trade Agreement to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Buy American Act—Free Trade Agreements—Balance of Payments Program clause; or

(C) Using a procedure specified in 225.7703–1(a).

[68 FR 15626, Mar. 31, 2003; 68 FR 25088, May 9, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 71 FR 9271, Feb. 23, 2006; 71 FR 58540, Oct. 4, 2006; 73 FR 4116, Jan. 24, 2008; 73 FR 53152, Sept. 15, 2008]

225.1103 Other provisions and clauses.

(1) Unless the contracting officer knows that the prospective contractor is not a domestic concern, use the clause at 252.225–7005, Identification of Expenditures in the United States, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Are for the acquisition of—

(A) Supplies for use outside the United States;

(B) Construction to be performed outside the United States; or

(C) Services to be performed primarily outside the United States.

(2) Use the clause at 252.225–7041, Correspondence in English, in solicitations and contracts when contract performance will be wholly or in part in a foreign country.

(3) Use the provision at 252.225–7042, Authorization to Perform, in solicitations when contract performance will be wholly or in part in a foreign country.

(4) Unless an exception in 225.770–3 applies, use the clause at 252.225–7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, in solicitations and contracts involving the delivery of items covered by the United States Munitions List.

[68 FR 16526, Mar. 31, 2003, as amended at 71 FR 39006, July 11, 2006; 71 FR 53046, Sept. 8, 2006]

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products and services, 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 the Balance of Payments Program.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997; 68 FR 15627, Mar. 31, 2003]

225.7001 Definitions.

As used in this subpart—

(a) *Bearing components* is defined in the clause at 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings.

(b) *Component* is defined in the clauses at 252.225–7012, Preference for

Certain Domestic Commodities, and 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings.

(c) *Hand or measuring tools* means those tools listed in Federal supply classifications 51 and 52, respectively.

(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; 67 FR 20697, Apr. 26, 2002; 71 FR 14111, Mar. 21, 2006]

225.7002–1 Restrictions.

The following restrictions implement 10 U.S.C. 2533a (the ''Berry Amendment''). Except as provided in subsection 225.7002–2, do not acquire—

(a) Any of the following items, either as end products or components, unless the items have been grown, reprocessed, reused, or produced in the United States:

(1) Food.

(2) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof. Clothing includes items such as outerwear, headwear, underwear, nightwear, footwear, hosiery, handwear, belts, badges, and insignia. For additional guidance and examples, see PGI 225.7002–1(a)(2).

(3) Tents, tarpaulins, or covers.

(4) Cotton and other natural fiber products.

(5) Woven silk or woven silk blends.

(6) Spun silk yarn for cartridge cloth.

(7) Synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics.

(8) Canvas products.

(9) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).

(10) Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (a).

(b) Specialty metals, including stainless steel flatware, unless the metals were melted in steel manufacturing facilities located within the United States. (For guidance on dealing with noncompliance with this requirement, see PGI 225.7002–1(b).)

(c) Hand or measuring tools, unless the tools were produced in the United States.

[67 FR 20697, Apr. 26, 2002, as amended at 71 FR 39009, July 11, 2006; 71 FR 58537, Oct. 4, 2006; 72 FR 2638, Jan. 22, 2007]

225.7002–2 Exceptions.

Acquisitions in the following categories are not subject to the restrictions in 225.7002–1:

(a) Acquisitions at or below the simplified acquisition threshold.

(b) Acquisitions of any of the items in 225.7002–1(a) or (b), if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. (See the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)

(1) The following officials are authorized, without power of redelegation, to make such a domestic nonavailability determination:

(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).

(ii) The Secretary of the Army.

(iii) The Secretary of the Navy.

(iv) The Secretary of the Air Force.

(2) The supporting documentation for the determination shall include—

(i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

(3) Defense agencies shall follow the procedures at PGI 225.7002–2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) If an official listed in paragraph (b)(1)(ii) through (iv) of this subsection makes a domestic nonavailability determination for the acquisition of titanium or a product containing titanium, that official shall—

(i) Notify the congressional defense committees at least 10 days before the award of a contract that relies on such a determination; and

(ii) Provide a copy of the notification and the determination to the Director, Defense Procurement and Acquisition Policy, as specified in PGI 225.7002–2(b)(4).

(5) Follow the procedures at PGI 225.7002–2(b)(5) for reciprocal use of domestic nonavailability determinations.

(c) Acquisitions of items listed in FAR 25.104(a), unless the items are hand or measuring tools.

(d) Acquisitions outside the United States in support of combat operations.

(e) Acquisitions of perishable foods by or for activities located outside the United States for personnel of those activities.

(f) Acquisitions of food, specialty metals, or hand or measuring tools—

(1) In support of contingency operations; or

(2) For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302–2.

(g) Emergency acquisitions by activities located outside the United States for personnel of those activities.

(h) Acquisitions by vessels in foreign waters.

(i) Acquisitions of items specifically for commissary resale.

(j) Acquisitions of incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool—

(1) Is not more than 10 percent of the total price of the end product; and

(2) Does not exceed the simplified acquisition threshold.

(k) Acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

(l) Acquisitions of foods manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced. However, in accordance with Section 8118 of the DoD Appropriations Act for Fiscal Year 2005 (Pub. L. 108–287), this exception does not apply to fish, shellfish, or seafood manufactured or processed in the United States or fish, shellfish, or seafood contained in foods manufactured or processed in the United States.

(m) Purchases of specialty metals by subcontractors at any tier for programs other than—

(1) Aircraft;

(2) Missile and space systems;

(3) Ships;

(4) Tank-automotive;

(5) Weapons; and

(6) Ammunition.

(n) Acquisitions of specialty metals when the acquisition furthers an agreement with a qualifying country (see 225.872).

(o) Acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if—

(1) The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include—

(i) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);

(ii) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;

(iii) Upholstered seats (whether for household, office, or other use); and

(iv) Parachutes (Federal Supply Class 1670); or

(2) The fibers and yarns are para-aramid fibers and yarns manufactured in—

(i) The Netherlands; or

(ii) Another qualifying country (see 225.872) if the Under Secretary of Defense (Acquisition, Technology, and Logistics) makes a determination in accordance with Section 807 of Public Law 105–261 that—

(A) Procuring articles that contain only para-aramid fibers and yarns manufactured from suppliers within the United States would result in sole source contracts or subcontracts for the supply of such para-aramid fibers and yarns;

(B) Such sole source contracts or subcontracts would not be in the best interest of the Government or consistent

with the objectives of the Competition in Contracting Act (10 U.S.C. 2304); and

(C) The qualifying country permits U.S. firms that manufacture para-aramid fibers and yarns to compete with foreign firms for the sale of para-aramid fibers and yarns in that country.

(p) Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country. (See 225.872 and the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)

(q) Acquisitions of commercially available off-the-shelf items containing specialty metals. This exception does not apply when the specialty metal (e.g., raw stock) is acquired directly by the Government or by a prime contractor for delivery to the Government as the end item.

[67 FR 20697, Apr. 26, 2002, as amended at 68 FR 7442, Feb. 14, 2003; 69 FR 26509, May 13, 2004; 69 FR 31910, June 8, 2004; 70 FR 43073, July 26, 2005; 71 FR 34833, June 16, 2006; 71 FR 58537, Oct. 4, 2006; 72 FR 20765, Apr. 26, 2007; 72 FR 63123, Nov. 8, 2007; 73 FR 11356, Mar. 3, 2008]

225.7002–3 Contract clauses.

Unless an exception applies—

(a) Use the clause at 252.225–7012, Preference for Certain Domestic Commodities, in solicitations and contracts exceeding the simplified acquisition threshold.

(b)(1) Use the clause at 252.225–7014, Preference for Domestic Specialty Metals, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of an article containing specialty metals.

(2) Use the clause with its Alternate I in solicitations and contracts exceeding the simplified acquisition threshold requiring delivery, for one of the following major programs, of an article containing specialty metals:

(i) Aircraft.

(ii) Missile and space systems.

(iii) Ships.

(iv) Tank-automotive.

(v) Weapons.

(vi) Ammunition.

(c) Use the clause at 252.225–7015, Restriction on Acquisition of Hand or Measuring Tools, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of hand or measuring tools.

[61 FR 50453, Sept. 26, 1996, as amended at 67 FR 20698, Apr. 26, 2002; 68 FR 15627, Mar. 31, 2003]

225.7003 Waiver of restrictions of 10 U.S.C. 2534.

(a) The waiver procedures of this section apply only if specifically authorized by reference elsewhere in this subpart. The restrictions on certain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that—

(A) 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; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, 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.

(ii) A notice of the determination to exercise the waiver authority shall be published in the FEDERAL REGISTER and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the United States or Canada are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (iii) of this section, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels (see 225.7006). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (a)(1)(iv) of this section.

[68 FR 15627, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005; 71 FR 14111, Mar. 21, 2006]

225.7004 Restriction on acquisition of foreign buses.

225.7004–1 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.

[68 FR 15627, Mar. 31, 2003]

225.7004–2 Applicability.

Apply this restriction if the buses are purchased, leased, rented, or made available under contracts for transportation services.

[68 FR 15627, Mar. 31, 2003]

225.7004–3 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 for an amount at or below the simplified acquisition threshold.

[68 FR 15627, Mar. 31, 2003]

225.7004–4 Waiver.

The waiver criteria at 225.7003(a) apply to this restriction.

[68 FR 15627, Mar. 31, 2003]

225.7005 Restriction on certain chemical weapons antidote.

225.7005–1 Restriction.

In accordance with 10 U.S.C. 2534 and defense industrial mobilization requirements, do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the chemical weapons antidote 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.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 39005, July 11, 2006]

225.7005–2 Exception.

This restriction does not apply if the acquisition is for an amount at or below the simplified acquisition threshold.

[68 FR 15627, Mar. 31, 2003]

225.7005–3 Waiver.

The waiver criteria at 225.7003(a) apply to this restriction.

[68 FR 15627, Mar. 31, 2003]

225.7006 Restriction on air circuit breakers for naval vessels.

225.7006–1 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.

[68 FR 15627, Mar. 31, 2003]

225.7006–2 Exceptions.

This restriction does not apply if the acquisition is—

(a) For an amount at or below the simplified acquisition threshold; or

(b) For spare or repair parts needed to support air circuit breakers manufactured outside the United States. Support includes the purchase of spare air circuit breakers when those from alternate sources are not interchangeable.

[68 FR 15627, Mar. 31, 2003]

225.7006–3 Waiver.

(a) The waiver criteria at 225.7003(a) apply to this restriction.

(b) The Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restriction for air circuit breakers manufactured in the United Kingdom. See 225.7003(b) for applicability.

[68 FR 15627, Mar. 31, 2003]

225.7006–4 Solicitation provision and contract clause.

(a) Use the provision at 252.225–7037, Evaluation of Offers for Air Circuit Breakers, in solicitations requiring air circuit breakers for naval vessels unless—

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the provision.

(b) Use the clause at 252.225–7038, Restriction on Acquisition of Air Circuit Breakers, in solicitations and contracts requiring air circuit breakers for naval vessels unless—

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the clause.

[68 FR 15627, Mar. 31, 2003]

225.7007 Restrictions on anchor and mooring chain.

225.7007–1 Restrictions.

(a) In accordance with Section 8041 of the Fiscal Year 1991 DoD Appropriations Act (Public Law 101–511) and similar sections in subsequent DoD appropriations acts, do not acquire welded shipboard anchor and mooring chain, four inches or less in diameter, 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) 10 U.S.C. 2534 also restricts acquisition of welded shipboard anchor and mooring chain, four inches or less in diameter, when used as a component of a naval vessel. However, the Appropriations Act restriction described in paragraph (a) of this subsection takes precedence over the restriction of 10 U.S.C. 2534.

[68 FR 15627, Mar. 31, 2003]

225.7007–2 Waiver.

(a) The Secretary of the department responsible for acquisition may waive the restriction in 225.7007–1(a), on a case-by-case basis, if—

(1) Sufficient domestic suppliers are not available to meet DoD requirements on a timely basis; and

(2) The acquisition is necessary to acquire capability for national security purposes.

(b) Document the waiver in a written determination and findings 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.

(c) Provide a copy of the determination and findings to the House and Senate Committees on Appropriations.

[68 FR 15627, Mar. 31, 2003]

225.7007–3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225–7019, Restriction on Acquisition of Anchor and Mooring Chain, in solicitations and contracts requiring welded shipboard anchor or mooring chain four inches or less in diameter.

[68 FR 15627, Mar. 31, 2003]

225.7008 [Reserved]

225.7009 Restriction on ball and roller bearings.

225.7009–1 Scope.

This section implements Section 8065 of the Fiscal Year 2002 DoD Appropriations Act (Pub. L. 107–117) and the same restriction in subsequent DoD appropriations acts.

[71 FR 14111, Mar. 21, 2006]

225.7009–2 Restriction.

Do not acquire ball and roller bearings or bearing components unless the bearings and bearing components are manufactured in the United States or Canada.

[71 FR 14111, Mar. 21, 2006]

225.7009–3 Exception.

The restriction in 225.7009–2 does not apply to contracts or subcontracts for the acquisition of commercial items, except for commercial ball and roller bearings acquired as end items.

[71 FR 14111, Mar. 21, 2006]

225.7009–4 Waiver.

The Secretary of the department responsible for acquisition or, for the Defense Logistics Agency, the Component Acquisition Executive, may waive the restriction in 225.7009–2, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate domestic 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.

[71 FR 14111, Mar. 21, 2006]

225.7009–5 Contract clause.

Use the clause at 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings, in solicitations and contracts, unless—

(a) The items being acquired are commercial items other than ball or roller bearings acquired as end items;

(b) The items being acquired do not contain ball and roller bearings; or

(c) A waiver has been granted in accordance with 225.7009–4.

[71 FR 14112, Mar. 21, 2006]

225.7010 [Reserved]

225.7011 Restriction on carbon, alloy, and armor steel plate.

225.7011–1 Restriction.

(a) In accordance with Section 8111 of the Fiscal Year 1992 DoD Appropriations Act (Pub. L. 102–172) and similar sections in subsequent DoD appropriations acts, do not acquire any of the following types of carbon, alloy, or armor steel plate for use in a Government-owned facility or a facility under the control of (*e.g.*, leased by) DoD, unless it is melted and rolled in the United States or Canada:

(1) Carbon, alloy, or armor steel plate in Federal Supply Class 9515.

(2) Carbon, alloy, or armor steel plate described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

(b) This restriction—

(1) Applies to the acquisition of carbon, alloy, or armor steel plate as a finished steel mill product that may be used ''as is'' or may be used as an intermediate material for the fabrication of an end product; and

(2) Does not apply to the acquisition of an end product (*e.g.*, a machine tool), to be used in the facility, that contains carbon, alloy, or armor steel plate as a component.

[71 FR 75894, Dec. 19, 2006]

225.7011–2 Waiver.

The Secretary of the department responsible for acquisition may waive this restriction, on a case-by-case basis, 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.

[68 FR 15627, Mar. 31, 2003]

225.7011–3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225–7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in solicitations and contracts that'

(a) Require the delivery to the Government of carbon, alloy, or armor steel plate that will be used in a Government-owned facility or a facility 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.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 75894, Dec. 19, 2006]

225.7012 Restriction on supercomputers.

225.7012–1 Restriction.

In accordance with Section 8112 of Public Law 100–202, and similar sections in subsequent DoD appropriations acts, do not purchase a supercomputer unless it is manufactured in the United States.

[68 FR 15627, Mar. 31, 2003]

225.7012–2 Waiver.

The Secretary of Defense may waive this restriction, on a case-by-case basis, after certifying 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.

[68 FR 15627, Mar. 31, 2003]

225.7012–3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225–7011, Restriction on Acquisition of Supercomputers, in solicitations and contracts for the acquisition of supercomputers.

[68 FR 15627, Mar. 31, 2003]

225.7013 Restrictions on construction or repair of vessels in foreign shipyards.

In accordance with 10 U.S.C. 7309 and 7310—

(a) Do not award a contract to construct in a foreign shipyard—

(1) A vessel for any of the armed forces; or

(2) A major component of the hull or superstructure of a vessel for any of the armed forces; and

(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.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 58537, Oct. 4, 2006]

225.7014 Restriction on overseas military construction.

For restriction on award of military construction contracts to be performed in the United States outlying areas in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.273(a).

[70 FR 35545, June 21, 2005, as amended at 72 FR 14239, Mar. 27, 2007]

225.7015 Restriction on overseas architect-engineer services.

For restriction on award of architect-engineer contracts to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, see 236.602–70.

[68 FR 15627, Mar. 31, 2003]

225.7016 Restriction on research and development.

(a) In accordance with Public Law 92–570, do not use DoD appropriations to make an 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) This restriction does not affect the requirements of FAR Part 35 for selection of research and development contractors. 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.

[68 FR 15627, Mar. 31, 2003]

225.7017 Restriction on Ballistic Missile Defense research, development, test, and evaluation.

[68 FR 15627, Mar. 31, 2003]

225.7017–1 Definitions.

Competent, foreign firm, and *U.S. firm* are defined in the provision at 252.225–7018, Notice of Prohibition of Certain Contracts with Foreign Entities for the Conduct of Ballistic Missile Defense Research, Development, Test, and Evaluation.

[68 FR 15627, Mar. 31, 2003]

225.7017–2 Restriction.

In accordance with Section 222 of the DoD Authorization Act for Fiscal Years 1988 and 1989 (Pub. L. 100–180), do not use any funds appropriated to or for the use of DoD to enter into or carry out a contract with a foreign government or firm, including any contract awarded as a result of a broad agency announcement, if the contract provides for the conduct of research, development, test, and evaluation (RDT&E) in connection with the Ballistic Missile Defense Program.

[68 FR 15627, Mar. 31, 2003]

225.7017–3 Exceptions.

This restriction does 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 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 that the United States and the foreign parties will derive from the contract. 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 U.S. firm cannot competently perform a contract for RDT&E at a price equal to or less than

the price at which a foreign government or firm would perform the RDT&E. The contracting officer or source selection authority, as applicable, shall make a determination, in accordance with PGI 225.7017–3(b), that will be the basis for the certification.

[68 FR 15627, Mar. 31, 2003, as amended at 71 FR 62565, Oct. 26, 2006]

225.7017–4 Solicitation provision.

Unless foreign participation is otherwise excluded, use the provision at 252.225–7018, Notice of Prohibition of Certain Contracts With Foreign Entities for the Conduct of Ballistic Missile Defense Research, Development, Test, and Evaluation, in competitively negotiated solicitations for RDT&E in connection with the Ballistic Missile Defense Program.

[68 FR 15627, Mar. 31, 2003]

Subpart 225.71—Other Restrictions on Foreign Acquisition

SOURCE: 68 FR 15631, Mar. 31, 2003, unless otherwise noted.

225.7100 Scope of subpart.

This subpart contains foreign product restrictions that are based on policies designed to protect the defense industrial base.

225.7101 Definitions.

Domestic manufacture is defined in the clause at 252.225–7025, Restriction on Acquisition of Forgings.

225.7102 Forgings.

225.7102–1 Policy.

When acquiring the following forging items, whether as end items or components, acquire items that are of domestic manufacture to the maximum extent practicable:

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears	All greater than 120 inches in diameter.

225.7102–2 Exceptions.

The policy in 225.7102–1 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 the excess quantity is an economical purchase quantity). The requirement for domestic manufacture does not apply to the quantity above that required to maintain the base, in which case, qualifying country sources may compete.

225.7102–3 Waiver.

Upon request from a contractor, the contracting officer may waive the requirement for domestic manufacture of the items listed in 225.7102–1.

225.7102–4 Contract clause.

Use the clause at 252.225–7025, Restriction on Acquisition of Forgings, in solicitations and contracts, unless—

(a) The supplies being acquired do not contain any of the items listed in 225.7102–1; or

(b) An exception in 225.7102–2 applies. If an exception applies to only a portion of the acquisition, specify the excepted portion in the solicitation and contract.

Subpart 225.72—Reporting Contract Performance Outside the United States

SOURCE: 70 FR 20839, Apr. 22, 2005, unless otherwise noted.

225.7201 Policy.

(a) 10 U.S.C. 2410g requires offerors and contractors to notify DoD of any intention to perform a DoD contract outside the United States and Canada when the contract could be performed inside the United States or Canada.

(b) DoD requires contractors to report the volume, type, and nature of contract performance outside the United States.

225.7202 Exception.

This subpart does not apply to contracts for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs), or subsistence.

225.7203 Contracting officer distribution of reports.

Follow the procedures at PGI 225.7203 for distribution of reports submitted with offers in accordance with the provision at 252.225–7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer.

225.7204 Solicitation provision and contract clauses.

Except for acquisitions described in 225.7202—

(a) Use the provision at 252.225–7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, in solicitations with a value exceeding $11.5 million;

(b) Use the clause at 252.225–7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, in solicitations and contracts with a value exceeding $11.5 million; and

(c) Use the clause at 252.225–7006, Quarterly Reporting of Actual Contract Performance Outside the United States, in solicitations and contracts with a value exceeding $550,000.

[70 FR 20839, Apr. 22, 2005, as amended at 71 FR 75892, Dec. 19, 2006]

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 (22 U.S.C. Chapter 39). Section 22 of the Arms Export Control Act (22 U.S.C. 2762) authorizes DoD to enter into contracts for resale to foreign countries or international organizations.

(b) This subpart does not apply to—

(1) FMS made from inventories or stocks;

(2) Acquisitions for replenishment of inventories or stocks; or

(3) Acquisitions made under DoD cooperative logistic supply support arrangements.

[63 FR 43889, Aug. 17, 1998]

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see DoD 5105.38–M, Security Assistance Management Manual).

(b) Conduct FMS acquisitions under the same acquisition and contract management procedures used for other defense acquisitions.

(c) Follow the additional procedures at PGI 225.7301(c) for preparation of solicitations and contracts that include FMS requirements.

(d) See 229.170 for policy on contracts financed under U.S. assistance programs that involve payment of foreign country value added taxes or customs duties.

[70 FR 73155, Dec. 9, 2005]

225.7302 Guidance.

For guidance on the role of the contracting officer in FMS programs that will require an acquisition, see PGI 225.7302.

[70 FR 73155, Dec. 9, 2005]

225.7303 Pricing acquisitions for FMS.

(a) Price FMS contracts using the same principles used in pricing other defense contracts. However, application of the pricing principles in FAR parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

(b) If the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403–1(b)(1)), the contracting officer shall not require the submission of cost or pricing data. The contracting officer

should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.

[64 FR 49683, Sept. 14, 1999, as amended at 68 FR 15632, Mar. 31, 2003]

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, the following:

(1) Selling expenses (not otherwise limited by FAR Part 31), such as—

(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. Section 126.8 of the International Traffic in Arms Regulations (22 CFR 126.8) may require Government approval for these costs to be allowable, in which case the appropriate Government approval shall be obtained; and

(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, or operations/tactics enhancement, and related travel to foreign countries.

(3) Offset costs (also see 225.7306).

(i) A U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA 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 FMS contracts, except as noted in paragraph (c) of this subsection.

(c) The limitations for major contractors on independent research and development and bid and proposal (IR&D/B&P) costs for projects that are of potential interest to DoD, in 231.205–18(c)(iii), do not apply to FMS contracts, except as provided in 225.7303–5. The allowability of IR&D/B&P costs on contracts for FMS not wholly paid for from funds made available on a nonrepayable basis is limited to the contract's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such FMS—

(1) Use the best estimate of reasonable costs in forward pricing; and

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under paragraph (e)(1)(A) of Section 21 of the Arms Export Control Act (22 U.S.C. 2761), the United States must charge for administrative services to

recover the estimated cost of administration of sales made under the Army 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; 63 FR 43889, Aug. 17, 1998; 64 FR 8729, Feb. 23, 1999; 64 FR 49684, Sept. 14, 1999; 68 FR 15632, Mar. 31, 2003; 70 FR 73155, Dec. 9, 2005]

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 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided—

(1) The 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); and

(2) The contracting officer determines that the fees are fair and reasonable.

(b)(1) Under DoD 5105.38–M, LOAs 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) shall provide that all U.S. Government contracts resulting from the LOAs prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the contractor identifies the payments and the foreign customer approves the payments in writing before contract award (see 225.7307(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding $50,000 per FMS case are unallowable under DoD contracts, unless the contractor identifies the payment and the foreign customer approves the payment in writing before contract award.

[68 FR 15633, Mar. 31, 2003, as amended at 70 FR 73155, Dec. 9, 2005]

225.7303–5 Aquisitions wholly paid for from nonrepayable funds.

(a) In accordance with 22 U.S.C. 2762(d), price FMS wholly paid for from funds made available on a nonrepayable basis 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 are allowable under such contracts. Indirect burden rates applicable to such direct costs are 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 for offset agreements with a foreign government or international organization if the LOA is financed with funds made available on a nonrepayable basis.

[61 FR 18988, Apr. 30, 1996; 61 FR 49531, Sept. 20, 1996, as amended at 63 FR 43890, Aug. 17, 1998; 64 FR 49684, Sept. 14, 1999; 68 FR 15633, Mar. 31, 2003]

225.7304 FMS customer involvement.

(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 LOA or other written direction sufficiently fulfills the requirements of FAR Subpart 6.3.

(b) FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to—

(1) Develop technical specifications;

(2) Establish delivery schedules;

(3) Identify any special warranty provisions or other requirements unique to the FMS customer; and

(4) Review prices of varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary unless the contractor authorizes its release.

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left to the discretion of the contracting officer after consultation with the contractor. The contracting officer shall provide an explanation to the FMS customer if its participation in negotiations will be limited. Factors that may limit FMS customer participation include situations where—

(1) The contract includes requirements for more than one FMS customer;

(2) The contract includes unique U.S. requirements; or

(3) Contractor proprietary data is a subject of negotiations.

(e) Do not allow representatives of the FMS customer to—

(1) Direct the exclusion of certain firms from the solicitation process (they may suggest the inclusion of certain firms);

(2) Interfere with a contractor's placement of subcontracts; or

(3) Observe or participate in negotiations between the U.S. Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with Subpart 201.4.

(f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).

(g) Do not honor any requests by the FMS customer to reject any bid or proposal.

(h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This information—

(1) May include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract price and the estimated contract price included in the initial LOA; and

(2) May be provided orally, in writing, or by any other method acceptable to the contracting officer.

[67 FR 70325, Nov. 22, 2002]

225.7305 Limitation of liability.

Advise the contractor when 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.

[56 FR 36367, July 31, 1991, as amended at 68 FR 15633, Mar. 31, 2003]

225.7306 Offset arrangements.

In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved. (Also see 225.7303–2(a)(3).)

[70 FR 73155, Dec. 9, 2005]

225.7307 Contract clauses.

(a) Use the clause at 252.225–7027, Restriction on Contingent Fees for Foreign Military Sales, in solicitations and contracts for FMS. Insert in paragraph (b)(1) of the clause the name(s) of any foreign country customer(s) listed in 225.7303–4(b).

(b) Use the clause at 252.225–7028, Exclusionary Policies and Practices of Foreign Governments, in solicitations and contracts for the purchase of supplies and services for international military education training and FMS.

[68 FR 15633, Mar. 31, 2003. Redesignated at 70 FR 73155, Dec. 9, 2005]

Subpart 225.74—Defense Contractors Outside the United States

SOURCE: 70 FR 23801, May 5, 2005, unless otherwise noted.

225.7401 Contracts requiring performance or delivery in a foreign country.

(a) If an acquisition requires performance of work in a foreign country by contractor personnel other than host country personnel, or delivery of items to a Unified Combatant Command designated operational area, follow the procedures at PGI 225.7401(a).

(b) For work performed in Germany, eligibility for logistics support or base privileges of contractor employees is governed by U.S.-German bilateral agreements. Follow the procedures in Army in Europe Regulation 715–9, available at *http://www.per.hqusareur.army.mil/cpd/docper/default.htm*. Follow the procedures in Army in Europe Regulation 715–9, available at *http://www.per.hqusareur.army.mil/cpd/docper/GermanyDefault.aspx*.

(c) For work performed in Japan or Korea, see PGI 225.7401(c) for information on bilateral agreements and policy relating to contractor employees in Japan or Korea.

[70 FR 23801, May 5, 2005, as amended at 71 FR 39009, July 11, 2006; 72 FR 14239, Mar. 27, 2007]

225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.

For additional information on contractor personnel authorized to accompany the U.S. Armed Forces, see PGI 225.7402.

[73 FR 16774, Mar. 31, 2008]

225.7402–1 Scope.

(a) This section applies to contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander.

(b) Any of the types of operations listed in paragraph (a) of this subsection may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

[73 FR 16774, Mar. 31, 2008]

225.7402–2 Definition.

See PGI 225.7402–2 for additional information on designated operational areas.

[73 FR 16774, Mar. 31, 2008]

225.7402–3 Government support.

(a) Government support that may be authorized or required for contractor personnel performing in a designated operational area may include, but is not limited to, the types of support listed in PGI 225.7402–3(a).

(b) The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines in coordination with the combatant commander that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(c) The contracting officer shall specify in the solicitation and contract—

(1) Valid terms, approved by the combatant commander, that specify the responsible party, if a party other than the combatant commander is responsible for providing protection to the contractor personnel performing in the designated operational area as specified in 225.7402–1;

(2) If medical or dental care is authorized beyond the standard specified in paragraph (c)(2)(i) of the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed

Forces Deployed Outside the United States; and

(3) Any other Government support to be provided, and whether this support will be provided on a reimbursable basis, citing the authority for the reimbursement.

(d) The contracting officer shall provide direction to the contractor, if the contractor is required to reimburse the Government for medical treatment or transportation of contractor personnel to a selected civilian facility in accordance with paragraph (c)(2)(ii) of the clause at 252.225–7040.

(e) Contractor personnel must have a letter of authorization (LOA) issued by a contracting officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The LOA also will identify any additional authorizations, privileges, or Government support that the contractor personnel are entitled to under the contract. For a sample LOA, see PGI 225.7402–3(e).

[73 FR 16774, Mar. 31, 2008]

225.7402–4 Contract clauses.

(a) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, instead of the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in solicitations and contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander.

(b) For additional guidance on clauses to consider when using the clause at 252.225–7040, see PGI 225.7402–4(b).

[73 FR 16774, Mar. 31, 2008]

225.7403 Antiterrorism/force protection.

225.7403–1 General.

Information and guidance pertaining to DoD antiterrorism/force protection policy for contracts that require performance or travel outside the United States can be obtained from the offices listed in PGI 225.7403–1.

225.7403–2 Contract clause.

Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that require performance or travel outside the United States, except for contracts with—

(a) Foreign governments;

(b) Representatives of foreign governments; or

(c) Foreign corporations wholly owned by foreign governments.

Subpart 225.75—Balance of Payments Program

SOURCE: 67 FR 20694, Apr. 26, 2002, unless otherwise noted.

225.7500 Scope of subpart.

This subpart provides policies and procedures implementing the Balance of Payments Program. It applies to contracts for the acquisition of—

(a) Supplies for use outside the United States; and

(b) Construction to be performed outside the United States.

225.7501 Policy.

Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

(a) Before issuing the solicitation—

(1) The estimated cost of the acquisition or the value of a particular construction material is at or below the simplified acquisition threshold;

(2) The end product or particular construction material is—

(i) Listed in FAR 25.104 or 225.104(a)(iii);

(ii) A petroleum product;

(iii) A spare part for foreign-manufactured vehicles, equipment, machinery, or systems, provided the acquisition is restricted to the original manufacturer or its supplier;

(iv) An industrial gas;

(v) A brand drug specified by the Defense Medical Materiel Board; or

(vi) Information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), and the same provision in subsequent appropriations acts);

(3) The acquisition is covered by the World Trade Organization Government Procurement Agreement;

(4) The acquisition of foreign end products or construction material is required by a treaty or executive agreement between governments;

(5) Use of a procedure specified in 225.7703–1(a) is authorized for an acquisition in support of operations in Iraq or Afghanistan;

(6) The end product is acquired for commissary resale; or

(7) The contracting officer determines that a requirement can best be filled by a foreign end product or construction material, including determinations that—

(i) A subsistence product is perishable and delivery from the United States would significantly impair the quality at the point of consumption;

(ii) An end product or construction material, by its nature or as a practical matter, can best be acquired in the geographic area concerned, e.g., ice or books; or bulk material, such as sand, gravel, or other soil material, stone, concrete masonry units, or fired brick;

(iii) A particular domestic construction material is not available;

(iv) The cost of domestic construction material would exceed the cost of foreign construction material by more than 50 percent, calculated on the basis of—

(A) A particular construction material; or

(B) The comparative cost of application of the Balance of Payments Program to the total acquisition; or

(v) Use of a particular domestic construction material is impracticable;

(b) After receipt of offers—

(1) The evaluated low offer (*see* Subpart 225.5) is an offer of an end product that—

(i) Is a qualifying country end product;

(ii) Is an eligible product; or

(iii) Is a nonqualifying country end product, but application of the Balance of Payments Program evaluation factor would not result in award on a domestic offer; or

(2) The construction material is an eligible product; or

(c) At any time during the acquisition process, the head of the agency determines that it is not in the public interest to apply the restrictions of the Balance of Payments Program to the end product or construction material.

[67 FR 20694, Apr. 26, 2002, as amended at 67 FR 77939, Dec. 20, 2002; 69 FR 1928, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005; 70 FR 73155, Dec. 9, 2005; 71 FR 58540, Oct. 4, 2006; 73 FR 53153, Sept. 15, 2008]

225.7502 Procedures.

If the Balance of Payments Program applies to the acquisition, follow the procedures at PGI 225.7502.

[71 FR 62566, Oct. 26, 2006]

§ 225.7503 Contract clauses.

Unless the entire acquisition is exempt from the Balance of Payments Program—

(a) Use the clause at 252.225–7044, Balance of Payments Program—Construction Material, in solicitations and contracts for construction to be performed outside the United States with a value greater than the simplified acquisition threshold but less than $7,443,000.

(b) Use the clause at 252.225–7045, Balance of Payments Program—Construction Material Under Trade Agreements, in solicitations and contracts for construction to be performed outside the United States with a value of $7,443,000 or more. For acquisitions with a value of $7,443,000 or more, but less than $8,817,449, use the clause with its Alternate I.

[71 FR 9271, Feb. 23, 2006, as amended at 73 FR 4116, Jan. 24, 2008]

Subpart 225.76—Secondary Arab Boycott of Israel

SOURCE: 71 FR 39006, July 11, 2006, unless otherwise noted.

225.7601 Restriction.

In accordance with 10 U.S.C. 2410i, do not enter into a contract with a foreign entity unless it has certified that it does not comply with the secondary Arab boycott of Israel.

225.7602 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 information (see 225.870).

225.7603 Exceptions.

This restriction does not apply to—

(a) Purchases at or below the simplified acquisition threshold;

(b) Contracts for consumable supplies, provisions, or services for the support of United States forces or of allied forces in a foreign country; or

(c) Contracts pertaining to the use of any equipment, technology, data, or services for intelligence or classified purposes, or to the acquisition or lease thereof, in the interest of national security.

225.7604 Waivers.

The Secretary of Defense may waive this restriction on the basis of national security interests. To request a waiver, follow the procedures at PGI 225.7604.

[71 FR 62566, Oct. 26, 2006]

225.7605 Solicitation provision.

Unless an exception applies or a waiver has been granted in accordance with 225.7604, use the provision at 252.225–7031, Secondary Arab Boycott of Israel, in all solicitations.

Subpart 225.77—Acquisitions in Support of Operations in Iraq or Afghanistan

SOURCE: 73 FR 53153, Sept. 15, 2008, unless otherwise noted.

225.7700 Scope.

This subpart implements Section 886 and Section 892 of the National Defense Authorization Act for Fiscal Year 2008 (Public Law 110–181).

225.7701 Definitions.

As used in this subpart—

Product from Iraq or Afghanistan means a product that is mined, produced, or manufactured in Iraq or Afghanistan.

Service from Iraq or Afghanistan means a service that is performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan.

Small arms means pistols and other weapons less than 0.50 caliber.

Source from Iraq or Afghanistan means a source that—

(1) Is located in Iraq or Afghanistan; and

(2) Offers products or services from Iraq or Afghanistan.

225.7702 Acquisition of small arms.

(a) Except as provided in paragraph (b) of this section, when acquiring small arms for assistance to the Army of Iraq, the Army of Afghanistan, the Iraqi Police Forces, the Afghani Police Forces, or other Iraqi or Afghani security organizations—

(1) Use full and open competition to the maximum extent practicable, consistent with the provisions of 10 U.S.C. 2304;

(2) If use of other than full and open competition is justified in accordance with FAR Subpart 6.3, ensure that—

(i) No responsible U.S. manufacturer is excluded from competing for the acquisition; and

(ii) Products manufactured in the United States are not excluded from the competition; and

(3) If the exception at FAR 6.302–2 (unusual and compelling urgency) applies, do not exclude responsible U.S. manufacturers or products manufactured in the United States from the competition for the purpose of administrative expediency. However, such an offer may be rejected if it does not meet delivery schedule requirements.

(b) Paragraph (a)(2) of this section does not apply when—

(1) The exception at FAR 6.302–1 (only one or a limited number of responsible sources) applies, and the only responsible source or sources are not U.S. manufacturers or are not offering products manufactured in the United States; or

(2) The exception at FAR 6.302–4 (international agreement) applies, and United States manufacturers or products manufactured in the United States are not the source(s) specified in the written directions of the foreign government reimbursing the agency for the cost of the acquisition of the property or services for such government.

225.7703 Acquisition of products or services other than small arms.

225.7703–1 Acquisition procedures.

(a) Subject to the requirements of 225.7703–2, a product or service (including construction), other than small arms, in support of operations in Iraq or Afghanistan, may be acquired by—

(1) Providing a preference for products or services from Iraq or Afghanistan in accordance with the evaluation procedures at 225.7703–3;

(2) Limiting competition to products or services from Iraq or Afghanistan; or

(3) Using procedures other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan. When other than competitive procedures are used, the contracting officer shall document the contract file with the rationale for selecting the particular source(s).

(b) For acquisitions conducted using a procedure specified in paragraph (a) of this subsection, the justification and approval addressed in FAR Subpart 6.3 is not required.

225.7703–2 Determination requirements.

Before use of a procedure specified in 225.7703–1(a), a written determination must be prepared and executed as follows:

(a) For products or services to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan, the contracting officer shall—

(1) Determine in writing that the product or service is to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan; and

(2) Include the written determination in the contract file.

(b) For products or services not limited to use by the military forces, police, or other security personnel of Iraq or Afghanistan, the following requirements apply:

(1) The appropriate official specified in paragraph (b)(2) of this subsection must determine in writing that it is in the national security interest of the United States to use a procedure specified in 225.7703–1(a), because—

(i) The procedure is necessary to provide a stable source of jobs in Iraq or Afghanistan; and

(ii) Use of the procedure will not adversely affect—

(A) Operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities); or

(B) The U.S. industrial base. The authorizing official generally may presume that there will not be an adverse effect on the U.S. industrial base. However, when in doubt, the authorizing official should coordinate with the applicable subject matter expert specified in PGI 225.7703–2(b).

(2) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (b)(1) of this subsection as follows:

(i) The head of the contacting activity is authorized to make a determination that applies to an individual acquisition with a value of less than $78.5 million.

(ii) The Director, Defense Procurement, Acquisition Policy, and Strategic Sourcing, and the following officials, without power of redelegation, are authorized to make a determination that applies to an individual acquisition with a value of $78.5 million or more or to a class of acquisitions:

(A) Defense Logistics Agency Component Acquisition Executive.

(B) Army Acquisition Executive.

(C) Navy Acquisition Executive.

(D) Air Force Acquisition Executive.

(3) The contracting officer—

(i) Shall include the applicable written determination in the contract file; and

(ii) Shall ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and shall document the contract file for each action accordingly.

(c) See PGI 225.7703–2(c) for formats for use in preparation of the determinations required by this subsection.

225.7703–3 Evaluating offers.

(a) Evaluate offers submitted in response to solicitations that include the provision at 252.225–7023, Preference for Products or Services from Iraq or Afghanistan, as follows:

(1) If the low offer is an offer of a product or service from Iraq or Afghanistan, award on that offer.

(2) If there are no offers of a product or service from Iraq or Afghanistan, award on the low offer.

(3) Otherwise, apply the evaluation factor specified in the solicitation to the low offer.

(i) If the price of the low offer of a product or service from Iraq or Afghanistan is less than the evaluated price of the low offer, award on the low offer of a product or service from Iraq or Afghanistan.

(ii) If the evaluated price of the low offer remains less than the low offer of a product or service from Iraq or Afghanistan, award on the low offer.

(b) If the provision at 252.225–7023 is modified to provide a preference exclusively for products or services from Iraq or Afghanistan, also modify the evaluation procedures in paragraph (a) of this subsection to remove ''or Afghanistan'' or ''Iraq or'', respectively, wherever the phrase appears.

225.7703–4 Reporting requirement.

The following organizations shall submit periodic reports to the Deputy Director, Program Acquisition and Contingency Contracting, Defense Procurement, Acquisition Policy, and Strategic Sourcing, in accordance with PGI 225.7703–4, to address the organization's use of the procedures authorized by this section:

(a) The Joint Contracting Command (Iraq/Afghanistan).

(b) The Department of the Army, except for contract actions reported by the Joint Contracting Command.

(c) The Department of the Navy.

(d) The Department of the Air Force.

(e) The Defense Logistics Agency.

(f) The other defense agencies and other DoD components that execute reportable contract actions.

225.7703–5 Solicitation provisions and contract clauses.

(a) Use the provision at 252.225–7023, Preference for Products or Services from Iraq or Afghanistan, in solicitations that provide a preference for products or services from Iraq or Afghanistan in accordance with 225.7703–1(a)(1). The contracting officer—

(1) May modify the provision to provide a preference exclusively for products or services from Iraq or exclusively for products or services from Afghanistan by removing ''or Afghanistan'' or ''Iraq or'', respectively, wherever the phrase appears in the provision. If this provision is so modified, the clause at 252.225–7024 shall be modified accordingly; and

(2) May modify the 50 percent evaluation factor in accordance with contracting office procedures.

(b) Use the clause at 252.225–7024, Requirement for Products or Services from Iraq or Afghanistan, in solicitations that include the provision at 252.225–7023, Preference for Products or Services from Iraq or Afghanistan, and in the resulting contract. If the provision at 252.225–7023 has been modified to provide a preference exclusively for Iraq or exclusively for Afghanistan, in accordance with paragraph (a)(1) of this subsection, the clause at 252.225–7024 shall be modified accordingly.

(c)(1) Use the clause at 252.225–7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan, in solicitations and contracts that—

(i) Are restricted to the acquisition of products or services from Iraq or Afghanistan in accordance with 225.7703–1(a)(2); or

(ii) Will be directed to a particular source or sources from Iraq or Afghanistan in accordance with 225.7703–1(a)(3).

(2) The contracting officer may modify the clause to restrict the acquisition to products or services from Iraq,

or to restrict the acquisition to products or services from Afghanistan, by removing ''or Afghanistan'' or ''Iraq or'', respectively, wherever the phrase appears in the clause.

(d) When the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at 225.1101(6) and (7).

(e) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225–7023, the clause at 252.225–7024, or the clause at 252.225–7026:

(1) 252.225–7000, Buy American Act—Balance of Payments Program Certificate.

(2) 252.225–7001, Buy American Act and Balance of Payments Program.

(3) 252.225–7002, Qualifying Country Sources as Subcontractors.

(4) 252.225–7020, Trade Agreements Certificate.

(5) 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(6) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(7) 252.225–7044, Balance of Payments Program—Construction Material.

(8) 252.225–7045, Balance of Payments Program—Construction Material Under Trade Agreements.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

Subpart 226.1—Indian Incentive Program

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Subpart 226.3—Historically Black Colleges and Universities and Minority Institutions

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Subpart 226.70 [Reserved]

Subpart 226.71—Preference for Local and Small Businesses

226.7100 Scope of subpart.
226.7101 Definition.
226.7102 Policy.
226.7103 Procedure.
226.7104 Other considerations.

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.

Follow the procedures at PGI 226.103 when submitting a request for funding of an Indian incentive.

[70 FR 73149, Dec. 9, 2005]

226.104 Contract clause.

Use the clause at 252.226–7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in solicitations and contracts for supplies or services exceeding $500,000 in value.

[68 FR 56562, Oct. 1, 2003, as amended at 69 FR 55991, Sept. 17, 2004]

Subpart 226.3—Historically Black Colleges and Universities and Minority Institutions

SOURCE: 70 FR 73149, Dec. 9, 2005, unless otherwise noted.

226.370 Contracting with historically black colleges and universities and minority institutions.

226.370–1 General.

This section implements the historically black college and university (HBCU) and minority institution (MI) provisions of 10 U.S.C. 2323.

226.370–2 Definitions.

Definitions of HBCUs and MIs are in the clause at 252.226–7000, Notice of Historically Black College or University and Minority Institution Set-Aside.

226.370–3 Policy.

DoD will use outreach efforts, technical assistance programs, advance payments, HBCU/MI set-asides, and evaluation preferences to meet its contract and subcontract goals for use of HBCUs and MIs.

226.370–4 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 that can comply with the subcontracting limitations in the clause at FAR 52.219–14, Limitations on Subcontracting;

(b) Award will be made at not more than 10 percent above fair market price; and

(c) Scientific or technological talent consistent with the demands of the acquisition will be offered.

226.370–5 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). Interested HBCU/MIs must provide evidence of their capability to perform the contract, and a positive statement of their eligibility, within 15 days of publication of the synopsis in order for the acquisition to proceed as an HBCU/MI set-aside.

(d) Cancel the set-aside if the low responsible offer exceeds the fair market price (defined in FAR part 19) by more than 10 percent.

226.370–6 Eligibility for award.

(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 HBCU or MI status under the provision at FAR 52.226–2, Historically Black College or University and Minority Institution Representation, unless—

(1) Another offeror challenges the status; or

(2) The contracting officer has reason to question the offeror's HBCU/MI status. (A list of HBCU/MIs is published periodically by the Department of Education.)

226.370–7 Protesting a 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.

226.370–8 Goals and incentives for subcontracting with HBCU/MIs.

(a) In reviewing subcontracting plans submitted under the clause at FAR 52.219–9, Small Business Subcontracting Plan, the contracting officer shall—

(1) Ensure that the contractor included anticipated awards to HBCU/MIs in the small disadvantaged business goal; and

(2) Consider whether subcontracts are contemplated that involve research or studies of the type normally performed by higher educational institutions.

(b) The contracting officer may, when contracting by negotiation, use in solicitations and contracts a clause similar to the clause at FAR 52.219–10, Incentive Subcontracting Program, when a subcontracting plan is required and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for HBCU/MIs. The clause should include a separate goal for HBCU/MIs.

226.370–9 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 FAR 52.226–2, Historically Black College or University and Minority Institution Representation, in solicitations set aside for HBCU/MIs.

Subpart 226.70 [Reserved]

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 at least one eligible 8(a) contractor is located in the vicinity.

(2) Set aside the acquisition for small business only if at least one of the expected offers is from a small business located in the vicinity.

[60 FR 29499, June 5, 1995, as amended at 63 FR 41974, Aug. 6, 1998; 67 FR 11438, Mar. 14, 2002]

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]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 227—PATENTS, DATA, AND COPYRIGHTS

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227.7203–7 [Reserved]
227.7203–8 Deferred delivery and deferred ordering of computer software and computer software documentation.
227.7203–9 Copyright.
227.7203–10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.
227.7203–11 Contractor procedures and records.
227.7203–12 Government right to establish conformity of markings.
227.7203–13 Government right to review, verify, challenge and validate asserted restrictions.
227.7203–14 Conformity, acceptance, and warranty of computer software and computer software documentation.
227.7203–15 Subcontractor rights in computer software or computer software documentation.
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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.

(1) Use 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—Ownership by the Contractor.

(2)(i) Use the clause at 252.227–7038, Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at FAR 52.227–11, in solicitations and contracts for experimental, developmental, or research work if—

(A) The contractor is other than a small business concern or nonprofit organization; and

(B) No alternative patent rights clause is used in accordance with FAR 27.303(c) or (e).

(ii) Use the clause with its Alternate I if—

(A) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(B) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(C) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be appropriately modified.

(iii) Use the clause with its Alternate II in long-term contracts if necessary to effect treaty or agreements to be entered into.

[72 FR 69159, Dec. 7, 2007]

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]

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.

227.676 Foreign patent interchange agreements.

(a) Patent interchange agreements between the United States and foreign governments provide for the use of patent rights, compensation, free licenses, and the establishment of committees to review and make recommendations on these matters. The agreements also may exempt the United States from royalty and other payments. The contracting officer shall ensure that royalty payments are consistent with patent interchange agreements.

(b) Assistance with patent rights and royalty payments in the United States European Command (USEUCOM) area of responsibility is available from HQ USEUCOM, ATTN: ECLA, Unit 30400, Box 1000, APO AE 09128; Telephone: DSN 430–8001/7263, Commercial 49–0711–680–8001/7263; Telefax: 49–0711–680–5732.

[62 FR 34125, June 24, 1997, as amended at 63 FR 11534, Mar. 9, 1998]

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 declaration 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 Threat Reduction Agency—The General Counsel; and

(7) For the National Imagery and 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; 62 FR 2613, Jan. 17, 1997; 64 FR 51076, Sept. 21, 1999]

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.

(f) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for technical data and the associated license rights in accordance with 207.106(S–70).

[60 FR 33471, June 28, 1995, as amended at 72 FR 51189, Sept. 6, 2007]

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; and

(3) 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; 62 FR 2613, Jan. 17, 1997; 69 FR 31911, June 8, 2004]

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) 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

(2) 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.

[60 FR 33471, June 28, 1995, as amended at 69 FR 31912, June 8, 2004]

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 outlying areas.

(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 outlying areas.

[56 FR 36389, July 31, 1991, as amended at 70 FR 35545, June 21, 2005]

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; and

(5) 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; 62 FR 2614, Jan. 17, 1997; 69 FR 31912, June 8, 2004]

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.

(e) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for computer software and computer software documentation, and the associated license rights, in accordance with 207.106(S–70).

[60 FR 33471, June 28, 1995 as amended at 72 FR 51189, Sept. 6, 2007]

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 15.306(a). 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.

[60 FR 33482, June 28, 1995, as amended at 63 FR 55052, Oct. 14, 1998]

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 outlying areas.

(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 outlying areas.

[56 FR 36389, July 31, 1991, as amended at 70 FR 35545, June 21, 2005]

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

Subpart 228.1—Bonds

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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.

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost-type contracts with fixed-price construction subcontracts over $30,000, require the prime contractor to obtain from each of its construction subcontractors performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over $30,000, but not exceeding $100,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102–1(b)(1).

(2) For fixed-price construction subcontracts over $100,000—

(i) A payment bond sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

[68 FR 36945, June 20, 2003, as amended at 71 FR 75892, Dec. 19, 2006]

228.102–70 Defense Environmental Restoration Program construction contracts.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701–

(a) 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;

(b) 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;

(c) 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; and

(d) 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.

[68 FR 36945, June 20, 2003]

228.105 Other types of bonds.

Fidelity and forgery bonds generally are not required but are authorized for use 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.

[70 FR 8538, Feb. 22, 2005]

228.106 Administration.

228.106–7 Withholding contract payments.

(a) Withholding may be appropriate in other than construction contracts (see FAR 32.112–1(b)).

[57 FR 42707, Sept. 16, 1992, as amended at 70 FR 8538, Feb. 22, 2005]

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.

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 procedures at PGI 228.304 when it provides the necessary coverage more advantageously than commercially available coverage.

[69 FR 65091, Nov. 10, 2004]

228.305 Overseas workers' compensation and war-hazard insurance.

(d) When submitting requests for waiver, follow the procedures at PGI 228.305(d).

[69 FR 65091, Nov. 10, 2004]

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.

(f) Use the clause at 252.228–7006, Compliance with Spanish Laws and Insurance, in solicitations and contracts

for services or construction to be performed in Spain, unless the contractor is a Spanish concern.

[56 FR 36404, July 31, 1991, as amended at 57 FR 42631, Sept. 15, 1992; 62 FR 34125, June 24, 1997; 63 FR 69006, Dec. 15, 1998]

PART 229—TAXES

Subpart 229.1—General

Sec.
229.101 Resolving tax problems.
229.170 Reporting of foreign taxation on U.S. assistance programs.
229.170–1 Definition.
229.170–2 Policy.
229.170–3 Reports.
229.170–4 Contract clause.

Subpart 229.4—Contract Clauses

229.402 Foreign contracts.
229.402–1 Foreign fixed-price contracts.
229.402–70 Additional clauses.

Subpart 229.70—Special Procedures for Overseas Contracts

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

SOURCE: 56 FR 36405, July 31, 1991, unless otherwise noted.

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. For additional information on the designated legal counsels, see PGI 229.101(a).

(b) For information on fuel excise taxes, see PGI 229.101(b).

(c) For guidance on directing a contractor to litigate the applicability of a particular tax, see PGI 229.101(c).

(d) For information on tax relief agreements between the United States and European foreign governments, see PGI 229.101(d).

[70 FR 8538, Feb. 22, 2005, as amended at 71 FR 14100, Mar. 21, 2006]

229.170 Reporting of foreign taxation on U.S. assistance programs.

229.170–1 Definition.

Commodities, as used in this section, means any materials, articles, supplies, goods, or equipment.

[70 FR 57192, Sept. 30, 2005]

229.170–2 Policy.

(a) By law, bilateral agreements with foreign governments must include a provision that commodities acquired under contracts funded by U.S. assistance programs shall be exempt from taxation by the foreign government. If taxes or customs duties nevertheless are imposed, the foreign government must reimburse the amount of such taxes to the U.S. Government (Section 579 of Division E of the Consolidated Appropriations Act, 2003 (Pub. L. 108–7), as amended by Section 506 of Division D of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199), and similar sections in subsequent acts).

(b) This foreign tax exemption—

(1) Applies to a contract or subcontract for commodities when—

(i) The funds are appropriated by the annual foreign operations appropriations act; and

(ii) The value of the contract or subcontract is $500 or more;

(2) Does not apply to the acquisition of services;

(3) Generally is implemented through letters of offer and acceptance, other country-to-country agreements, or Federal interagency agreements; and

(4) Requires reporting of noncompliance for effective implementation.

[70 FR 57192, Sept. 30, 2005]

229.170–3 Reports.

The contracting officer shall submit a report to the designated Security Assistance Office when a foreign government or entity imposes tax or customs duties on commodities acquired under contracts or subcontracts meeting the criteria of 229.170–2(b)(1). Follow the procedures at PGI 229.170–3 for submission of reports.

[70 FR 57192, Sept. 30, 2005]

229.170–4 Contract clause.

Use the clause at 252.229–7011, Reporting of Foreign Taxes—U.S. Assistance Programs, in solicitations and contracts funded with U.S. assistance appropriations provided in the annual foreign operations appropriations act.

[70 FR 57192, Sept. 30, 2005]

Subpart 229.4—Contract Clauses

SOURCE: 62 FR 34125, June 24, 1997, unless otherwise noted.

229.402 Foreign contracts.

229.402–1 Foreign fixed-price contracts.

Use the clause at 252.229–7000, Invoices Exclusive of Taxes or Duties, in solicitations and contracts when a fixed-price contract will be awarded to a foreign concern.

229.402–70 Additional clauses.

(a) Use the clause at 252.229–7001, Tax Relief, in solicitations and contracts when a contract will be awarded to a foreign concern in a foreign country. When contract performance will be in Germany, use the clause with its Alternate I.

(b) Use the clause at 252.229–7002, Customs Exemptions (Germany), in solicitations and contracts requiring the import of U.S. manufactured products into Germany.

(c) Use the clause at 252.229–7003, Tax Exemptions (Italy), in solicitations and contracts when contract performance will be in Italy.

(d) Use the clause at 252.229–7004, Status of Contractor as a Direct Contractor (Spain), in solicitations and contracts requiring the import into Spain of supplies for construction, development, maintenance, or operation of Spanish-American installations and facilities.

(e) Use the clause at 252.229–7005, Tax Exemptions (Spain), in solicitations and contracts when contract performance will be in Spain.

(f) Use the clause at 252.229–7006, Value Added Tax Exclusion (United Kingdom), in solicitations and contracts when contract performance will be in the United Kingdom.

(g) Use the clause at 252.229–7007, Verification of United States Receipt of Goods, in solicitations and contracts when contract performance will be in the United Kingdom.

(h) Use the clause at 252.229–7008, Relief from Import Duty (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom.

(i) Use the clause at 252.229–7009, Relief from Customs Duty and Value Added Tax on Fuel (Passenger Vehicles) (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom for fuels (gasoline or diesel) and lubricants used in passenger vehicles (excluding taxis).

(j) Use the clause at 252.229–7010, Relief from Customs Duty on Fuel (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom that require the use of fuels (gasoline or diesel) and lubricants in taxis or vehicles other than passenger vehicles.

Subpart 229.70—Special Procedures for Overseas Contracts

SOURCE: 70 FR 6375, Feb. 7, 2005, unless otherwise noted.

NOTE: To obtain tax relief for overseas contracts, follow the procedures at PGI 229.70.

PART 230—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 230.2—CAS Program Requirements

Sec.
230.201–5 Waiver.

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

SOURCE: 56 FR 36406, July 31, 1991, unless otherwise noted.

Subpart 230.2—CAS Program Requirements

230.201–5 Waiver.

(a)(1)(A) The military departments and the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics)—

(*1*) May grant CAS waivers that meet the conditions in FAR 30.201–5(b)(1); and

(*2*) May grant CAS waivers that meet the conditions in FAR 30.201–5(b)(2), provided the cognizant Federal agency official granting the waiver determines that—

(*i*) The property or services cannot reasonably be obtained under the contract, subcontract, or modification, as applicable, without granting the waiver;

(*ii*) The price can be determined to be fair and reasonable without the application of the Cost Accounting Standards; and

(*iii*) There are demonstrated benefits to granting the waiver.

(B) Follow the procedures at PGI 230.201–5(a)(1) for submitting waiver requests to the Director, Defense Procurement and Acquisition Policy.

(2) The military departments shall not delegate CAS waiver authority below the individual responsible for issuing contracting policy for the department.

(e) By November 30th of each year, the military departments shall provide a report to the Director, Defense Procurement and Acquisition Policy, ATTN: DPAP/CPF, of all waivers granted under FAR 30.201–5(a), during the previous fiscal year, for any contract, subcontract, or modification expected to have a value of $15,000,000 or more. See PGI 230.201–5(e) for format and guidance for the report. The Director, Defense Procurement and Acquisition Policy, will submit a consolidated report to the CAS Board and the congressional defense committees.

[71 FR 69495, Dec. 1, 2006]

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 231.1—Applicability

Sec.
231.100 Scope of subpart.
231.100–70 Contract clause.

Subpart 231.2—Contracts With Commercial Organizations

231.201–2 Determining allowability.
231.203 Indirect costs.
231.205 Selected costs.
231.205–6 Compensation for personal services.
231.205–18 Independent research and development and bid and proposal costs.
231.205–22 Legislative lobbying costs.
231.205–70 External restructuring costs.

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

231.201–2 Determining allowability.

(a) In addition to the requirements at FAR 31.201–2(a), a cost is allowable only when it complies with the clause at 252.215–7004, Excessive Pass-Through Charges.

[72 FR 20760, Apr. 26, 2007]

231.203 Indirect costs.

(d) Indirect costs related to excessive pass-through charges, as defined in the clause at 252.215–7004, are unallowable.

[73 FR 27472, May 13, 2008]

231.205 Selected costs.

231.205–6 Compensation for personal services.

(f)(1) In accordance with Section 8122 of Pub. L. 104–61, and similar sections

in subsequent Defense appropriations acts, 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 or subsequent appropriations. 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; 61 FR 58490, Nov. 15, 1996; 61 FR 65479, Dec. 13, 1996; 62 FR 63036, Nov. 26, 1997; 63 FR 14641, Mar. 26, 1998]

231.205–18 Independent research and development and bid and proposal costs.

(a) *Definitions.* As used in this subsection—

(i) *Covered contract* means a DoD prime contract for an amount exceeding the simplified acquisition threshold, except for a fixed-price contract without cost incentives. The term also includes a subcontract for an amount exceeding the simplified acquisition threshold, except for a fixed-price subcontract without cost incentives under such a prime contract.

(ii) *Covered segment* means a product division of the contractor that allocated more than $1,100,000 in independent research and development and bid and proposal (IR&D/B&P) costs to covered contracts during the preceding fiscal year. In the case of a contractor that has no product divisions, the term means that contractor as a whole. A product division of the contractor that allocated less than $1,100,000 in IR&D/B&P costs to covered contracts during the preceding fiscal year is not subject to the limitations in paragraph (c) of this subsection.

(iii) *Major contractor* means any contractor whose covered segments allocated a total of more than $11,000,000 in IR&D/B&P costs to covered contracts during the preceding fiscal year. For purposes of calculating the dollar threshold amounts to determine whether a contractor meets the definition of ''major contractor,'' do not include contractor segments allocating less than $1,100,000 of IR&D/B&P costs to covered contracts during the preceding fiscal year.

(c) *Allowability.*

(i) Departments/agencies shall not supplement this regulation in any way that limits IR&D/B&P cost allowability.

(ii) See 225.7303–2(c) for allowability provisions affecting foreign military sale contracts.

(iii) For major contractors, the following limitations apply:

(A) The amount of IR&D/B&P costs allowable under DoD contracts shall not exceed the lesser of—

(*1*) Such contracts' allocable share of total incurred IR&D/B&O costs; or

(*2*) The amount of incurred IR&D/B&P costs for projects having potential interest to DoD.

(B) Allowable IR&D/B&P costs are limited to those for projects that are of potential interest to DoD, including activities intended to accomplish any of the following:

(*1*) Enable superior performance of future U.S. weapon systems and components.

(*2*) Reduce acquisition costs and life-cycle costs of military systems.

(*3*) Strengthen the defense industrial and technology base of the United States.

(*4*) Enhance the industrial competitiveness of the United States.

(*5*) Promote the development of technologies identified as critical under 10 U.S.C. 2522.

(*6*) Increase the development and promotion of efficient and effective applications of dual-use technologies.

(*7*) 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.

(iv) For major contractors, the cognizant administrative contracting officer (ACO) or corporate ACO shall—

(A) Determine whether IR&D/B&P projects are of potential interest to DoD; and

(B) Provide the results of the determination to the contractor.

(v) 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 (also see 242.771–3).

[64 FR 8729, Feb. 23, 1999]

231.205–22 Legislative lobbying costs.

(a) Costs associated with 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 also are unallowable (10 U.S.C. 2249).

[69 FR 63332, Nov. 1, 2004]

231.205–70 External restructuring costs.

(a) *Scope.* This subsection—

(1) Prescribes policies and procedures for allowing contractor external restructuring costs when savings would result for DoD; and

(2) Implements 10 U.S.C. 2325.

(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 determination requirements of paragraph (c)(4) of this subsection; 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.* Restructuring costs associated with external restructuring activities shall not be allowed unless—

(1) Such costs are allowable in accordance with FAR part 31 and DFARS part 231;

(2) An audit of projected restructuring costs and restructuring savings is performed;

(3) The cognizant administrative contracting officer (ACO) reviews the audit report and the projected costs and projected savings, and negotiates an advance agreement in accordance with paragraph (d) of this subsection; and

(4)(i) The official designated in paragraph (c)(4)(ii) of this subsection determines in writing that the audited projected savings, on a present value basis, for DoD resulting from the restructuring will exceed either—

(A) The costs allowed by a factor of at least two to one; or

(B) The costs allowed, and the business combination will result in the preservation of a critical capability that might otherwise be lost to DoD.

(ii)(A) If the amount of restructuring costs is expected to exceed $25 million over a 5-year period, the designated official is the Under Secretary of Defense (Acquisition, Technology, and Logistics) or the Principal Deputy. This authority may not be delegated below the level of an Assistant Secretary of Defense.

(B) For all other cases, the designated official is the Director of the Defense Contract Management Agency. The Director may not delegate this authority.

(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 follow the procedures at PGI 231.205–70(d).

(e) *Information needed to obtain a determination.* (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 a determination. This recommendation must clearly indicate one of the following, consistent with paragraph (c)(4)(i) of this subsection:

(i) The audited projected savings for DoD will exceed the costs allowed by a factor of at least two to one on a present value basis.

(ii) The business combination will result in the preservation of a critical capability that might otherwise be lost to DoD, and the audited projected savings for DoD will exceed the costs allowed on a present value basis.

(f) *Contracting officer responsibilities.* (1) The contracting officer, in consultation with the cognizant ACO, should consider including a repricing clause in noncompetitive fixed-price contracts that are negotiated during the period between—

(i) The time a business combination is announced; and

(ii) The time the contractor's forward pricing rates are adjusted to reflect the impact of restructuring.

(2) The decision to use a repricing clause will depend upon the particular circumstances involved, including—

(i) When the restructuring will take place;

(ii) When restructuring savings will begin to be realized;

(iii) The contract performance period;

(iv) Whether the contracting parties are able to make a reasonable estimate of the impact of restructuring on the contract; and

(v) The size of the potential dollar impact of restructuring on the contract.

(3) If the contracting officer decides to use a repricing clause, the clause must provide for a downward-only price adjustment to ensure that DoD receives its appropriate share of restructuring net savings.

[63 FR 7309, Feb. 13, 1998; 63 FR 12862, Mar. 16, 1998, as amended at 64 FR 18828, Apr. 16, 1999; 65 FR 39705, June 27, 2000; 68 FR 7440, Feb. 14, 2003; 69 FR 63332, Nov. 1, 2004; 70 FR 43075, July 26, 2005]

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) Under 10 U.S.C. 2249, the costs cited in 231.205–22(a) are unallowable.

[59 FR 26144, May 19, 1994, as amended at 60 FR 2331, Jan. 9, 1995; 61 FR 36306, July 10, 1996; 62 FR 47155, Sept. 8, 1997; 63 FR 14641, Mar. 26, 1998]

Subpart 231.6—Contracts With State, Local, and Federally Recognized Indian Tribal Governments

231.603 Requirements.

Under 10 U.S.C. 2249, the costs cited in 231.205–22(a) are unallowable.

[61 FR 36306, July 10, 1996, as amended at 62 FR 47155, Sept. 8, 1997; 63 FR 14641, Mar. 26, 1998]

Subpart 231.7—Contracts With Nonprofit Organizations

231.703 Requirements.

Under 10 U.S.C. 2249, the costs cited in 231.205–22(a) are unallowable.

[61 FR 36306, July 10, 1996, as amended at 62 FR 47155, Sept. 8, 1997; 63 FR 14641, Mar. 26, 1998]

PART 232—CONTRACT FINANCING

Sec.
232.001 Definitions.
232.006 Reduction or suspension of contract payments upon finding of fraud.
232.006–5 Reporting.
232.007 Contract financing payments.
232.070 Responsibilities.
232.071 [Reserved]
232.072 Financial responsibility of contractors.
232.072–1 Required financial reviews.
232.072–2 Appropriate information.
232.072–3 Cash flow forecasts.

Subpart 232.1—Non-Commercial Item Purchase Financing

232.102 Description of contract financing methods.
232.102–70 Provisional delivery payments.

Subpart 232.2—Commercial Item Purchase Financing

232.202–4 Security for Government financing.
232.206 Solicitation provisions and contract clauses.

Subpart 232.3—Loan Guarantees for Defense Production

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Subpart 232.4—Advance Payments for Non-Commercial Items

232.404 Exclusions.
232.409 Contracting officer action.
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232.501–1 Customary progress payment rates.
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Subpart 232.7—Contract Funding

232.702 Policy.
232.703 Contract funding requirements.
232.703–1 General.
232.703–3 Contracts crossing fiscal years.
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232.704–70 Incrementally funded fixed-price contracts.
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Subpart 232.8—Assignment of Claims

232.803 Policies.
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Subpart 232.9—Prompt Payment

232.903 Responsibilities.
232.904 Determining payment due dates.
232.906 Making payments.

Subpart 232.10—Performance-Based Payments

232.1001 Policy.
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232.1110 Solicitation provision and contract clauses.

Subpart 232.70—Electronic Submission and Processing of Payment Requests and Receiving Reports

232.7000 Scope of subpart.
232.7001 Definitions.
232.7002 Policy.
232.7003 Procedures.
232.7004 Contract clause.

Subpart 232.71—Levies on Contract Payments

232.7100 Scope of subpart.
232.7101 Policy and procedures.
232.7102 Contract clause.

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

SOURCE: 56 FR 36409, July 31, 1991, unless otherwise noted.

232.001 Definitions.

Incremental funding means the partial funding of a contract or an exercised option, with additional funds anticipated to be provided at a later time.

[71 FR 18673, Apr. 12, 2006]

232.006 Reduction or suspension of contract payments upon finding of fraud.

232.006–5 Reporting.

Departments and agencies in accordance with department/agency procedures, shall prepare and submit to the Under Secretary of Defense (Acquisition, Technology, and Logistics), through the Director of Defense Procurement and Acquisition Policy, annual reports (Report Control Symbol DD-AT&L(A) 1891) containing the information required by FAR 32.006–5.

[63 FR 11535, Mar. 9, 1998, as amended at 65 FR 39705, June 27, 2000; 68 FR 7440, Feb. 14, 2003]

232.007 Contract financing payments.

(a) 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 performance-based payments and interim payments on cost-type contracts, in the appropriate paragraphs of the respective payment clauses. For interim payments on cost-reimbursement contracts for services, see 232.906(a)(i).

(b) The contracting officer should coordinate contract financing payment terms with offices that will be involved in the payment process to ensure that specified terms 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—

(i) Geographical separation;

(ii) Workload;

(iii) Contractor ability to submit a proper request; and

(iv) Other factors that could affect timing of payment.

[70 FR 75412, Dec. 20, 2005]

232.070 Responsibilities.

(a) The Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)DPAP) is responsible for ensuring uniform administration of DoD contract financing, including DoD

contract financing policies and important related procedures. Agency discretion under FAR part 32 is at the DoD level and is not delegated to the departments and agencies. Proposals by the departments and agencies, to exercise agency discretion, shall be submitted to OUSD(AT&L)DPAP.

(b) Departments and agencies are responsible for their day-to-day contract financing operations. Refer specific cases involving financing policy or important procedural issues to OUSD(AT&L)DPAP for consideration through the department/agency Contract Finance Committee members (also see Subpart 201.4 for deviation request and approval procedures).

(c) See PGI 232.070(c) for information on department/agency contract financing offices.

[63 FR 11535, Mar. 9, 1998, as amended at 65 FR 39705, June 27, 2000; 68 FR 7440, Feb. 14, 2003; 70 FR 75412, Dec. 20, 2005; 72 FR 20765, Apr. 26, 2007]

232.071 [Reserved]

232.072 Financial responsibility of contractors.

Use the policies and procedures in this section in determining the financial capability of current or prospective contractors.

[63 FR 11535, Mar. 9, 1998]

232.072–1 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 in paragraphs (a)(2) through (a)(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.

[63 FR 11535, Mar. 9, 1998]

232.072–2 Appropriate information.

(a) The contracting officer shall obtain the type and depth of financial and other information that 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 protection for the Government's interests, the contracting officer must insist upon obtaining the information that 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 to 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) The contracting officer shall 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 in paragraphs (b)(1) through (b)(10) of this subsection is required to comply with 232.072–1, 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, the contracting officer shall 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 2 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 that—

(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 232.072–3).

(7) Financing arrangement information that 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;

(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, or 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.

[63 FR 11535, Mar. 9, 1998]

232.072–3 Cash flow forecasts.

(a) A contractor must be able to sustain a sufficient cash flow to perform the contract. When there is doubt regarding 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 of 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 of 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 amount and timing of cash receipt 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.

[63 FR 11536, Mar. 9, 1998]

Subpart 232.1—Non-Commercial Item Purchase Financing

SOURCE: 63 FR 11536, Mar. 9, 1998, unless otherwise noted.

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. However, percentage or state of completion methods of measuring contractor performance may be used for performance-based payments in accordance with FAR Subpart 32.10.

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.

(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.

Subpart 232.2—Commercial Item Purchase Financing

SOURCE: 63 FR 11537, Mar. 9, 1998, unless otherwise noted.

232.202–4 Security for Government financing.

(a)(2) When determining whether an offeror's financial condition is adequate security, see 232.072–2 and 232.072–3 for guidance. It should be noted that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but may not be adequate security for commercial contract financing.

232.206 Solicitation provisions and contract clauses.

(f) *Prompt payment for commercial purchase payments.* The contracting officer shall incorporate the following standard prompt payment terms for commercial item contract financing:

(i) *Commercial advance payments:* The contractor entitlement date specified in the contract, or 30 days after receipt by the designated billing office of a proper request for payment, whichever is later.

(ii) *Commercial interim payments:* The contractor entitlement date specified in the contract, or 14 days after receipt by the designated billing office of a proper request for payment, whichever is later. The prompt payment standards for commercial delivery payments shall be the same as specified in FAR Subpart 32.9 for invoice payments for the item delivered.

(g) *Installment payment financing for commercial items.* Installment payment financing shall not be used for DoD contracts, unless market research has established that this form of contract financing is both appropriate and customary in the commercial marketplace. When installment payment financing is used, the contracting officer shall use the ceiling percentage of contract price that is customary in the particular marketplace (not to exceed the maximum rate established in FAR 52.232–30).

[63 FR 11537, Mar. 9, 1998, as amended at 70 FR 75413, Dec. 20, 2005]

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 for Non-Commercial Items

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 $3,000.

[56 FR 36409, July 31, 1991, as amended at 70 FR 75413, Dec. 20, 2005; 71 FR 75892, Dec. 19, 2006]

232.409 Contracting officer action.

232.409–1 Recommendation for approval.

Follow the procedures at PGI 232.409–1 for preparation of the documents required by FAR 32.409–1(e) and (f).

[70 FR 75413, Dec. 20, 2005]

232.410 Findings, determination, and authorization.

If an advance payment procedure is used without a special bank account, follow the procedures at PGI 232.410.

[70 FR 75413, Dec. 20, 2005]

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.

232.501–1 Customary progress payment rates.

(a) The customary progress payment rates for DoD contracts, including contracts that contain foreign military sales (FMS) requirements, are 80 percent for large business concerns, 90 percent for small business concerns, and 95 percent for small disadvantaged business concerns.

[66 FR 49865, Oct. 1, 2001]

232.501–2 Unusual progress payments.

Follow the procedures at PGI 232.501–2 for approval of unusual progress payments.

[70 FR 75413, Dec. 20, 2005]

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 limits the Government's liability 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.

[56 FR 36409, July 31, 1991, as amended at 65 FR 39722, June 27, 2000; 70 FR 75413, Dec. 20, 2005]

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 $55,000 or more.

[56 FR 36409, July 31, 1991, as amended at 71 FR 75893, Dec. 19, 2006]

232.502–4–70 Additional clauses.

(a) Use the clause at 252.232–7002, Progress Payments for Foreign Military Sales Acquisitions, in solicitations and contracts that—

(i) Contain FMS requirements; and

(ii) Provide for progress payments.

(b) Use the clause at 252.232–7004, DoD Progress Payment Rates, instead of Alternate I of the clause at FAR 52.232–16, if the contractor is a small business or small disadvantaged business concern.

[56 FR 36409, July 31, 1991, as amended at 56 FR 67217, Dec. 30, 1991; 64 FR 8731, Feb. 23, 1999; 65 FR 39722, June 27, 2000; 66 FR 49865, Oct. 1, 2001]

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 must 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; 65 FR 39722, June 27, 2000]

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(e)(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; 70 FR 75413, Dec. 20, 2005]

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. 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.

[56 FR 36409, July 31, 1991, as amended at 70 FR 75413, Dec. 20, 2005]

232.606 Debt determination and collection.

When transferring a case to the contract financing office, follow the procedures at PGI 232.606.

[70 FR 75413, Dec. 20, 2005]

232.610 Demand for payment of contract debt.

When issuing a demand for payment of a contract debt, follow the procedures at PGI 232.610.

[70 FR 75413, Dec. 20, 2005]

232.616 Compromise actions.

Only the department/agency contract financing offices (see 232.070(c)) are authorized to compromise debts covered by this subpart.

[56 FR 36409, July 31, 1991, as amended at 70 FR 75413, Dec. 20, 2005]

232.617 Contract clause.

(a) The Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), 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.

(7) Other exceptions are—

(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.

[70 FR 75413, Dec. 20, 2005]

232.670 Transfer of responsibility for debt collection.

Follow the procedures at PGI 232.670 for transferring responsibility for debt collection.

[70 FR 75413, Dec. 20, 2005]

232.671 Bankruptcy reporting.

Follow the procedures at PGI 232.671 for bankruptcy reporting.

[70 FR 75413, Dec. 20, 2005]

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 (excluding any options) or any exercised option—

(A) Is for severable services;

(B) Does not exceed one year in length; and

(C) Is incrementally funded using funds available (unexpired) as of the date the funds are obligated; or

(ii) The contract uses funds available from multiple (two or more) fiscal years and—

(A) The contract is funded with research and development appropriations; or

(B) Congress has otherwise authorized incremental funding.

(2) An incrementally funded fixed-price contract shall be fully funded as soon as funds are available.

[71 FR 18673, Apr. 12, 2006]

232.703–3 Contracts crossing fiscal years.

(b) The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed 1 year (10 U.S.C. 2410a).

[64 FR 28110, May 25, 1999]

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 (Acquisition, Technology, and Logistics) 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; 65 FR 39706, June 27, 2000]

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)(1) Use the clause at 252.232–7008, Assignment of Claims (Overseas), instead of the clause at FAR 52.232–23, Assignment of Claims, in solicitations and contracts when contract performance will be in a foreign country.

(2) Use Alternate I with the clause at FAR 52.232–23, Assignment of Claims, unless otherwise authorized under 232.803(d).

[62 FR 34126, June 24, 1997]

Subpart 232.9—Prompt Payment

232.903 Responsibilities.

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 232.906(a)).

[70 FR 75413, Dec. 20, 2005]

232.904 Determining payment due dates.

(d) 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.

[70 FR 75413, Dec. 20, 2005]

232.906 Making payments.

(a)(i) Generally, the contracting officer shall insert the standard due date of 14 days for interim payments on cost-reimbursement contracts for services in the clause at FAR 52.232–25, Prompt Payment, when using the clause with its Alternate I.

(ii) The restrictions of FAR 32.906 prohibiting early payment do not apply to invoice payments made to small disadvantaged business concerns. However, contractors shall not be entitled to interest penalties if the Government fails to make early payment.

[70 FR 75413, Dec. 20, 2005]

Subpart 232.10—Performance-Based Payments

SOURCE: 63 FR 11537, Mar. 9, 1998, unless otherwise noted.

232.1001 Policy.

(d) The contracting officer shall use the following standard prompt payment terms for performance-based payments: The contractor entitlement date, if any, specified in the contract, or 14 days after receipt by the designated billing office of a proper request for payment, whichever is later.

232.1004 Procedure.

(c) *Instructions for multiple appropriations.* If the contract contains foreign military sales requirements, the contracting officer shall provide instructions for distribution of the contract financing payments to each country's account.

Subpart 232.11—Electronic Funds Transfer

SOURCE: 65 FR 46626, July 31, 2000, unless otherwise noted.

232.1110 Solicitation provision and contract clauses.

Use the clause at 252.232–7009, Mandatory Payment by Governmentwide Commercial Purchase Card, in solicitations, contracts, and agreements when—

(1) Placement of orders or calls valued at or below the micropurchase threshold is anticipated; and

(2) Payment by Governmentwide commercial purchase card is required for orders or calls valued at or below the micropurchase threshold under the contract or agreement.

Subpart 232.70—Electronic Submission and Processing of Payment Requests and Receiving Reports

SOURCE: 68 FR 8455, Feb. 21, 2003, unless otherwise noted.

232.7000 Scope of subpart.

This subpart prescribes policies and procedures for submitting and processing payment requests in electronic form to comply with 10 U.S.C. 2227.

232.7001 Definitions.

Electronic form and *payment request*, as used in this subpart, are defined in the clause at 252.232–7003, Electronic Submission of Payment Requests.

232.7002 Policy.

(a) Contractors shall submit payment requests and receiving reports in electronic form, except for—

(1) Purchases paid for with a Governmentwide commercial purchase card;

(2) Awards made to foreign vendors for work performed outside the United States;

(3) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified information or national security;

(4) Contracts awarded by deployed contracting officers in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(8), or contracts awarded by contracting officers in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies;

(5) Purchases to support unusual or compelling needs of the type described in FAR 6.302–2;

(6) Cases in which DoD is unable to receive payment requests or provide acceptance in electronic form; or

(7) Cases in which the contracting officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the contractor.

(b) DoD officials receiving payment requests in electronic form shall process the payment requests in electronic form. Any supporting documentation necessary for payment, such as receiving reports, contracts, contract modifications, and required certifications, also shall be processed in electronic form. Scanned documents are acceptable for processing supporting documentation other than receiving reports and other forms of acceptance.

(c) When payment requests and receiving reports will not be submitted in electronic form—

(1) Payment requests and receiving reports shall be submitted by facsimile or conventional mail. The contracting officer shall consult with the payment office and the contract administration office regarding the method of payment request to be used; and

(2) Section G of the contract shall specify the method of payment request.

[72 FR 14241, Mar. 27, 2007, as amended at 73 FR 11358, Mar. 3, 2008]

232.7003 Procedures.

(a) The accepted electronic form for submission of payment requests and receiving reports is Wide Area WorkFlow (see Web site—*https://wawf.eb.mil/*).

(b) If the payment office and the contract administration office concur, the contracting officer may authorize a contractor to submit a payment request and receiving report using an electronic form other than Wide Area WorkFlow. However, with this authorization, the contractor and the contracting officer shall agree to a plan, which shall include a timeline, specifying when the contractor will transfer to Wide Area WorkFlow.

(c) For payment of commercial transportation services provided under a Government rate tender or a contract for transportation services, the use of a DoD-approved electronic third party payment system or other exempted vendor payment/invoicing system (e.g., PowerTrack, Transportation Financial Management System, and Cargo and Billing System) is permitted.

[73 FR 11358, Mar. 3, 2008]

232.7004 Contract clause.

Except as provided in 232.7002(a), use the clause at 252.232–7003, Electronic Submission of Payment Requests and Receiving Reports, in solicitations and contracts.

[73 FR 11358, Mar. 3, 2008]

Subpart 232.71—Levies on Contract Payments

SOURCE: 70 FR 52032, Sept. 1, 2005, unless otherwise noted.

232.7100 Scope of subpart.

This subpart prescribes policies and procedures concerning the effect of levies pursuant to 26 U.S.C. 6331(h) on contract payments. The Internal Revenue Service (IRS) is authorized to levy up to 100 percent of all payments made under a DoD contract, up to the amount of the tax debt.

232.7101 Policy and procedures.

(a) The contracting officer shall require the contractor to—

(1) Promptly notify the contracting officer when a levy may result in an inability to perform the contract; and

(2) Advise the contracting officer whether the inability to perform may adversely affect national security.

(b) The contracting officer shall promptly notify the Director, Defense Procurement and Acquisition Policy (DPAP), when the contractor's inability to perform will adversely affect national security or will result in significant additional costs to the Government. Follow the procedures at PGI 232.7101(b) for reviewing the contractor's rationale and submitting the required notification.

(c) The Director, DPAP, will promptly evaluate the contractor's rationale and will notify the IRS, the contracting officer, and the payment office, as appropriate, in accordance with the procedures at PGI 232.7101(c).

(d) The contracting officer shall then notify the contractor in accordance with paragraph (c) of the clause at 252.232–7010 and in accordance with the procedures at PGI 232.7101(d).

[71 FR 69492, Dec. 1, 2006]

232.7102 Contract clause.

Use the clause at 252.232–7010, Levies on Contract Payments, in all solicitations and contracts other than those for micro-purchases.

[71 FR 69492, Dec. 1, 2006]

PART 233—PROTESTS, DISPUTES, AND APPEALS

Subpart 233.2—Disputes and Appeals

Sec.
233.204–70 Limitations on payment.
233.210 Contracting officer's authority.
233.215 Contract clause.
233.215–70 Additional 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

233.204–70 Limitations on payment.

See 10 U.S.C. 2410(b) for limitations on Congressionally directed payment of a claim under the Contract Disputes Act of 1978, a request for equitable adjustment to contract terms, or a request for relied under Pub. L. 85–804.

[63 FR 11537, Mar. 9, 1998]

233.210 Contracting officer's authority.

See PGI 233.210 for guidance on reviewing a contractor's claim.

[72 FR 6485, Feb. 12, 2007]

233.215 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.

[56 FR 36416, July 31, 1991. Redesignated at 62 FR 34126, June 24, 1997]

233.215–70 Additional contract clause.

Use the clause at 252.233–7001, Choice of Law (Overseas), in solicitations and contracts when contract performance will be outside the United States and its outlying areas, unless otherwise provided for in a government-to-government agreement.

[70 FR 35545, June 21, 2005]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 234—MAJOR SYSTEM ACQUISITION

Sec.
234.003 Responsibilities.
234.004 Acquisition strategy.

Subpart 234.2—Earned Value Management System

234.201 Policy.
234.203 Solicitation provisions and contract clause.

Subpart 234.70—Acquisition of Major Weapon Systems as Commercial Items

234.7000 Scope of subpart.
234.7001 Definition.
234.7002 Policy.

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

234.003 Responsibilities.

DoDD 5000.1, The Defense Acquisition System, and DoDI 5000.2, Operation of the Defense Acquisition System, contain the DoD implementation of OMB Circular A–109 and OMB Circular A–11.

[70 FR 14575, Mar. 23, 2005]

234.004 Acquisition strategy.

(1) See 209.570 for policy applicable to acquisition strategies that consider the use of lead system integrators.

(2) In accordance with Section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), for major defense acquisition programs as defined in 10 U.S.C. 2430—

(i) The Milestone Decision Authority shall select, with the advice of the contracting officer, the contract type for a development program at the time of Milestone B approval or, in the case of a space program, Key Decision Point B approval;

(ii) The basis for the contract type selection shall be documented in the acquisition strategy. The documentation—

(A) Shall include an explanation of the level of program risk; and

(B) If program risk is determined to be high, shall outline the steps taken to reduce program risk and the reasons for proceeding with Milestone B approval despite the high level of program risk; and

(iii) If a cost-type contract is selected, the contract file shall include the Milestone Decision Authority's written determination that—

(A) The program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and

(B) The complexity and technical challenge of the program is not the result of a failure to meet the requirements of 10 U.S.C. 2366a.

[73 FR 4118, Jan. 24, 2008]

Subpart 234.2—Earned Value Management System

SOURCE: 73 FR 21848, Apr. 23, 2008, unless otherwise noted.

§ 234.201 Policy.

(1) DoD applies the earned value management system requirement as follows:

(i) For cost or incentive contracts and subcontracts valued at $20,000,000 or more, the earned value management system shall comply with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA–748).

(ii) For cost or incentive contracts and subcontracts valued at $50,000,000 or more, the contractor shall have an earned value management system that has been determined by the cognizant Federal agency to be in compliance with the guidelines in ANSI/EIA–748.

(iii) For cost or incentive contracts and subcontracts valued at less than $20,000,000—

(A) The application of earned value management is optional and is a risk-based decision;

(B) A decision to apply earned value management shall be documented in the contract file; and

(C) Follow the procedures at PGI 234.201(1)(iii) for conducting a cost-benefit analysis.

(iv) For firm-fixed-price contracts and subcontracts of any dollar value—

(A) The application of earned value management is discouraged; and

(B) Follow the procedures at PGI 234.201(1)(iv) for obtaining a waiver before applying earned value management.

(2) When an offeror proposes a plan for compliance with the earned value management system guidelines in ANSI/EIA–748, follow the review procedures at PGI 234.201(2).

(3) The Defense Contract Management Agency is responsible for determining earned value management system compliance when DoD is the cognizant Federal agency.

(4) See PGI 234.201(4) for additional guidance on earned value management.

234.203 Solicitation provisions and contract clause.

For cost or incentive contracts valued at $20,000,000 or more, and for other contracts for which EVMS will be applied in accordance with 234.201(1)(iii) and (iv)—

(1) Use the provision at 252.234–7001, Notice of Earned Value Management System, instead of the provisions at FAR 52.234–2, Notice of Earned Value Management System—Pre-Award IBR, and FAR 52.234–3, Notice of Earned Value Management System—Post-Award IBR, in the solicitation; and

(2) Use the clause at 252.234–7002, Earned Value Management System, instead of the clause at FAR 52.234–4, Earned Value Management System, in the solicitation and contract.

Subpart 234.70—Acquisition of Major Weapon Systems as Commercial Items

SOURCE: 71 FR 58538, Oct. 4, 2006, unless otherwise noted.

§ 234.7000 Scope of subpart.

This subpart—

(a) Implements 10 U.S.C. 2379; and

(b) Requires a determination by the Secretary of Defense and a notification to Congress before acquiring a major weapon system as a commercial item.

§ 234.7001 Definition.

Major weapon system, as used in this subpart, means a weapon system acquired pursuant to a major defense acquisition program, as defined in 10 U.S.C. 2430 to be a program that—

(1) Is not a highly sensitive classified program, as determined by the Secretary of Defense; and

(2)(i) Is designated by the Secretary of Defense as a major defense acquisition program; or

(ii) Is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than $300,000,000 (based on fiscal year 1990 constant dollars) or an eventual total expenditures for procurement of more than $1,800,000,000 (based on fiscal year 1990 constant dollars).

§ 234.7002 Policy.

(a) A DoD major weapon system may be treated as a commercial item, or acquired under procedures established for the acquisition of commercial items, only if—

(1) The Secretary of Defense determines that—

(i) The major weapon system is a commercial item as defined in FAR 2.101; and

(ii) Such treatment is necessary to meet national security objectives; and

(2) The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs. Follow the procedures at PGI 234.7002.

(b) A subsystem or component of a major weapon system that meets the definition of a commercial item—

(1) Shall be acquired under the procedures established for the acquisition of commercial items (see FAR Part 12); and

(2) Is not subject to the requirements of paragraph (a) of this section.

(c) The authority of the Secretary of Defense to make a determination under paragraph (a)(1) of this section may not be delegated below the level of Deputy Secretary of Defense.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
235.001 Definitions.
235.006 Contracting methods and contract type.
235.006–70 Manufacturing Technology Program.
235.008 Evaluation for award.
235.010 Scientific and technical reports.
235.015–70 Special use allowances for research facilities acquired by educational institutions.
235.016 Broad agency announcement.
235.017 Federally Funded Research and Development Centers.
235.017–1 Sponsoring agreements.
235.070 Indemnification against unusually hazardous risks.
235.070–1 Indemnification under research and development contracts.
235.070–2 Indemnification under contracts involving both research and development and other work.
235.070–3 Contract clauses.
235.071 Export–controlled items.
235.072 Additional contract clauses.

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

SOURCE: 56 FR 36416, July 31, 1991, unless otherwise noted.

235.001 Definitions.

''Research and development'' means those efforts described by the Research, Development, Test, and Evaluation (RDT&E) budget activity definitions found in the DoD Financial Management Regulation (DoD 7000.14–R), Volume 2B, Chapter 5.

[65 FR 32040, May 22, 2000]

235.006 Contracting methods and contract type.

(b)(i) For major defense acquisition programs as defined in 10 U.S.C. 2430—

(A) Follow the procedures at 234.004; and

(B) Notify the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) 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.

(ii) For other than major defense acquisition programs—

(A) Do not award a fixed-price type contract for a development program effort unless—

(*1*) The level of program risk permits realistic pricing;

(*2*) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(*3*) A written determination that the criteria of paragraphs (b)(ii)(A)(*1*) and (*2*) of this section have been met is executed—

(*i*) By the USD(AT&L) if the contract is over $25 million and is for: research and development for a non-major system; the development of a major system (as defined in FAR 2.101); or the development of a subsystem of a major system; or

(*ii*) By the contracting officer for any development not covered by paragraph (b)(ii)(A)(*3*)(*i*) of this section.

(B) Obtain USD(AT&L) approval of the Government's prenegotiation position before negotiations begin, and obtain USD(AT&L) approval of the negotiated agreement with the contractor before the agreement is executed, for any action that is—

(*1*) 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;

(*2*) 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

(*3*)) A repricing of fixed-price type production options to a development contract, or a contract for the lead ship of a class, that increases the price or ceiling price by more than $250 million for equivalent quantities.

[73 FR 4118, Jan. 24, 2008]

235.006–70 Manufacturing Technology Program.

In accordance with 10 U.S.C. 2521(d), for acquisitions under the Manufacturing Technology Program—

(a) Award all contracts using competitive procedures; and

(b) Include in all solicitations an evaluation factor that addresses the extent to which offerors propose to

share in the cost of the project (see FAR 15.304).

[65 FR 2058, Jan. 13, 2000, as amended at 69 FR 65092, Nov. 10, 2004]

235.008 Evaluation for award.

See 209.570 for limitations on the award of contracts to contractors acting as lead system integrators.

[73 FR 1825, Jan. 10, 2008]

235.010 Scientific and technical reports.

(b) For DoD, the Defense Technical Information Center is responsible for collecting all scientific and technical reports. For access to these reports, follow the procedures at PGI 235.010(b).

[69 FR 65092, Nov. 10, 2004]

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]

235.016 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)).

[56 FR 36416, July 31, 1991, as amended at 69 FR 63328, Nov. 1, 2004]

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 operated by Carnegie Mellon) 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, as amended at 69 FR 65092, Nov. 10, 2004]

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, 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.

[56 FR 36416, July 31, 1991, as amended at 64 FR 51076, Sept. 21, 1999]

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 Export-controlled items.

For requirements regarding access to export–controlled items, see Subpart 204.73.

[73 FR 42278, July 21, 2008]

235.072 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 or its outlying areas 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; 70 FR 35545, June 21, 2005. Redesignated at 73 FR 42278, July 21, 2008]

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 236.1—General

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236.102 Definitions.

Subpart 236.2—Special Aspects of Contracting for Construction

236.201 Evaluation of contractor performance.
236.203 Government estimate of construction costs.
236.204 Disclosure of the magnitude of construction projects.
236.206 Liquidated damages.
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236.270 Expediting construction contracts.
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Subpart 236.5—Contract Clauses

236.570 Additional provisions and clauses.

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236.601 Policy.
236.602 Selection of firms for architect-engineer contracts.
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236.604 Performance evaluation.
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236.609–70 Additional provision and clause.

Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

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

SOURCE: 56 FR 36421, July 31, 1991, unless otherwise noted.

Subpart 236.1—General

236.102 Definitions.

(1) A-E means architect-engineer.

(2) *Construction activity* means an activity at any organizational level of the DoD that—

(i) Is responsible for the architectural, engineering, and other related technical aspects of the planning, design, and construction of facilities; and

(ii) Receives its technical guidance from the Army Office of the Chief of Engineers, Naval Facilities Engineering Command, or Air Force Directorate of Civil Engineering.

(3) *Marshallese firm* is defined in the provision at 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference.

(4) *United States firm* is defined in the provisions at 252.236–7010, Overseas Military Construction-Preference for United States Firms, and 252.236–7011, Overseas Architect-Engineer Services-Restriction to United States firms.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2857, Jan. 17, 1997; 63 FR 11538, Mar. 9, 1998; 71 FR 9272, Feb. 23, 2006]

Subpart 236.2—Special Aspects of Contracting for Construction

236.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.* Use DD Form 2626, Performance Evaluation (Construction), instead of SF 1420.

(c) Follow the procedures at PGI 236.201(c) for distribution and use of performance reports.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996; 66 FR 49861, Oct. 1, 2001; 71 FR 9272, Feb. 23, 2006]

236.203 Government estimate of construction costs.

Follow the procedures at PGI 236.203 for handling the Government estimate of construction costs.

[71 FR 9273, Feb. 23, 2006]

236.204 Disclosure of the magnitude of construction projects.

Additional price ranges are—

(i) Between $10,000,000 and $25,000,000;

(ii) Between $25,000,000 and $100,000,000;

(iii) Between $100,000,000 and $250,000,000;

(iv) Between $250,000,000 and $500,000,000; and

(v) Over $500,000,000.

[61 FR 7749, Feb. 29, 1996]

236.206 Liquidated damages.

See 211.503 for instructions on use of liquidated damages.

[56 FR 36421, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

236.213 Special procedures for sealed bidding in construction contracting.

If it appears that sufficient funds may not be available for all the desired construction features, consider using a bid schedule with additive or deductive items in accordance with PGI 236.213.

[71 FR 9273, Feb. 23, 2006]

236.270 Expediting construction contracts.

(a) 10 U.S.C. 2858 requires agency head approval to expedite the completion date of a contract funded by a Military Construction Appropriations Act, if additional costs are involved. This approval authority may not be redelegated. The approval authority must—

(1) Certify that the additional expenditures are necessary to protect the National interest; and

(2) Establish a reasonable completion date for the project.

(b) The contracting officer may approve an expedited completion date if no additional costs are involved.

236.271 Cost-plus-fixed-fee contracts.

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see 216.306(c)).

[61 FR 7749, Feb. 29, 1996]

236.272 Prequalification of sources.

(a) Prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific construction contract; and

(2) Limits offerors to those with proven competence to perform in the required manner.

(b) The head of the contracting activity must—

(1) Authorize the use of prequalification by determining, in writing, that a construction project is of an urgency or complexity that requires prequalification; and

(2) Approve the prequalification procedures.

(c) For small businesses, the prequalification procedures must require the qualifying authority to—

(1) Request a preliminary recommendation from the appropriate Small Business Administration regional office, if the qualifying authority believes a small business is not responsible;

(2) Permit the small business to submit a bid or proposal if the preliminary recommendation is that the small business is responsible; and

(3) Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

236.273 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 105–45 and similar sections in subsequent military construction appropriations acts, military construction contracts funded with military construction appropriations, that are estimated to exceed $1,000,000 and are to be performed in the United States outlying area in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

(b) See PGI 236.273(b) for guidance on technical working agreements with foreign governments.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998; 66 FR 49861, Oct. 1, 2001; 70 FR 35545, June 21, 2005. Redesignated and amended at 71 FR 9273, Feb. 23, 2006]

Subpart 236.5—Contract Clauses

236.570 Additional provisions and clauses.

(a) Use the following clauses in all fixed-price construction solicitations and contracts—

(1) 252.236–7000, Modification Proposals-Price Breakdown; and

(2) 252.236–7001, Contract Drawings and Specifications.

(b) Use the following provisions and clauses in fixed-price construction contracts and solicitations as applicable—

(1) 252.236–7002, Obstruction of Navigable Waterways, when the contract will involve work near or on navigable waterways.

(2) When the head of the contracting activity has approved use of a separate bid item for mobilization and preparatory work, use either—

(i) 252.236–7003, Payment for Mobilization and Preparatory Work. Use this clause for major construction contracts that require—

(A) Major or special items of plant and equipment; or

(B) Large stockpiles of material which are in excess of the type, kind, and quantity which would be normal for a contractor qualified to undertake the work; or

(ii) 252.236–7004, Payment for Mobilization and Demobilization. Use this clause for contracts involving major mobilization expense, or plant equipment and material (other than the situations covered in paragraph (b)(2)(i) of this section) made necessary by the location or nature of the work.

(A) Generally, allocate 60 percent of the lump sum price in paragraph (a) of the clause to the cost of mobilization.

(B) Vary this percentage to reflect the circumstances of the particular contract, but in no event should mobilization exceed 80 percent of the payment item.

(3) 252.236–7005, Airfield Safety Precautions, when construction will be performed on or near airfields.

(4) 252.236–7006, Cost Limitation, if the solicitation's bid schedule contains one or more items subject to statutory cost limitations, and if a waiver has not been granted (FAR 36.205).

(5) 252.236–7007, Additive or Deductive Items, if the procedures in 236.213 are being used.

(6) 252.236–7008, Contract Prices—Bidding Schedule, if the contract will contain only unit prices for some items.

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed $1,000,000:

(1) 252.236–7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States outlying area in the Pacific or in a country bordering the Arabian Gulf.

(2) 252.236–7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll.

(d) Also see 246.710(4) for an additional clause applicable to construction contracts to be performed in Germany.

[56 FR 36421, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992; 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998; 65 FR 63804, Oct. 25, 2000; 68 FR 7440, Feb. 14, 2003; 70 FR 35545, June 21, 2005; 73 FR 46817, Aug. 12, 2008]

Subpart 236.6—Architect-Engineer Services

§ 236.601 Policy

(1) Written notification to the congressional defense committees is required if the total estimated contract price for architect-engineer services or construction design, in connection with military construction, military family housing, or restoration or replacement of damaged or destroyed facilities, exceeds $1,000,000. In accordance with 10 U.S.C. 480, unclassified notifications must be provided by electronic medium.

(i) For military construction or military family housing (10 U.S.C. 2807(b)), the notification—

(A) Must include the scope of the project and the estimated contract price; and

(B)(*1*) If provided by electronic medium, must be provided at least 14 days before the initial obligation of funds; or

(*2*) If provided by other than electronic medium, must be received by the congressional defense committees at least 21 days before the initial obligation of funds.

(ii) For restoration or replacement of damaged or destroyed facilities (10 U.S.C. 2854(b)), the notification—

(A) Must include the justification for the project, the estimated contract price, and the source of the funds for the project; and

(B)(*1*) If provided by electronic medium, must be provided at least 7 days before the initial obligation of funds; or

(*2*) If provided by other than electronic medium, must be received by the congressional defense committees at least 21 days before the initial obligation of funds.

(2) During the applicable notice period, synopsis of the proposed contract action and administrative actions leading to the award may be started.

[71 FR 58541, Oct. 4, 2006]

236.602 Selection of firms for architect-engineer contracts.

236.602–1 Selection criteria.

(a) Establish the evaluation criteria before making the public announcement required by FAR 5.205(d) and include the criteria and their relative order of importance in the announcement. Follow the procedures at PGI 236.602–1(a).

[69 FR 75000, Dec. 15, 2004, as amended at 71 FR 53044, Sept. 8, 2006]

236.602–70 Restriction on award of overseas architect-engineer contracts to foreign firms.

In accordance with Section 111 of Public Law 104–32 and similar sections in subsequent military construction appropriations acts, A-E contracts funded by military construction appropriations that are estimated to exceed $500,000 and are to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms or to joint ventures of United States and host nation firms.

[62 FR 2858, Jan. 17, 1997]

236.604 Performance evaluation.

(a) *Preparation of performance reports.* Use DD Form 2631, Performance Evaluation (Architect-Engineer), instead of SF 1421.

(2) Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the A-E's performance.

(c) Distribution and use of performance reports.

(i) Forward each performance report to the central data base identified in 236.201(c) after completing the review. The procedures in 236.201 also apply to A-E contracts.

(ii) File and use the DD Form 2631, Performance Evaluation (Architect-Engineer), in a manner similar to the SF 330, Architect-Engineer Qualifications, Part II.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996; 64 FR 51076, Sept. 21, 1999; 69 FR 75000, Dec. 15, 2004]

236.606 Negotiations.

236.606–70 Statutory fee limitation.

(a) 10 U.S.C. 4540, 7212, and 9540 limit the contract price (or fee) for A-E services for the preparation of designs, plans, drawings, and specifications to six percent of the project's estimated construction cost.

(b) The six percent limit also applies to contract modifications, including modifications involving—

(1) Work not initially included in the contract. Apply the six percent limit to the revised total estimated construction cost.

(2) Redesign. Apply the six percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign; and

(iii) Divide the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the six percent statutory limitation.

(c) The six percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the six percent limit.

236.609 Contract clauses.

236.609–70 Additional provision and clause.

(a)(1) Use the clause at 252.236–7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when—

(i) The contract will be fixed price; and

(ii) Supervision and inspection services by the A-E may be required during construction.

(2) Include the scope of such services in appendix A of the contract.

(b) Use the provision at 252.236–7011, Overseas Architect-Engineer Services—Restriction to United States Firms, in solicitations for A-E contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed $500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2858, Jan. 17, 1997; 63 FR 11539, Mar. 9, 1998]

Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

(c) Do not use Optional Form 347, Order for Supplies or Services (see 213.307).

[56 FR 36421, July 31, 1991, as amended at 65 FR 63804, Oct. 25, 2000]

PART 237—SERVICE CONTRACTING

Subpart 237.1—Service Contracts—General

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

SOURCE: 56 FR 36424, July 31, 1991, unless otherwise noted.

Subpart 237.1—Service Contracts—General

237.101 Definitions.

Increased performance of security-guard functions, as used in this subpart, means—

(1) In the case of an installation or facility where no security-guard functions were performed as of September 10, 2001, the entire scope or extent of the performance of security-guard functions at the installation or facility after such date; and

(2) In the case of an installation or facility where security-guard functions were performed within a lesser scope of requirements or to a lesser extent as of

September 10, 2001, than after such date, the increment of the performance of security-guard functions at the installation or facility that exceeds such lesser scope of requirements or extent of performance.

[68 FR 7443, Feb. 14, 2003]

237.102 Policy.

(c) In addition to the prohibition on award of contracts for the performance of inherently governmental functions, contracting officers shall not award contracts for functions that are exempt from private sector performance. See 207.503(e) for the associated documentation requirement.

[73 FR 1826, Jan. 10, 2008]

237.102–70 Prohibition on contracting for firefighting or security-guard functions.

(a) Under 10 U.S.C. 2465, the DoD is prohibited for entering into contracts for the performance of firefighting or security-guard functions at any military installation or facility unless—

(1) The contract is to be carried out at a location outside the United States and its outlying areas at which members of the armed forces would have to be used for the performance of firefighting or security-guard functions at the expense of unit readiness;

(2) The contract will be carried out on a Government-owned but privately operated installation;

(3) The contract (or renewal of a contract) is for the performance of a function under contract on September 24, 1983; or

(4) The contract—

(i) Is for the performance of firefighting functions;

(ii) Is for a period of 1 year or less; and

(iii) Covers only the performance of firefighting functions that, in the absence of the contract, would have to be performed by members of the armed forces who are not readily available to perform such functions by reason of a deployment.

(b) Under Section 2907 of Public Law 103–160, this prohibition does not apply to services at installations being closed (see subpart 237.74).

(c) Under Section 1010 of Public Law 107–56, this prohibition does not apply to any contract that'

(1) Is entered into during the period of time that United States armed forces are engaged in Operation Enduring Freedom or during the period 180 days thereafter;

(2) Is for the performance of security functions at any military installation or facility in the United States;

(3) Is awarded to a proximately located local or State government, or a combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation; and

(4) Prescribes standards for the training and other qualifications of local government law enforcement personnel who perform security functions under the contract in accordance with criteria established by the Secretary of the department concerned.

(d)(1) Under Section 332 of Public Law 107–314, as amended by Section 333 of Public Law 109–364 and Section 343 of Public Law 110–181, this prohibition does not apply to any contract that is entered into for any increased performance of security-guard functions at a military installation or facility undertaken in response to the terrorist attacks on the United States on September 11, 2001, if—

(i) Without the contract, members of the Armed Forces are or would be used to perform the increased security-guard functions;

(ii) The agency has determined that—

(A) Recruiting and training standards for the personnel who are to perform the security-guard functions are comparable to the recruiting and training standards for DoD personnel who perform the same security-guard functions;

(B) Contractor personnel performing such functions will be effectively supervised, reviewed, and evaluated; and

(C) Performance of such functions will not result in a reduction in the security of the installation or facility;

(iii) Contract performance will not extend beyond September 30, 2012; and

(iv) The total number of personnel employed to perform security-guard functions under all contracts entered into pursuant to this authority does not exceed the following limitations:

(A) For fiscal year 2007, the total number of such personnel employed under such contracts on October 1, 2006.

(B) For fiscal year 2008, the number equal to 90 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(C) For fiscal year 2009, the number equal to 80 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(D) For fiscal year 2010, the number equal to 70 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(E) For fiscal year 2011, the number equal to 60 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(F) For fiscal year 2012, the number equal to 50 percent of the total number of such personnel employed under such contracts on October 1, 2006.

[60 FR 61599, Nov. 30, 1995, as amended at 67 FR 11439, Mar. 14, 2002; 68 FR 7443, Feb. 14, 2003; 69 FR 35533, June 25, 2004; 70 FR 14577, Mar. 23, 2005; 70 FR 35545, June 21, 2005; 71 FR 34834, June 16, 2006; 72 FR 51192, Sept. 6, 2007; 73 FR 53157, Sept. 15, 2008]

237.102–71 Limitation on service contracts for military flight simulators.

(a) *Definitions.* As used in this subsection—

(1) *Military flight simulator* means any system to simulate the form, fit, and function of a military aircraft that has no commonly available commercial variant.

(2) *Service contract* means any contract entered into by DoD, the principal purpose of which is to furnish services in the United States through the use of service employees as defined in 41 U.S.C. 357(b).

(b) Under Section 832 of Public Law 109–364, as amended by Section 883(b) of Public Law 110–181, DoD is prohibited from entering into a service contract to acquire a military flight simulator. However, the Secretary of Defense may waive this prohibition with respect to a contract, if the Secretary—

(1) Determines that a waiver is in the national interest; and

(2) Provides an economic analysis to the congressional defense committees at least 30 days before the waiver takes effect. This economic analysis shall include, at a minimum—

(i) A clear explanation of the need for the contract; and

(ii) An examination of at least two alternatives for fulfilling the requirements that the contract is meant to fulfill, including the following with respect to each alternative:

(A) A rationale for including the alternative.

(B) A cost estimate of the alternative and an analysis of the quality of each cost estimate.

(C) A discussion of the benefits to be realized from the alternative.

(D) A best value determination of each alternative and a detailed explanation of the life-cycle cost calculations used in the determination.

(c) When reviewing requirements or participating in acquisition planning that would result in a military department or defense agency acquiring a military flight simulator, the contracting officer shall notify the program officials of the prohibition in paragraph (b) of this subsection. If the program officials decide to request a waiver from the Secretary of Defense under paragraph (b) of this subsection, the contracting officer shall follow the procedures at PGI 237.102–71.

[72 FR 51193, Sept. 6, 2007, as amended at 73 FR 53156, Sept. 15, 2008]

237.104 Personal services contracts.

(b)(i) Authorization to acquire the personal services of experts and consultants is included in 10 U.S.C. 129b. Personal service contracts for expert and consultant services must also be authorized by a determination and findings (D&F) in accordance with department/agency regulations.

(A) Generally, the D&F should authorize one contract at a time; however, an authorizing official may issue a blanket D&F for classes of contracts.

(B) Prepare each D&F in accordance with FAR 1.7 and include a determination that—

(*1*) The duties are of a temporary or intermittent nature;

(*2*) Acquisition of the services is advantageous to the national defense;

(*3*) DoD personnel with necessary skills are not available;

(*4*) Excepted appointment cannot be obtained;

(*5*) A nonpersonal services contract is not practicable;

(*6*) Statutory authority, 5 U.S.C. 3109 and other legislation, apply; and

(*7*) Any other determination required by statues has been made.

(ii) Personal services contracts for health care are authorized by 10 U.S.C. 1091.

(A) This authority may be used to acquire—

(*1*) Direct health care services provided in medical treatment facilities;

(*2*) Health care services at locations outside of medical treatment facilities (such as the provision of medical screening examinations at military entrance processing stations); and

(*3*) Services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services, provided in medical treatment facilities or elsewhere. Persons with whom a personal services contract may be entered into under this authority include clinical social workers, psychologists, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.

(B) Sources for personal services contracts with individuals under the authority of 10 U.S.C. 1091 shall be selected through the procedures in this section. These procedures do not apply to contracts awarded to business entities other than individuals. Selections made using the procedures in this section are exempt by statute from FAR part 6 competition requirements (see 206.001(b)).

(C) Approval requirements for—

(*1*) Direct health care personal services contracts (see paragraphs (b)(ii)(A)(*1*) and (*2*) of this section) and a pay cap are in DoDI 6025.5, Personal Services Contracts for Health Care Providers.

(*i*) A request to enter into a personal services contract for direct health care services must be approved by the commander of the medical/dental treatment facility where the services will be performed.

(*ii*) A request to enter into a personal services contract for a location outside of a medical treatment facility must be approved by the chief of the medical facility who is responsible for the area in which the services will be performed.

(*2*) Services of clinical counselors, family advocacy program staff, and victim's services representatives (see paragraph (b)(ii)(A)(*3*) of this section), shall be in accordance with agency procedures.

(D) The contracting officer must ensure that the requiring activity provides a copy of the approval with the purchase request.

(E) The contracting officer must provide adequate advance notice of contracting opportunities to individuals residing in the area of the facility. The notice must include the qualification criteria against which individuals responding will be evaluated. The contracting officer shall solicit applicants through at least one local publication which serves the area of the facility. Acquisitions under this section for personal service contracts are exempt from the posting and synopsis requirements of FAR part 5.

(F) The contracting officer shall provide the qualifications of individuals responding to the notice to the commander of the facility for evaluation and ranking in accordance with agency procedures. Individuals must be considered solely on the basis of the professional qualifications established for the particular personal services being acquired and the Government's estimate of reasonable rates, fees, or other costs. The commander of the facility shall provide the contracting officer with rationale for the ranking of individuals, consistent with the required qualifications.

(G) Upon receipt from the facility of the ranked listing of applicants, the contracting officer shall either—

(*1*) Enter into negotiations with the highest ranked applicant. If a mutually satisfactory contract cannot be negotiated, the contracting officer shall terminate negotiations with the highest ranked applicant and enter into negotiations with the next highest.

(*2*) Enter into negotiations with all qualified applicants and select on the basis of qualifications and rates, fees, or other costs.

(H) In the event only one individual responds to an advertised requirement, the contracting officer is authorized to negotiate the contract award. In this case, the individual must still meet the minimum qualifications of the requirement and the contracting officer must be able to make a determination that the price is fair and reasonable.

(I) If a fair and reasonable price cannot be obtained from a qualified individual, the requirement should be canceled and acquired using procedures other than those set forth in this section.

(iii) (A) In accordance with 10 U.S.C. 129b(d), an agency may enter into a personal services contract if—

(*1*) The personal services—

(*i*) Are to be provided by individuals outside the United States, regardless of their nationality;

(*ii*) Directly support the mission of a defense intelligence component or counter-intelligence organization of DoD; or

(*iii*) Directly support the mission of the special operations command of DoD; and

(*2*) The head of the contracting activity provides written approval for the proposed contract. The approval shall include a determination that addresses the following:

(*i*) The services to be procured are urgent or unique;

(*ii*) It would not be practical to obtain such services by other means; and

(*iii*) For acquisition of services in accordance with paragraph (b)(iii)(A)(*1*)(*i*) of this section, the services to be acquired are necessary and appropriate for supporting DoD activities and programs outside the United States.

(B) The contracting officer shall ensure that the applicable requirements of paragraph (b)(iii)(A)(*2*) of this section have been satisfied and shall include the approval documentation in the contract file.

(iv) The requirements of 5 U.S.C. 3109, Employment of Experts and Consultants; Temporary or Intermittent, do not apply to contracts entered into in accordance with paragraph (b)(iii) of this section.

(f)(i) Payment to each expert or consultant for personal services under 5 U.S.C. 3109 shall not exceed the highest rate fixed by the Classification Act Schedules for grade GS–15 (see 5 CFR 304.105(a)).

(ii) The contract may provide for the same per diem and travel expenses authorized for a Government employee, including actual transportation and per diem in lieu of subsistence for travel between home or place of business and official duty station.

(iii) Coordinate with the civilian personnel office on benefits, taxes, personnel ceilings, and maintenance of records.

[56 FR 36424, July 31, 1991, as amended at 60 FR 2888, Jan. 12, 1995; 60 FR 61599, Nov. 30, 1995; 63 FR 11539, Mar. 9, 1998; 67 FR 61516, Oct. 1, 2002; 69 FR 55992, Sept. 17, 2004]

237.106 Funding and term of service contracts.

(1) Personal service contracts for expert or consultant services shall not exceed 1 year. The nature of the duties must be—

(i) Temporary (not more than 1 year); or

(ii) Intermittent (not cumulatively more than 130 days in 1 year).

(2) The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed 1 year (10 U.S.C. 2410a).

[64 FR 28110, May 25, 1999]

237.109 Services of quasi-military armed forces.

See 237.102–70b for prohibition on contracting for firefighting or security-guard functions.

[60 FR 61599, Nov. 30, 1995]

237.170 Approval of contracts and task orders for services.

237.170–1 Scope.

This section—

(a) Implements 10 U.S.C. 2330; and

(b) Applies to services acquired for DoD, regardless of whether the services are acquired through—

(1) A DoD contract or task order; or

(2) A contract or task order awarded by an agency other than DoD.

[68 FR 56564, Oct. 1, 2003]

237.170–2 Approval requirements.

(a) *Acquisition of services through a contract or task order that is not performance based.* (1) For acquisitions at or below $78.5 million, obtain the approval of the official designated by the department or agency.

(2) For acquisitions exceeding $78.5 million, obtain the approval of the senior procurement executive.

(b) *Acquisition of services through use of a contract or task order issued by a non-DoD agency.* Comply with the review, approval, and reporting requirements established in accordance with Subpart 217.78 when acquiring services through use of a contract or task order issued by a non-DoD agency.

[70 FR 29643, May 24, 2005, as amended at 71 FR 14104, Mar. 21, 2006; 71 FR 75893, Dec. 19, 2006]

237.171 Training for contractor personnel interacting with detainees.

237.171–1 Scope.

This section prescribes policies to prevent the abuse of detainees, as required by Section 1092 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375).

[70 FR 52033, Sept. 1, 2005]

237.171–2 Definition.

Combatant commander, detainee, and *personnel interacting with detainees,* as used in this section, are defined in the clause at 252.237–7019, Training for Contractor Personnel Interacting with Detainees.

[71 FR 53048, Sept. 8, 2006]

237.171–3 Policy.

(a) Each DoD contract in which contractor personnel, in the course of their duties, interact with detainees shall include a requirement that such contractor personnel—

(1) Receive Government-provided training regarding the international obligations and laws of the United States applicable to the detention of personnel, including the Geneva Conventions; and

(2) Provide a copy of the training receipt document to the contractor.

(b) The combatant commander responsible for the area where the detention or interrogation facility is located will arrange for the training and a training receipt document to be provided to contractor personnel. For information on combatant commander geographic areas of responsibility and point of contact information for each command, see PGI 237.171–3(b).

[71 FR 53048, Sept. 8, 2006]

237.171–4 Contract clause.

Use the clause at 252.237–7019, Training for Contractor Personnel Interacting with Detainees, in solicitations and contracts for the acquisition of services if—

(a) The clause at 252.225–7040, Contractor Personnel Supporting a Force Deployed Outside the United States, is included in the solicitation or contract; or

(b) The services will be performed at a facility holding detainees, and contractor personnel in the course of their duties may be expected to interact with the detainees.

[70 FR 52033, Sept. 1, 2005]

Subpart 237.2—Advisory and Assistance Services

237.270 Acquisition of audit services.

(a) *General policy.* (1) Do not contract for audit services unless—

(i) The cognizant DoD audit organization determines that expertise required to perform the audit is not available within the DoD audit organization; or

(ii) Temporary audit assistance is required to meet audit reporting requirements mandated by law or DoD regulation.

(2) See PGI 237.270 for a list of DoD publications that govern the conduct of audits.

(b) *Contract period.* Except in unusual circumstances, award contracts for recurring audit services for a 1-year period with at least 2 option years.

(c) *Approvals.* Do not issue a solicitation for audit services unless the requiring activity provides evidence that the cognizant DoD audit organization has approved the statement of work. The requiring agency shall obtain the same evidence of approval for subsequent material changes to the statement of work.

(d) *Solicitation provisions and contract clauses.* (1) Use the provision at 252.237–7000, Notice of Special Standards of Responsibility, in solicitations for audit services.

(2) Use the clause at 252.237–7001, Compliance with Audit Standards, in solicitations and contracts for audit services.

[70 FR 57193, Sept. 30, 2005]

Subpart 237.70—Mortuary Services

SOURCE: 71 FR 3416, Jan. 23, 2006, unless otherwise noted.

237.7000 Scope.

This subpart—

(a) Applies to contracts for mortuary services (the care of remains) for military personnel within the United States; and

(b) May be used as guidance in areas outside the United States for mortuary services for deceased military and civilian personnel.

237.7001 Method of acquisition.

(a) *Requirements type contract.* By agreement among the military activities, one activity in each geographical area will contract for the estimated requirements for the care of remains for all military activities in the area. Use a requirements type contract (see FAR 16.503) when the estimated annual requirements for the activities in the area are ten or more.

(b) *Purchase order.* Where no contract exists, use DD Form 1155, Order for Supplies or Services, to obtain mortuary services.

237.7002 Area of performance and distribution of contracts.

Follow the procedures at PGI 237.7002 for—

(a) Defining the geographical area to be covered by the contract; and

(b) Distributing copies of the contract.

237.7003 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237–7002, Award to Single Offeror, in all sealed bid solicitations for mortuary services. Use the basic provision with its Alternate I in all negotiated solicitations for mortuary services.

(b) Use the following clauses in all mortuary service solicitations and contracts, except do not use the clauses at 252.237–7004, Area of Performance, in solicitations or contracts that include port of entry requirements:

(1) 252.237–7003, Requirements, (insert activities authorized to place orders in paragraph (e) of the clause).

(2) 252.237–7004, Area of Performance.

(3) 252.237–7005, Performance and Delivery.

(4) 252.237–7006, Subcontracting.

(5) 252.237–7007, Termination for Default.

(6) 252.237–7008, Group Interment.

(7) 252.237–7009, Permits.

(8) 252.237–7011, Preparation History.

(c) Use the clause at FAR 52.245–4, Government-Furnished Property (Short Form), in solicitations and contracts that include port of entry requirements.

Subpart 237.71—Laundry and Dry Cleaning Services

237.7100 Scope.

This subpart—

(a) Applies to contracts for laundry and dry cleaning services within the United States; and

(b) May be used as guidance in areas outside the United States.

[71 FR 3416, Jan. 23, 2006]

237.7101 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237–7012, Instruction to Offerors (Count-of-Articles), in solicitations for laundry and dry cleaning services to be provided on a count-of-articles basis.

(b) Use the provision at 252.237–7013, Instruction to Offerors (Bulk Weight), in solicitations for laundry services to be provided on a bulk weight basis.

(c) Use the clause at 252.237–7014, Loss or Damage (Count-of-Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a count-of-articles basis.

(d) Use the clause at 252.237–7015, Loss or Damage (Weight of Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a bulk weight basis.

(1) Insert a reasonable per pound price in paragraph (b) of the clause, based on the average per pound value. When the contract requires laundry services on a bag type basis, insert reasonable per pound prices by bag type.

(2) Insert an appropriate percentage in paragraph (e) of the clause, not to exceed eight percent.

(e) Use the clause at 252.237–7016, Delivery Tickets, in all solicitations and contracts for laundry and dry cleaning services.

(1) Use the clause with its Alternate I when services are for bag type laundry to be provided on a bulk weight basis.

(2) Use the clause with its Alternate II when services are unsorted laundry to be provided on a bulk weight basis.

(f) Use the clause at 252.237–7017, Individual Laundry, in solicitations and contracts for laundry and dry cleaning services to be provided to individual personnel.

(1) Insert the number of pieces of outer garments in paragraphs (d) (1) and (2) of the clause.

(2) The number of pieces and composition of a bundle in paragraphs (d) (1) and (2) of the clause may be modified to meet local conditions.

(g) Use the clause at 252.237–7018, Special Definitions of Government Property, in all solicitations and contracts for laundry and dry cleaning services.

[56 FR 36424, July 31, 1991, as amended at 62 FR 34127, June 24, 1997. Redesignated at 71 FR 3416, Jan. 23, 2006]

Subpart 237.72—Educational Service Agreements

237.7200 Scope.

(a) This subpart prescribes acquisition procedures for educational services from schools, colleges, universities, or other educational institutions. This subpart does not include tuition assistance agreements, i.e., payment by the Government of partial tuition under the off-duty educational program.

(b) As used in the subpart—

(1) ''*Facilities*'' do not include the institution's dining rooms or dormitories; and

(2) ''*Fees*'' does not include charges for meals or lodging.

237.7201 Educational service agreement.

(a) An educational service agreement is not a contract, but is an ordering agreement under which the Government may order educational services.

(b) Educational service agreements provide for ordering educational services when—

(1) The Government pays normal tuition and fees for educational services provided to a student by the institution under its normal schedule of tuition and fees applicable to all students generally; and

(2) Enrollment is at the institution under the institution's normal rules and in courses and curricula which the institution offers to all students meeting admission requirements.

237.7202 Limitations.

(a) Make no agreement under this subpart which will result in payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004.

(b) Educational service agreements are not used to provide special courses or special fees for Government students.

237.7203 Duration.

(a) Educational service agreements are for an indefinite duration and remain in effect until terminated.

(b) The issuing activity must establish procedures to review each educational service agreement at least once each year. Review dates should consider the institution's academic calendar and occur at least 30 days before the beginning of a term. The purpose of the review is to incorporate changes to reflect requirements of any

statute, Executive Order, FAR, or DFARS.

(c) If the contracting officer and the institution do not agree on required changes, terminate the agreement.

237.7204 Format and clauses for educational service agreements.

Educational service agreements under this subpart shall be in the following format. Add to the schedule any other provisions necessary to describe the requirements, if they are consistent with the following provisions and the policy of acquiring educational services in the form of standard course offerings at the prevailing rates of the institution.

EDUCATIONAL SERVICE AGREEMENT

Agreement No. _____

1. This agreement entered into on the _____ day of _____ 19___, is between the Government, represented by the Contracting Officer, and the Contractor, (name of institution), an educational institution located in _____ (city), _____ (state).

2. This agreement is for educational services to be provided by the Contractor to Government personnel at the Contractor's institution. The Contractor shall provide instruction with standard offerings of courses available to the public.

3. The Government shall pay for services under the Contractor's normal schedule of tuition and fees applicable to the public and in effect at the time the services are performed.

4. The Government will review this agreement annually before the anniversary of its effective date for the purpose of incorporating changes required by statutes, executive orders, the Federal Acquisition Regulation, or the Defense Federal Acquisition Regulation Supplement. Changes required to be made by modification to this agreement or by issuance of a superseding agreement. If mutual agreement on the changes cannot be reached, the Government will terminate this agreement.

5. The parties may amend this agreement only by mutual consent.

6. This agreement shall start on the date in paragraph 1 and shall continue until terminated.

7. The estimated annual cost of this agreement is $_____. This estimate is for administrative purposes only and does not impose any obligation on the Government to request any services or make any payment.

8. Advance payments are authorized by 10 U.S.C. 2396(a)(3).

9. Submit invoices to: _____ (name and address of activity).

SCHEDULE PROVISIONS

1. *Ordering procedures and services to be provided.* (a) The Contractor shall promptly deliver to the Contracting Officer one copy of each catalog applicable to this agreement, and one copy of any subsequent revision.

(b) The Government will request educational services under this agreement by a (insert type of request, such as, delivery order, official Government order, or other written communication). The (insert type of request, such as, delivery order, official Government order, or other written communication) will contain the number of this agreement and will designate as students at the Contractor's institution one or more Government-selected persons who have already been accepted for admission under the Contractor's usual admission standards.

(c) All students under this agreement shall register in the same manner, be subject to the same academic regulations, and have the same privileges, including the use of all facilities and equipment as any other students enrolled in the institution.

(d) Upon enrolling each student under this agreement, the Contractor shall, where the resident or nonresident status involves a difference in tuition or fees—

(i) Determine the resident or nonresident status of the student;

(ii) Notify the student and the Contracting Officer of the determination. If there is an appeal of the determination;

(iii) If there is an appeal of the determination, process the appeal under the Contractor's standard procedures;

(iv) Notify the student and Contracting Officer of the result; and

(v) Make the determination a part of the student's permanent record.

(e) The Contractor shall not furnish any instruction or other services to any student under this agreement before the effective date of a request for services in the form specified in paragraph (b) of this schedule.

2. *Change in curriculum.* The Contracting Officer may vary the curriculum for any student enrolled under this agreement but shall not require or make any change in any course without the Contractor's consent.

3. *Payment.* (a) The Government shall pay the Contractor the normal tuition and fees which the Contractor charges any students pursuing the same or similar curricula, except for any tuition and fees which this agreement excludes. The Contractor may change any tuition and fees, provided—

(1) The Contractor publishes the revisions in a catalog or otherwise publicly announces the revisions;

(2) Applies the revisions uniformly to all students studying the same or similar curricula;

(3) Provides the Contracting Officer notice of changes before their effective date.

(b) The Contractor shall not establish any tuition or fees which apply solely to students under this agreement.

(c) If the Contractor regularly charges higher tuition and fees for nonresident students, the Contractor may charge the Government the normal nonresident tuition and fees for students under this agreement who are nonresidents. The Government shall not claim resident tuition and fees for any student solely on the basis of the student residing in the State as a consequence of enrollment under this agreement.

(d) The Contractor shall charge the Government only the tuition and fees which relate directly to enrollment as a student. Tuition and fees may include—

(i) Penalty fees for late registration or change of course caused by the Government;

(ii) Mandatory health fees and health insurance charges; and

(iii) Any flat rate charge applicable to all students registered for research that appears in the Contractor's publicly announced fee schedule.

(e) The Contractor shall not charge the Government for—

(i) Permit charges, such as vehicle registration or parking fees, unless specifically authorized in the request for service; and

(ii) Any equipment, refundable deposits, or any items or services (such as computer time) related to student research.

(f) Normally, the Contractor shall not directly charge individual students for application fees or any other fee chargeable to this agreement. However, if the Contractor's standard procedures require payment of any fee before the student is enrolled under this agreement, the Contractor may charge the student. When the Contractor receives payment from the Government, the Contractor shall fully reimburse the student.

(g) For each term the Contractor enrolls students under this agreement, the Contractor shall submit _____ copies of an invoice listing charges for each student separately. The Contractor shall submit invoices within _____ days after the start of the term and shall include—

(i) Agreement number and inclusive dates of the term;

(ii) Name of each student;

(iii) A list showing each course for each student if the school charges by credit hour;

(iv) The resident or nonresident status of each student (if applicable to the Contractor's school); and

(v) A breakdown of charges for each student, including credit hours, tuition, application fee, and other fees. Provide a total for each student and a grand total for all students listed on the invoice.

(h) If unforeseen events require additional charges that are otherwise payable under the Contractor's normal tuition and fee schedule, the Contractor may submit a supplemental invoice or make the adjustment on the next regular invoice under this agreement. The Contractor shall clearly identify and explain the supplemental invoice or the adjustment.

(i) The Contractor shall apply any credits resulting from withdrawal of students, or from any other cause under its standard procedures, to subsequent invoices submitted under this agreement. Credits should appear on the first invoice submitted after the action resulting in the credits. If no subsequent invoice is submitted, the Contractor shall deliver to the Contracting Officer a check drawn to the order of the office designated for contract administration. The Contractor shall identify the reason for the credit and the applicable term dates in all cases.

4. *Withdrawal of students.* (a) The Government may, at its option and at any time, withdraw financial support for any student by issuing official orders. The Government will furnish _____ copies of the orders to the Contractor within a reasonable time after publication.

(b) The Contractor may request withdrawal by the Government of any student for academic or disciplinary reasons.

(c) If withdrawal occurs before the end of a term, the Government will pay any tuition and fees due for the current term. The Contractor shall credit the Government with any charges eligible for refund under the Contractor's standard procedures for any students in effect on the date of withdrawal.

(d) Withdrawal of students by the Government will not be the basis for any special charge or claim by the Contractor other than charges under the Contractor's standard procedures.

5. *Transcripts.* Within a reasonable time after withdrawal of a student for any reason, or after graduation, the Contractor shall send to the Contracting Officer (or to an address supplied by the Contracting Officer) one copy of an official transcript showing all work by the student at the institution until such withdrawal or graduation.

6. *Student teaching.* The Government does not anticipate the Contractor awarding fellowships and assistantships to students attending school under this agreement. However, for graduate students, should both the student and the Contractor decide it to be in the student's best interests to assist in the institution's teaching program, the Contractor may provide nominal compensation for part-time service. Base the compensation on the Contractor's practices and procedures for other students of similar accomplishment in that department or field. The Contractor shall apply the compensation as a credit against any invoices presented for payment for any period in which the student performed the part-time teaching service.

7. *Termination of agreement.* (a) Either party may terminate this agreement by giving 30 days advance written notice of the effective date of termination. In the event of termination, the Government shall have the right, at its option, to continue to receive educational services for those students already enrolled in the contractor's institution under this agreement until such time that the students complete their courses or curricula or the Government withdraws them from the Contractor's institution. The terms and conditions of this agreement in effect on the effective date of the termination shall continue to apply to such students remaining in the Contractor's institution.

(b) Withdrawal of students under Schedule provision 4 shall not be considered a termination within the meaning of this provision 7.

(c) Termination by either party shall not be the basis for any special charge or claim by the Contractor, other than as provided by the Contractor's standard procedures.

GENERAL PROVISIONS

Use the following clauses in educational service agreements:

1. FAR 52.202–1, Definitions, and add the following paragraphs (h) through (m).

(h) ''Term'' means the period of time into which the Contractor divides the academic year for purposes of instruction. This includes ''semester,'' ''trimester,'' ''quarter,'' or any similar word the Contractor may use.

(i) ''Course'' means a series of lectures or instructions, and laboratory periods, relating to one specific representation of subject matter, such as Elementary College Algebra, German 401, or Surveying. Normally, a student completes a course in one term and receives a certain number of semester hours credit (or equivalent) upon successful completion.

(j) ''Curriculum'' means a series of courses having a unified purpose and belonging primarily to one major academic field. It will usually include certain required courses and elective courses within established criteria. Examples include Business Administration, Civil Engineering, Fine and Applied Arts, and Physics. A curriculum normally covers more than one term and leads to a degree or diploma upon successful completion.

(k) ''Catalog'' means any medium by which the Contractor publicly announces terms and conditions for enrollment in the Contractor's institution, including tuition and fees to be charged. This includes ''bulletin,'' ''announcement,'' or any other similar word the Contractor may use.

(l) ''Tuition'' means the amount of money charged by an educational institution for instruction, not including fees.

(m) ''Fees'' means those applicable charges directly related to enrollment in the Contractor's institution. Unless specifically allowed in the request for services, fees shall not include—

(1) Any permit charge, such as parking and vehicle registration; or

(2) Charges for services of a personal nature, such as food, housing, and laundry.

2. FAR 52.203–3, Gratuities.

3. FAR 52.203–5, Covenant Against Contingent Fees.

4. FAR 52.204–1, Approval of Contract, if required by department/agency procedures.

5. FAR 52.215–2, Audit and Records—Negotiation.

6. FAR 52.215–8, Order of Precedence—Uniform Contract Format.

7. Conflicts Between Agreement and Catalog. Insert the following clause:

CONFLICTS BETWEEN AGREEMENT AND CATALOG

If there is any inconsistency between this agreement and any catalog or other document incorporated in this agreement by reference or any of the Contractor's rules and regulations, the provisions of this agreement shall govern.

8. FAR 52.222–3, Convict Labor.

9. Under FAR 22.802, FAR 22.807, and FAR 22.810, use the appropriate clause from FAR 52.222–26, Equal Opportunity.

10. FAR 52.233–1, Disputes.

11. Assignment of Claims. Insert the following clause:

ASSIGNMENT OF CLAIMS

No claim under this agreement shall be assigned.

12. FAR 52.252–4, Alterations in Contract, if required by department/agency procedures.

SIGNATURE PAGE

Agreement No. _____

Date _____

The United States of America

By: _____

(Contracting Officer)

Activity _____

Location _____

(Name of Contractor)

By: _____

(Title) _____

[56 FR 36424, July 31, 1991, as amended at 60 FR 61599, Nov. 30, 1995; 63 FR 55052, Oct. 14, 1998; 64 FR 49684, Sept. 14, 1999; 64 FR 53447, Oct. 1, 1999]

Subpart 237.73—Services of Students at Research and Development Laboratories

237.7300 Scope.

This subpart prescribes procedures for acquisition of temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at Defense research and development laboratories (10 U.S.C. 2360).

237.7301 Definitions.

As used in this subpart—

(a) *Institution of higher learning* means any public or private post-secondary school, junior college, college, university, or other degree granting educational institution that—

(1) Is located in the United States or its outlying areas;

(2) Has an accredited education program approved by an appropriate accrediting body; and

(3) Offers a program of study at any level beyond high school.

(b) *Nonprofit organization* means any organization described by section 501(c)(3) of title 26 of the U.S.C. which is exempt from taxation under section 501(a) of title 26.

(c) *Student* means an individual enrolled (or accepted for enrollment) at an institution of higher learning before the term of the student technical support contract. The individual shall remain in good standing in a curriculum designed to lead to the granting of a recognized degree, during the term of the contract.

(d) *Technical support* means any scientific or engineering work in support of the mission of the DoD laboratory involved. It does not include administrative or clerical services.

[56 FR 36424, July 31, 1991, as amended at 70 FR 35545, June 21, 2005]

237.7302 General.

Generally, agencies will acquire services of students at institutions of higher learning by contract between a nonprofit organization employing the student and the Government. When it is in the best interest of the Government, contracts may be made directly with students. These services are not subject to the requirements of FAR part 19, FAR 13.003(b)(1), or DFARS part 219. Award authority for these contracts is 10 U.S.C. 2304(a)(1) and 10 U.S.C. 2360.

[56 FR 36424, July 31, 1991, as amended at 60 FR 29500, June 5, 1995; 64 FR 2598, Jan. 15, 1999]

237.7303 Contract clauses.

Contracts made directly with students are nonpersonal service contracts but shall include the clauses at FAR 52.232–3, Payments Under Personal Services Contracts, and FAR 52.249–12, Termination (Personal Services).

Subpart 237.74—Services at Installations Being Closed

SOURCE: 59 FR 36089, July 15, 1994, unless otherwise noted.

237.7400 Scope.

This subpart prescribes procedures for contracting, through use of other than full and open competition, with local governments for police, fire protection, airfield operation, or other community services at military installations to be closed under the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100–526), as amended, and the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510), as amended.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

237.7401 Policy.

The authority in 206.302–5(b)(ii) to contract with local governments—

(a) May be exercised without regard to the provisions of 10 U.S.C. Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions;

(b) May not be exercised earlier than 180 days before the date the installation is scheduled to be closed;

(c) Requires a determination by the head of the contracting activity that the services being acquired under contract with the local government are in the best interests of the Department of Defense.

(d) Includes the requirement of subpart 222.71, Right of First Refusal of Employment, unless it conflicts with

the local government's civil service selection procedures.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

237.7402 Contract clause.

Use the clause at 252.237–7022, Services at Installations Being Closed, in solicitations and contracts based upon the authority of this subpart.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 239.1—General

Sec.
239.101 Policy.

Subpart 239.70—Exchange or Sale of Information Technology

239.7001 Policy.

Subpart 239.71—Security and Privacy for Computer Systems

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Subpart 239.73 [Reserved]

Subpart 239.74—Telecommunications Services

239.7400 Scope.
239.7401 Definitions.
239.7402 Policy.
239.7403–239.7404 [Reserved]
239.7405 Delegated authority for telecommunications resources.
239.7406 Cost or pricing data and information other than cost or pricing data.
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239.7408 Special construction.
239.7408–1 General.
239.7408–2 Applicability of construction labor standards for special construction.
239.7409 Special assembly.
239.7410 Cancellation and termination.
239.7411 Contract clauses.

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

SOURCE: 56 FR 36429, July 31, 1991, unless otherwise noted.

Subpart 239.1—General

239.101 Policy.

See Subpart 208.74 when acquiring commercial software or software maintenance.

[67 FR 65512, Oct. 25, 2002]

Subpart 239.70—Exchange or Sale of Information Technology

239.7001 Policy.

Agencies shall follow the procedures in DoD 4140.1–R, DoD Supply Chain Materiel Management Regulation, Chapter 9, Section C9.5, when considering the exchange or sale of Government-owned information technology.

[71 FR 39010, July 11, 2006]

Subpart 239.71—Security and Privacy for Computer Systems

SOURCE: 69 FR 35534, June 25, 2004, unless otherwise noted.

239.7100 Scope of subpart.

This subpart includes information assurance and Privacy Act considerations. Information assurance requirements are in addition to provisions concerning protection of privacy of individuals (see FAR Subpart 24.1).

239.7101 Definition.

Information assurance, as used in this subpart, means measures that protect and defend information, that is entered, processed, transmitted, stored, retrieved, displayed, or destroyed, and information systems, by ensuring their availability, integrity, authentication, confidentiality, and non-repudiation. This includes providing for the restoration of information systems by incorporating protection, detection, and reaction capabilities.

239.7102 Policy and responsibilities.

239.7102–1 General.

(a) Agencies shall ensure that information assurance is provided for information technology in accordance with current policies, procedures, and statutes, to include—

(1) The National Security Act;

(2) The Clinger-Cohen Act;

(3) National Security Telecommunications and Information Systems Security Policy No. 11;

(4) Federal Information Processing Standards;

(5) DoD Directive 8500.1, Information Assurance;

(6) DoD Instruction 8500.2, Information Assurance Implementation;

(7) DoD Directive 8570.1, Information Assurance Training, Certification, and Workforce Management; and

(8) DoD Manual 8570.01–M, Information Assurance Workforce Improvement Program.

(b) For all acquisitions, the requiring activity is responsible for providing to the contracting officer—

(1) Statements of work, specifications, or statements of objectives that meet information assurance requirements as specified in paragraph (a) of this subsection;

(2) Inspection and acceptance contract requirements; and

(3) A determination as to whether the information technology requires protection against compromising emanations.

[69 FR 35534, June 25, 2004, as amended at 73 FR 1829, Jan. 10, 2008]

239.7102–2 Compromising emanations—TEMPEST or other standard.

For acquisitions requiring information assurance against compromising emanations, the requiring activity is responsible for providing to the contracting officer—

(a) The required protections, *i.e.*, an established National TEMPEST standard (*e.g.*, NACSEM 5100, NACSIM 5100A) or a standard used by other authority;

(b) The required identification markings to include markings for TEMPEST or other standard, certified equipment (especially if to be reused);

(c) Inspection and acceptance requirements addressing the validation of compliance with TEMPEST or other standards; and

(d) A date through which the accreditation is considered current for purposes of the proposed contract.

239.7102–3 Information assurance contractor training and certification.

(a) For acquisitions that include information assurance functional services for DoD information systems, or that require any appropriately cleared contractor personnel to access a DoD information system to perform contract duties, the requiring activity is responsible for providing to the contracting officer—(1) A list of information assurance functional responsibilities for DoD information systems by category (e.g., technical or management) and level (e.g., computing environment, network environment, or enclave); and

(2) The information assurance training, certification, certification maintenance, and continuing education or sustainment training required for the information assurance functional responsibilities.

(b) After contract award, the requiring activity is responsible for ensuring that the certifications and certification status of all contractor personnel performing information assurance functions as described in DoD 8570.01–M, Information Assurance Workforce Improvement Program, are in compliance with the manual and are identified, documented, and tracked.

(c) The responsibilities specified in paragraphs (a) and (b) of this section apply to all DoD information assurance duties supported by a contractor, whether performed full-time or part-time as additional or embedded duties, and when using a DoD contract, or a contract or agreement administered by another agency (e.g., under an interagency agreement).

(d) See PGI 239.7102–3 for guidance on documenting and tracking certification status of contractor personnel, and for additional information regarding the requirements of DoD 8570.01–M.

[73 FR 1829, Jan. 10, 2008]

239.7103 Contract clauses.

(a) Use the clause at 252.239–7000, Protection Against Compromising Emanations, in solicitations and contracts involving information technology that requires protection against compromising emanations.

(b) Use the clause at 252.239–7001, Information Assurance Contractor Training and Certification, in solicitations and contracts involving contractor performance of information assurance functions as described in DoD 8570.01–M.

[73 FR 1829, Jan. 10, 2008]

Subpart 239.72—Standards

239.7201 Solicitation requirements.

Contracting officers shall ensure that all applicable Federal Information Processing Standards are incorporated into solicitations.

[71 FR 39011, July 11, 2006]

Subpart 239.73 [Reserved]

Subpart 239.74—Telecommunications Services

239.7400 Scope.

This subpart prescribes policy and procedures for acquisition of telecommunications services and maintenance of telecommunications security. Telecommunications services meet the definition of information technology.

[62 FR 1060, Jan. 8, 1997, as amended at 71 FR 39011, July 11, 2006]

239.7401 Definitions.

As used in this subpart—

(a) *Common carrier* means any entity engaged in the business of providing telecommunications services which are regulated by the Federal Communications Commission or other governmental body.

(b) *Foreign carrier* means any person, partnership, association, joint-stock company, trust, governmental body, or corporation not subject to regulation by a U.S. governmental regulatory body and not doing business as a citizen of the United States, providing telecommunications services outside the territorial limits of the United States.

(c) *Governmental regulatory body* means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating under the State authority. The following are not ''governmental regulatory bodies''—

(1) Regulatory bodies whose decisions are not subject to judicial appeal; and

(2) Regulatory bodies which regulate a company owned by the same entity which creates the regulatory body.

(d) *Noncommon carrier* means any entity other than a common carrier offering telecommunications facilities, services, or equipment for lease.

(e) *Securing, sensitive information,* and *telecommunications systems* have the meaning given in the clause at 252.239–7016, Telecommunications Security Equipment, Devices, Techniques, and Services.

(f) *Telecommunications* means the transmission, emission, or reception of signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

(g) *Telecommunications services* means the services acquired, whether by lease or contract, to meet the Government's telecommunications needs. The term includes the telecommunications facilities and equipment necessary to provide such services.

[56 FR 36429, July 31, 1991, as amended at 70 FR 67918, Nov. 9, 2005]

239.7402 Policy.

(a) *Acquisition*. DoD policy is to acquire telecommunications services from common and noncommon telecommunications carriers—

(1) On a competitive basis, except when acquisition using other than full and open competition is justified;

(2) Recognizing the regulations, practices, and decisions of the Federal Communications Commission (FCC) and other governmental regulatory bodies on rates, cost principles, and accounting practices; and

(3) Making provision in telecommunications services contracts for adoption of—

(i) FCC approved practices; or

(ii) The generally accepted practices of the industry on those issues concerning common carrier services where—

(A) The governmental regulatory body has not expressed itself;

(B) The governmental regulatory body has declined jurisdiction; or

(C) There is no governmental regulatory body to decide.

(b) *Security*. (1) The contracting officer shall ensure, in accordance with agency procedures, that purchase requests identify—

(i) The nature and extent of information requiring security during telecommunications;

(ii) The requirement for the contractor to secure telecommunications systems;

(iii) The telecommunications security equipment, devices, techniques, or services with which the contractor's telecommunications security equipment, devices, techniques, or services must be interoperable; and

(iv) The approved telecommunications security equipment, devices, techniques, or services, such as found in the National Security Agency's Information Systems Security Products and Services Catalogue.

(2) Contractors and subcontractors shall provide all telecommunications security techniques or services required for performance of Government contracts.

(3) Except as provided in paragraph (b)(4) of this subsection, contractors and subcontractors shall normally provide all required telecommunications security equipment or devices as plant equipment in accordance with FAR part 45. In some cases, such as for communications security (COMSEC) equipment designated as controlled cryptographic item (CCI), contractors or subcontractors must also meet ownership eligibility conditions.

(4) When the contractor or subcontractor does not meet ownership eligibility conditions, the head of the agency may authorize provision of the necessary facilities as Government-furnished property or acquisition as contractor-acquired property, as long as conditions of FAR 45.303 are met.

(c) *Foreign carriers*. For information on contracting with foreign carriers, see PGI 239.7402(c).

[56 FR 36429, July 31, 1991, as amended at 56 FR 67220, Dec. 30, 1991; 62 FR 1060, Jan. 8, 1997; 71 FR 39011, July 11, 2006]

239.7403–239.7404 [Reserved]

239.7405 Delegated authority for telecommunications resources.

The contracting officer may enter into a telecommunications service contract on a month-to-month basis or for any longer period or series of periods, not to exceed a total of 10 years. See PGI 239.7405 for documents relating to this contracting authority, which the General Services Administration has delegated to DoD.

[70 FR 67918, Nov. 9, 2005]

239.7406 Cost or pricing data and information other than cost or pricing data.

(a) Common carriers are not required to submit cost or pricing data before award of contracts for tariffed services. Rates or preliminary estimates quoted by a common carrier for tariffed telecommunications services are considered to be prices set by regulation within the provisions of 10 U.S.C. 2306a. This is true even if the tariff is set after execution of the contract.

(b) Rates or preliminary estimates quoted by a common carrier for nontariffed telecommunications services or by a noncommon carrier for any telecommunications service are not considered prices set by law or regulation.

(c) Contracting officers shall obtain sufficient information to determine that the prices are reasonable in accordance with FAR 15.403–3 or 15.403–4. See PGI 239.7406 for examples of instances where additional information may be necessary to determine price reasonableness.

[62 FR 40473, July 29, 1997, as amended at 63 FR 11539, Mar. 9, 1998; 70 FR 67919, Nov. 9, 2005; 71 FR 39011, July 11, 2006]

239.7407 Type of contract.

When acquiring telecommunications services, the contracting officer may

use a basic agreement (see FAR 16.702) in conjunction with communication service authorizations. When using this method, follow the procedures at PGI 239.7407.

[71 FR 27646, May 12, 2006]

239.7408 Special construction.

239.7408–1 General.

(a) Special construction normally involves a common carrier giving a special service or facility related to the performance of the basic telecommunications service requirements.

This may include—

(1) Moving or relocating equipment;

(2) Providing temporary facilities;

(3) Expediting provision of facilities; or

(4) Providing specially constructed channel facilities to meet Government requirements.

(b) Use this subpart instead of FAR part 36 for acquisition of ''special construction.''

(c) Special construction costs may be—

(1) A contingent liability for using telecommunications services for a shorter time than the minimum to reimburse the contractor for unamortized nonrecoverable costs. These costs are usually expressed in terms of a termination liability, as provided in the contract or by tariff;

(2) A onetime special construction charge;

(3) Recurring charges for constructed facilities;

(4) A minimum service charge;

(5) An expediting charge; or

(6) A move or relocation charge.

(d) When a common carrier submits a proposal or quotation which has special construction requirements, the contracting officer shall require a detailed special construction proposal. Analyze all special construction proposals to—

(1) Determine the adequacy of the proposed construction;

(2) Disclose excessive or duplicative construction; and

(3) When different forms of charge are possible, provide for the form of charge most advantageous to the Government.

(e) When possible, analyze and approve special construction charges before receiving the service. Impose a ceiling on the special construction costs before authorizing the contractor to proceed, if prior approval is not possible. The contracting officer must approve special construction charges before final payment.

[56 FR 36429, July 31, 1991, as amended at 71 FR 39011, July 11, 2006]

239.7408–2 Applicability of construction labor standards for special construction.

(a) The construction labor standards in FAR Subpart 22.4 ordinarily do not apply to special construction. However, if the special construction includes construction, alteration, or repair (as defined in FAR 22.401) of a public building or public work, the construction labor standards may apply. Determine applicability under FAR 22.402.

(b) Each CSA or other type contract which is subject to construction labor standards under FAR 22.402 shall cite that fact.

[56 FR 36429, July 31, 1991, as amended at 71 FR 39011, July 11, 2006]

239.7409 Special assembly.

(a) Special assembly is the designing, manufacturing, arranging, assembling, or wiring of equipment to provide telecommunications services that cannot be provided with general use equipment.

(b) Special assembly rates and charges shall be based on estimated costs. The contracting officer should negotiate special assembly rates and charges before starting service. When it is not possible to negotiate in advance, use provisional rates and charges subject to adjustment, until final rates and charges are negotiated. The CSAs authorizing the special assembly shall be modified to reflect negotiated final rates and charges.

[56 FR 36429, July 31, 1991, as amended at 71 FR 39011, July 11, 2006]

239.7410 Cancellation and termination.

(a)(1) Cancellation is stopping a requirement after placing of an order but before service starts.

(2) Termination is stopping a requirement after placing an order and after service starts.

(b) Determine cancellation or termination charges under the provisions of the applicable tariff or agreement/contract.

239.7411 Contract clauses.

(a) In addition to other appropriate FAR and DFARS clauses, use the following clauses in solicitations, contracts, and basic agreements for telecommunications services. Modify the clauses only if necessary to meet the requirements of a governmental regulatory agency—

(1) 252.239–7002, Access;

(2) 252.239–7004, Orders for Facilities and Services;

(3) 252.239–7005, Rates, Charges, and Services;

(4) 252.239–7006, Tariff Information;

(5) 252.239–7007, Cancellation or Termination of Orders;

(6) 252.239–7008, Reuse Arrangements.

(b) Use the following clauses in solicitations, contracts, and basic agreements for telecommunications services when the acquisition includes or may include special construction. Modify the clauses only if necessary to meet the requirements of a governmental regulatory agency—

(1) 252.239–7011, Special Construction and Equipment Charges; and

(2) 252.239–7012, Title to Telecommunication Facilities and Equipment.

(c) Use the following clauses in basic agreements for telecommunications services—

(1) 252.239–7013, Obligation of the Government;

(2) 252.239–7014, Term of Agreement, and insert the effective date of the agreement in paragraph (a) of the clause; and

(3) 252.239–7015, Continuation of Communication Service Authorizations, as appropriate, and insert in paragraph (a) of the clause, the name of the contracting office and the basic agreement or contract number which is being superseded.

(d) Use the clause at 252.239–7016, Telecommunications Security Equipment, Devices, Techniques, and Services, in solicitations and contracts when performance of a contract requires secure telecommunications.

[56 FR 36429, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992; 62 FR 40473, July 29, 1997; 70 FR 67919, Nov. 9, 2005; 71 FR 39011, July 11, 2006]

PART 241—ACQUISITION OF UTILITY SERVICES

Subpart 241.1—General

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AUTHORITY: 48 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 63 FR 11539, Mar. 9, 1998, unless otherwise noted.

Subpart 241.1—General

241.101 Definitions.

As used in this part—

Independent regulatory body means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

Nonindependent regulatory body means a body that regulates a utility supplier which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility.

Regulated utility supplier means a utility supplier regulated by an independent regulatory body.

Service power procurement officer means for the—

(1) Army, the Chief of Engineers;

(2) Navy, the Commander, Naval Facilities Engineering Command;

(3) Air Force, the head of a contracting activity; and

(4) Defense Logistics Agency, the head of a contracting activity.

[63 FR 11539, Mar. 9, 1998, as amended at 71 FR 3417, Jan. 23, 2006]

241.102 Applicability.

(a) This part applies to purchase of utility services from nonregulated and regulated utility suppliers. It includes the acquisition of liquefied petroleum gas as a utility service when purchased from regulated utility suppliers.

(b)(7) This part does not apply to third party financed projects. However, it may be used for any purchased utility services directly resulting from such projects, including those authorized by—

(A) 10 U.S.C. 2394 for energy, fuels, and energy production facilities for periods not to exceed 30 years;

(B) 10 U.S.C. 2394a for renewable energy for periods not to exceed 25 years;

(C) 10 U.S.C. 2689 for geothermal resources that result in energy production facilities;

(D) 10 U.S.C. 2809 for potable and waste water treatment plants for periods not to exceed 32 years; and

(E) 10 U.S.C. 2812 for lease/purchase of energy production facilities for periods not to exceed 32 years.

241.103 Statutory and delegated authority.

(1) The contracting officer may enter into a utility service contract related to the conveyance of a utility system for a period not to exceed 50 years (10 U.S.C. 2688(c)(3)).

(2) See PGI 241.103 for statutory authorities and maximum contract periods for utility and energy contracts.

[71 FR 3417, Jan. 23, 2006]

Subpart 241.2—Acquiring Utility Services

241.201 Policy.

(1) DoD, as a matter of comity, generally complies with the current regulations, practices, and decisions of independent regulatory bodies. This policy does not extend to nonindependent regulatory bodies.

(2) Purchases of utility services outside the United States may use—

(i) Formats and technical provisions consistent with local practice; and

(ii) Dual language forms and contracts.

(3) Rates established by an independent regulatory body—

(i) Are considered ''prices set by law or regulation'';

(ii) Are sufficient to set prices without obtaining cost or pricing data (see FAR Subpart 15.4); and

(iii) Are a valid basis on which prices can be determined fair and reasonable.

(4) Compliance with the regulations, practices, and decisions of independent regulatory bodies as a matter of comity is not a substitute for the procedures at FAR 41.202(a).

[71 FR 3418, Jan. 23, 2006]

241.202 Procedures.

(1) *Connection and service charges.* The Government may pay a connection charge when required to cover the cost of the necessary connecting facilities. A connection charge based on the estimated labor cost of installing and removing the facility shall not include salvage cost. A lump-sum connection charge shall be no more than the agreed cost of the connecting facilities less net salvage. The order of precedence for contractual treatment of connection and service charges is—

(i) No connection charge.

(ii) Termination liability. Use when an obligation is necessary to secure the required services. The obligation must be not more than the agreed connection charge, less any net salvage material costs. Use of a termination liability instead of a connection charge requires the approval of the service power procurement officer or designee.

(iii) Connection charge, refundable. Use a refundable connection charge when the supplier refuses to provide the facilities based on lack of capital or published rules which prohibit providing up-front funding. The contract should provide for refund of the connection charge within five years unless a longer period or omission of the refund requirement is authorized by the service power procurement officer or designee.

(iv) Connection and service charges, nonrefundable. The Government may

pay certain nonrefundable, nonrecurring charges including service initiation charges, a contribution in aid of construction, membership fees, and charges required by the supplier's rules and regulations to be paid by the customer. If possible, consider sharing with other than Government users the use of (and costs for) facilities when large nonrefundable charges are required.

(2) *Construction and labor requirements.* Follow the procedures at PGI 241.202(2) for construction and labor requirements associated with connection and service charges.

[71 FR 3417, Jan. 23, 2006]

241.205 Separate contracts.

Follow the procedures at PGI 241.205 when acquiring utility services by separate contract.

[71 FR 3417, Jan. 23, 2006]

Subpart 241.5—Solicitation Provision and Contract Clauses

241.501 Solicitation provision and contract clauses.

(d)(1) Use a clause substantially the same as the clause at FAR 52.241–7, Change in Rates or Terms and Conditions of Service for Regulated Services, when the utility services to be provided are subject to an independent regulatory body.

(2) Use a clause substantially the same as the clause at FAR 52.241–8, Change in Rates or Terms and Conditions of Service for Unregulated Services, when the utility services to be provided are not subject to a regulatory body or are subject to a nonindependent regulatory body.

[71 FR 3418, Jan. 23, 2006]

241.501–70 Additional clauses.

(a) If the Government must execute a superseding contract and capital credits, connection charge credits, or termination liability exist, use the clause at 252.241–7000, Superseding Contract.

(b) Use the clause at 252.241–70001, Government Access, when the clause at FAR 52.241–5, Contractor's Facilities, is used.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

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242.7501 Policy.
242.7502 Procedures.

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

SOURCE: 56 FR 36437, July 31, 1991, unless otherwise noted.

242.002 Interagency agreements.

(b)(i) DoD requires reimbursement, at a rate set by the Under Secretary of Defense (Comptroller/Chief Financial Officer), from non-DoD organizations, except for—

(A) Quality assurance, contract administration, and audit services provided under a no-charge reciprocal agreement;

(B) Services performed under subcontracts awarded by the Small Business Administration under FAR subpart 19.8; and

(C) Quality assurance and pricing services performed for the Supply and Services Canada.

(ii) Departments and agencies may request an exception from the reimbursement policy in paragraph (b)(i) of this section from the Under Secretary of Defense (Comptroller/Chief Financial Officer). A request must show that an exception is in the best interest of the Government.

(iii) Departments and agencies must pay for services performed by non-DoD activities, foreign governments, or international organizations, unless otherwise provided by reciprocal agreements.

(S–70)(i) Foreign governments and international organizations may request contract administration services on their direct purchases from U.S. producers. Direct purchase is the purchase of defense supplies in the United States through commercial channels for use by the foreign government or international organization.

(ii) Supply and Services Canada (SSC) is permitted to submit its requests for contract administration services directly to the cognizant contract administration office.

(iii) Other foreign governments (including Canadian government organizations other than SSC) and international organizations send their requests for contract administration services to the DoD Central Control Point (CCP) at the Headquarters, Defense Contract Management Agency, International and Federal Business Team. Contract administration offices provide services only upon request from the CCP. The CCP shall follow the procedures at PGI 242.002(S–70)(iii).

[64 FR 61029, Nov. 9, 1999, as amended at 65 FR 52952, Aug. 31, 2000; 65 FR 63804, Oct. 25, 2000; 70 FR 67920, Nov. 9, 2005]

Subpart 242.2—Contract Administration Services

SOURCE: 64 FR 61029, Nov. 9, 1999, unless otherwise noted.

242.200–70 Scope of subpart.

This subpart does not address the contract administration role of a contracting officer's representative (see 201.602).

242.202 Assignment of contract administration.

(a)(i) DoD activities shall not retain any contract for administration that requires performance of any contract administration function at or near contractor facilities, except contracts for—

(A) The National Security Agency;

(B) Research and development with universities;

(C) Flight training;

(D) Management and professional support services;

(E) Mapping, charting, and geodesy services;

(F) Base, post, camp, and station purchases;

(G) Operation or maintenance of, or installation of equipment at, radar or communication network sites;

(H) Communications services;

(I) Installation, operation, and maintenance of space-track sensors and relays;

(J) Dependents Medicare program contracts;

(K) Stevedoring contracts;

(L) Construction and maintenance of military and civil public works, including harbors, docks, port facilities, military housing, development of recreational facilities, water resources, flood control, and public utilities;

(M) Architect-engineer services;

(N) Airlift and sealift services (Air Mobility Command and Military Sealift Command may perform contract administration services at contractor locations involved solely in performance of airlift or sealift contracts);

(O) Subsistence supplies;

(P) Ballistic missile sites (contract administration offices may perform supporting administration of these contracts at missile activation sites during the installation, test, and

checkout of the missiles and associated equipment);

(Q) Operation and maintenance of, or installation of equipment at, military test ranges, facilities, and installations; and

(R) The Defense Energy Support Center, Defense Logistics Agency.

(ii) Contract administration functions for base, post, camp, and station contracts on a military installation are normally the responsibility of the installation or tenant commander. However, the Defense Contract Management Agency (DCMA) shall, upon request of the military department, and subject to prior agreement, perform contract administration services on a military installation.

(iii) DCMA shall provide preaward survey assistance for post, camp, and station work performed on a military installation. The contracting office and the DCMA preaward survey monitor should jointly determine the scope of the survey and individual responsibilities.

(iv) To avoid duplication, contracting offices shall not locate their personnel at contractor facilities, except—

(A) In support of contracts retained for administration in accordance with paragraph (a)(i) of this section; or

(B) As permitted under subpart 242.74.

(e)(1)(A) In special circumstances, a contract administration office may request support from a component not listed in the Federal Directory of Contract Administration Services Components (available via the Internet at *http://home.dcma.mil/casbook/casbook.htm*). An example is a situation where the contractor's work site is on a military base and a base organization is asked to provide support. Before formally sending the request, coordinate with the office concerned to ensure that resources are available for, and capable of, providing the support.

(B) When requesting support on a subcontract that includes foreign contract military sale (FMS) requirements, the contract administration office shall—

(*1*) Mark ''FMS Requirement'' on the face of the documents; and

(*2*) For each FMS case involved, provide the FMS case identifier, associated item quantities, DoD prime contract number, and prime contract line/subline item number.

[64 FR 61029, Nov. 9, 1999, as amended at 65 FR 52953, Aug. 31, 2000; 66 FR 49861, Oct. 1, 2001; 66 FR 63335, Dec. 6, 2001; 70 FR 52034, Sept. 1, 2005; 70 FR 67920, Nov. 9, 2005]

Subpart 242.3—Contract Administration Office Functions

242.301 General.

Contract administration services performed outside the U.S. should be performed in accordance with FAR 42.301 unless there are no policies and procedures covering a given situation. In this case, coordinate proposed actions with the appropriate U.S. country teams or commanders of unified and specified commands.

242.302 Contract administration functions.

(a)(4) Also, review and evaluate—

(A) Contractor estimating systems (see FAR 15.407–5); and

(B) Contractor material management and accounting systems under subpart 242.72.

(7) See 242.7502 for ACO responsibilities with regard to receipt of an audit report identifying significant accounting system or related internal control deficiencies.

(9) For additional contract administration functions related to IR&D/B&P projects performed by major contractors, see 242.771–3(a).

(12) Also perform all payment administration in accordance with any applicable payment clauses.

(13)(A) Do not delegate the responsibility to make payments to the Defense Contract Management Agency (DCMA).

(B) Follow the procedures at PGI 242.302(a)(13)(B) for designation of payment offices.

(39) See 223.370 for contract administration responsibilities on contracts for ammunition and explosives.

(67) Also support program offices and buying activities in precontractual efforts leading to a solicitation or award.

(S–70) Serve as the single point of contact for all Single Process Initiative (SPI) Management Council activities. The ACO shall negotiate and execute facilitywide class modifications

and agreements for SPI processes, when authorized by the affected components.

(S–71) DCMA has responsibility for reviewing earned value management system (EVMS) plans and for verifying initial and continuing contractor compliance with DoD EVMS criteria. The contracting officer shall not retain this function.

(b)(S–70) Issue, negotiate, and execute orders under basic ordering agreements for overhaul, maintenance, and repair.

[71 FR 44928, Aug. 8, 2006]

Subpart 242.5—Postaward Orientation

242.503 Postaward conferences.

242.503–2 Post-award conference procedure.

DD Form 1484, Post-Award Conference Record, may be used in conducting the conference and in preparing the conference report.

[70 FR 67920, Nov. 9, 2005]

Subpart 242.6—Corporate Administrative Contracting Officer

242.602 Assignment and location.

(c)(2) If the agencies cannot agree, refer the matter to the Director of Defense Procurement and Acquisition Policy.

[56 FR 36437, July 31, 1991, as amended at 68 FR 7440, Feb. 14, 2003]

Subpart 242.7—Indirect Cost Rates

242.705 Final indirect cost rates.

242.705–1 Contracting officer determination procedure.

(a) *Applicability and responsibility*. (1) The corporate administrative contracting officer and individual administrative contracting officers shall jointly decide how to conduct negotiations. Follow the procedures at PGI 242.705–1(a)(1) when negotiations are conducted on a coordinated basis.

[70 FR 67920, Nov. 9, 2005]

242.705–2 Auditor determination procedure.

(b) *Procedures.*

(2)(iii) When agreement cannot be reached with the contractor, the auditor will issue a DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved, in addition to the advisory report to the administrative contracting officer.

[56 FR 36437, July 31, 1991, as amended at 60 FR 61599, Nov. 30, 1995; 64 FR 61030, Nov. 9, 1999; 70 FR 67920, Nov. 9, 2005]

242.771 Independent research and development and bid and proposal costs.

242.771–1 Scope.

This section implements 10 U.S.C. 2372, Independent research and development and bid and proposal costs: Payments to contractors.

[64 FR 8730, Feb. 23, 1999]

242.771–2 Policy.

Defense contractors are encouraged to engage in independent research and development and bid and proposal (IR&D/B&P) activities of potential interest to DoD, including activities cited in 231.205–18(c)(iii)(B).

[64 FR 8730, Feb. 23, 1999]

242.771–3 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) or corporate ACO shall—

(1) Determine cost allowability of IR&D/B&P costs as set forth in 231.205–18 and FAR 31.205–18.

(2) Determine whether IR&D/B&P projects performed by major contractors (see 231.205–18(a)) are of potential interest to DoD; and

(3) Notify the contractor promptly of any IR&D/B&P activities that are not of potential interest to DoD.

(b) The Defense Contract Management Agency or the military department responsible for performing contract administration functions is responsible for providing the Defense Contract Audit Agency (DCAA) with IR&D/B&P statistical information, as necessary, to assist DCAA in the annual report required by paragraph (c) of this subsection.

(c) DCAA is responsible for submitting an annual report to the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics (OUSD (AT&L))) setting forth required statistical information relating to the DoD-wide IR&D/B&P program.

(d) The Director, Defense Research and Engineering (OUSD(AT&L)DDR&E), is responsible for establishing a regular method for communication—

(1) From DoD to contractors, of timely and comprehensive information regarding planned or expected DoD future needs; and

(2) From contractors to DoD, of brief technical descriptions of contractor IR&D projects.

[64 FR 8730, Feb. 23, 1999, as amended at 65 FR 39706, June 27, 2000; 65 FR 52953, Aug. 31, 2000; 68 FR 7440, Feb. 14, 2003]

Subpart 242.8—Disallowance of Costs

242.803 Disallowing costs after incurrence.

(a) *Contracting officer receipt of vouchers.* Contracting officer receipt of vouchers is applicable only for cost-reimbursement contracts with the Canadian Commercial Corporation. See 225.870–5(b) for invoice procedures.

(b) *Auditor receipt of voucher.*

(i) The contract auditor is the authorized representative of the contracting officer for—

(A) Receiving vouchers from contractors;

(B) Approving interim vouchers for provisional payment (this includes approving the fee portion of vouchers in accordance with the contract schedule and administrative contracting officer instructions) and sending them to the disbursing office;

(C) Authorizing direct submission of interim vouchers for provisional payment to the disbursing office for contractors with approved billing systems;

(D) Reviewing completion/final vouchers and sending them to the administrative contracting officer; and

(E) Issuing DCAA Forms 1, Notice of Contract Costs Suspended and/or Disapproved, to deduct costs where allowability is questionable.

(ii) The administrative contracting officer—

(A) Approves all completion/final vouchers and sends them to the disbursing officer; and

(B) May issue or direct the issuance of DCAA Form 1 on any cost when there is reason to believe it should be suspended or disallowed.

[61 FR 25409, May 21, 1996, as amended at 61 FR 25409, May 21, 1996; 61 FR 50454, Sept. 26, 1996]

Subpart 242.11—Production Surveillance and Reporting

242.1104 Surveillance requirements.

(a) The cognizant contract administration office (CAO)—

(i) Shall perform production surveillance on all contractors that have Criticality Designator A or B contracts;

(ii) Shall not perform production surveillance on contractors that have only Criticality Designator C contracts, unless specifically requested by the contracting officer; and

(iii) When production surveillance is required, shall—

(A) Conduct a periodic risk assessment of the contractor to determine the degree of production surveillance needed for all contracts awarded to that contractor. The risk assessment shall consider information provided by the contractor and the contracting officer;

(B) Develop a production surveillance plan based on the risk level determined during a risk assessment;

(C) Modify the production surveillance plan to incorporate any special surveillance requirements for individual contracts, including any requirements identified by the contracting officer; and

(D) Monitor contract progress and identify potential contract delinquencies in accordance with the production surveillance plan. Contracts with Criticality Designator C are exempt from this requirement unless specifically requested by the contracting officer.

[69 FR 31912, June 8, 2004]

242.1105 Assignment of criticality designator.

(1) Contracting officers shall—

(i) Assign criticality designator A to items with a priority 01, 02, 03, or 06 (if emergency supply of clothing) under DoD 4140.1–R, DoD Materiel Management Regulation; and

(ii) Ordinarily assign criticality designator C to unilateral purchase orders.

(2) Only the contracting officer shall change the assigned designator.

[56 FR 36437, July 31, 1991, as amended at 67 FR 61516, Oct. 1, 2002]

242.1106 Reporting requirements.

(a) See DoDI 5000.2, Operation of the Defense Acquisition System, for reporting requirements for defense technology projects and acquisition programs.

(b)(i) Within four working days after receipt of the contractor's report, the CAO must provide the report and any required comments to the contracting officer and, unless otherwise specified in the contract, the inventory control manager.

(ii) If the contractor's report indicates that the contract is on schedule and the CAO agrees, the CAO does not need to add further comments. In all other cases, the CAO must add comments and recommend a course of action.

[65 FR 39723, June 27, 2000, as amended at 70 FR 14575, Mar. 23, 2005; 73 FR 21848, Apr. 23, 2008]

242.1107 Contract clause.

(b) When using the clause at FAR 52.242–2, include the following instructions in the contract schedule—

(i) Frequency and timing of reporting (normally 5 working days after each reporting period);

(ii) Contract line items, exhibits, or exhibit line items requiring reports;

(iii) Offices (with addressees/codes) where reports should be sent (always include the contracting office and contract administration office); and

(iv) The following requirements for report content—

(A) The problem, actual or potential, and its cause;

(B) Items and quantities affected;

(C) When the delinquency started or will start;

(D) Actions taken to overcome the delinquency;

(E) Estimated recovery date; and/or

(F) Proposed schedule revision.

Subpart 242.12—Novation and Change-of-Name Agreements

242.1203 Processing agreements.

The responsible contracting officer shall process and execute novation and change-of-name agreements in accordance with the procedures at PGI 242.1203.

[70 FR 67920, Nov. 9, 2005]

242.1204 Agreement to recognize a successor in interest (novation agreement).

(i) When a novation agreement is required and the transferee intends to incur restructuring costs as defined at 213.205–70, the cognizant contracting officer shall include the following provision as paragraph (b)(7) of the novation agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i):

''(7)(i) Except as set forth in subparagraph (7)(ii) below, the Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(ii) The Government recognizes that restructuring by the Transferee incidental to the acquisition/merger may be in the best interests of the Government. Restructuring costs that are allowable under Part 31 of the Federal Acquisition Regulation (FAR) or Part 231 of the Defense Federal Acquisition Regulation Supplement (DFARS) may be reimbursed under flexibily-priced novated contracts, provided the Transferee demonstrates that the restructuring will reduce overall costs to the Department of Defense (DoD) (and to the National Aeronautics and Space Administration (NASA), where there is a mix of DoD and NASA contracts), and the requirements included in DFARS 231.205–70 are met. Restructuring costs shall not be allowed on novated contracts unless there is

an audit of the restructuring proposal; a determination by the contracting officer of overall reduced costs to DoD/NASA; and an Advance Agreement setting forth a cumulative cost ceiling for restructuring projects and the period to which such costs shall be assigned.''

[60 FR 1749, Jan. 5, 1995, as amended at 61 FR 16882, Apr. 18, 1996; 65 FR 63805, Oct. 25, 2000]

Subpart 242.14—Traffic and Transportation Management

242.1402 Volume movements within the contiguous United States.

(a)(2) In reporting planned and actual volume movements—

(A) The contracting officer—

(*1*) Provides production schedules and planned destinations to the servicing transportation office as soon as the information is available to permit the transportation office to determine if volume movements will occur. If a volume movement appears likely, the transportation office reports a planned volume movement in accordance with DoD 4500.9–R, Defense Transportation Regulation, Part II, Chapter 201.

(*2*) Sends a copy of the volume movement report to the contract administration office.

(B) The contract administration office submits a volume movement report when—

(*1*) Significant changes are made to the movement requirements; or

(*2*) The contracting office did not submit a report.

(C) Include the destination country, freight forwarder, and, if known, port of embarkation on volume movement reports for foreign military sale shipments.

[56 FR 36437, July 31, 1991, as amended at 65 FR 50143, Aug. 17, 2000]

242.1403 Shipping documents covering f.o.b. origin shipments.

(a)(i) Procedures for the contractor to obtain Government bills of lading are in the clause at 252.242–7003, Application for U.S. Government Shipping Documentation/Instructions.

(ii) The term ''commercial bills of lading'' includes the use of any commercial form or procedure.

[56 FR 36437, July 31, 1991, as amended at 65 FR 50144, Aug. 17, 2000]

242.1404 Shipments by parcel post or other classes of mail.

242.1404–1 Parcel post eligible shipments.

(b)(1) See DoD 4525.8–M, DoD Official Mail Manual.

[56 FR 67220, Dec. 30, 1991]

242.1404–2 Contract clauses.

When using FAR 52.213–1, Fast Payment Procedures, do not use FAR clauses 52.242–10, F.o.b. Origin—Government Bills of Lading or Prepaid Postage, or 52.242–11, F.o.b. Origin—Government Bills of Lading or Indicia Mail.

242.1404–2–70 Additional clause.

Use the clause at 252.242–7003, Application for U.S. Government Shipping Documentation/Instructions, when using the clause at FAR 52.242–10, F.o.b. Origin—Government Bills of Lading or Prepaid Postage, or FAR 52.242–11, F.o.b. Origin—Government Bills of Lading or Indicia Mail.

[62 FR 34127, June 24, 1997]

242.1405 Discrepancies incident to shipment of supplies.

(a) See also DoD 4500.9–R, Defense Transportation Regulation, Part II, Chapter 210, for discrepancy procedures.

[65 FR 50144, Aug. 17, 2000]

242.1470 Demurrage and detention charges.

(a) Carrier demurrage rules usually allow for a ''free time'' for loading or unloading cars or for any other purpose, and impose charges for cars held beyond this period. If a contractor detains railroad cars beyond the ''free time,'' the contractor has to pay the carrier's published tariff charges for demurrage.

(b) Detention results when a shipper or consignee holds motor carrier equipment beyond a reasonable period for loading, unloading, forwarding directions, or any other reason. Detention rules and charges are not uniform; they

are published in individual carrier or agency tenders.

[56 FR 36437, July 31, 1991, as amended at 65 FR 50144, Aug. 17, 2000]

Subpart 242.70 [Reserved]

Subpart 242.71—Voluntary Refunds

242.7100 General.

A voluntary refund is a payment or credit (adjustment under one or more contracts or subcontracts) to the Government from a contractor or subcontractor that is not required by any contractual or other legal obligation. Follow the procedures at PGI 242.7100 for voluntary refunds.

[70 FR 67920, Nov. 9, 2005]

Subpart 242.72—Contractor Material Management and Accounting System

SOURCE: 65 FR 77833, Dec. 13, 2000, unless otherwise noted.

242.7200 Scope of subpart.

(a) This subpart provides policies, procedures, and standards for use in the evaluation of a contractor's material management and accounting system (MMAS).

(b) The policies, procedures, and standards in this subpart—

(1) Apply only when the contractor has contracts exceeding the simplified acquisition threshold that are not for the acquisition of commercial items and are either—

(i) Cost-reimbursement contracts; or

(ii) Fixed-price contracts with progress payments made on the basis of costs incurred by the contractor as work progresses under the contract; and

(2) Do not apply to small businesses, educational institutions, or nonprofit organizations.

242.7201 Definitions.

Material management and accounting system and *valid time-phased requirements* are defined in the clause at 252.242–7004, Material Management and Accounting System.

242.7202 Policy.

DoD policy is for its contractors to have an MMAS that conforms to the standards in paragraph (e) of the clause at 252.242–7004, so that the system—

(a) Reasonably forecasts material requirements;

(b) Ensures the costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements; and

(c) Maintains a consistent, equitable, and unbiased logic for costing of material transactions.

242.7203 Review procedures.

(a) *Criteria for conducting reviews.* Conduct an MMAS review when—

(1) A contractor has $40 million of qualifying sales to the Government during the contractor's preceding fiscal year; and

(2) The administrative contracting officer (ACO), with advice from the auditor, determines an MMAS review is needed based on a risk assessment of the contractor's past experience and current vulnerability.

(b) *Qualifying sales.* Qualifying sales are sales for which cost or pricing data were required under 10 U.S.C. 2306a, as implemented in FAR 15.403, or that are contracts priced on other than a firm-fixed-price or fixed-price with economic price adjustment basis. Sales include prime contracts, subcontracts, and modifications to such contracts and subcontracts.

(c) *System evaluation.* Cognizant contract administration and audit activities must jointly establish and manage programs for evaluating the MMAS systems of contractors and must annually establish a schedule of contractors to be reviewed. In addition, they must—

(1) Conduct reviews as a team effort.

(i) the ACO—

(A) Appoints a team leader; and

(B) Ensures that the team includes appropriate functional specialists (*e.g.*, industrial specialist, engineer, property administrator, auditor).

(ii) The team leader—

(A) Advises the ACO and the contractor of findings during the review and at the exit conference; and

(B) Makes every effort to resolve differences regarding questions of fact during the review.

(iii) The contract auditor—

(A) Participates as a member of the MMAS team or serves as the team leader (see paragraph (c)(1)(i) of this section); and

(B) Issues an audit report for incorporation into the MMAS report based on an analysis of the contractor's books, accounting records, and other related data.

(2) Tailor reviews to take full advantage of the day-to-day work done by both organizations.

(3) Prepare the MMAS report.

(d) *Disposition of evaluation team findings.* The team leader must document the evaluation team findings and recommendations in the MMAS report to the ACO. If there are any significant MMAS deficiencies, the report must provide an estimate of the adverse impact on the Government resulting from those deficiencies.

(1) *Initial notification to the contractor.* The ACO must provide a copy of the report to the contractor immediately upon receipt from the team leader.

(i) The ACO must notify the contractor in a timely manner if there are no deficiencies.

(ii) If there are any deficiencies, the ACO must request the contractor to provide a written response within 30 days (or such other date as may be mutually agreed to by the ACO and the contractor) from the date of initial notification.

(iii) If the contractor agrees with the report, the contractor has 60 days (or such other date as may be mutually agreed to by the ACO and the contractor) to correct any identified deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.

(iv) If the contractor disagrees with the report, the contractor must provide rationale in the written response.

(2) *Evaluation of the contractor's response.* The ACO, in consultation with the auditor, evaluates the contractor's response and determines whether—

(i) The MMAS contains any deficiencies and, if so, any corrective action is needed;

(ii) The deficiencies are significant enough to result in the reduction of progress payments or disallowance of costs on vouchers; and

(iii) Proposed corrective actions (if the contractor submitted them) are adequate to correct the deficiencies.

(3) *Notification of ACO determination.* (i) The ACO must notify the contractor in writing (copy to auditor and functional specialists) of—

(A) Any deficiencies and the necessary corrective action;

(B) Acceptability of the contractor's corrective action plan (if one was submitted) or the need for a corrective action plan; and

(C) Any decision to reduce progress payments or disallow costs on vouchers.

(ii) The Government does not approve or disapprove the contractor's MMAS. ACO notifications should avoid any such implications.

(iii) From the time the ACO determines that there are any significant MMAS deficiencies until the time the deficiencies are corrected, all field pricing reports for that contractor must contain a recommendation relating to proposed adjustments necessary to protect the Government's interests.

(iv) The ACO should consider the effect of any significant MMAS deficiencies in reviews of the contractor's estimating system (see 215.407–5).

(4) *Reductions or disallowances.* (i) When the ACO determines the MMAS deficiencies have a material impact on Government contract costs, the ACO must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503–6) and/or disallow costs on vouchers (in accordance with FAR 42.803). The reductions or disallowances must remain in effect until the ACO determines that—

(A) The deficiencies are corrected; or

(B) The amount of the impact is immaterial.

(ii) The maximum payment adjustment is the adverse material impact to the Government as specified in the MMAS report. The ACO should use the maximum adjustment when the contractor did not submit a corrective action plan with its response, or when the plan is unacceptable. In other cases,

the ACO should consider the quality of the contractor's corrective action plan in determining the appropriate percentage.

(iii) As the contractor implements its accepted corrective action plan, the ACO should reinstate a portion of withheld amounts commensurate with the contractor's progress in making corrections. However, the ACO must not fully reinstate withheld amounts until the contractor corrects the deficiencies, or until the impact of the deficiencies become immaterial.

(5) *Monitoring contractor's corrective action.* The ACO and the auditor must monitor the contractor's progress in correcting deficiencies. When the ACO determines the deficiencies have been corrected, the ACO must notify the contractor in writing. If the contractor fails to make adequate progress, the ACO must take further action. The ACO may—

(i) Elevate the issue to higher level management;

(ii) Further reduce progress payments and/or disallow costs on vouchers;

(iii) Notify the contractor of the inadequacy of the contractor's cost estimating system and/or cost accounting system; and

(iv) Issue cautions to contracting activities regarding the award of future contracts.

242.7204 Contract clause.

Use the clause at 252.242–7004, Material Management and Accounting System, in all solicitations and contracts exceeding the simplified acquisition threshold that are not for the acquisition of commercial items and—

(a) Are not awarded to small businesses, educational institutions, or nonprofit organizations; and

(b) Are either—

(1) Cost-reimbursement contracts; or

(2) Fixed-price contracts with progress payments made on the basis of costs incurred by the contractor as work progresses under the contract.

Subpart 242.73—Contractor Insurance/Pension Review

242.7301 General.

(a) The administrative contracting officer (ACO) is responsible for determining the allowability of insurance/pension costs in Government contracts and for determining the need for a Contractor/Insurance Pension Review (CIPR). Defense Contract Management Agency (DCMA) insurance/pension specialists and Defense Contract Audit Agency (DCAA) auditors assist ACOs in making these determinations, conduct CIPRs when needed, and perform other routine audits as authorized under FAR 42.705 and 52.215–2. A CIPR is a DCMA/DCAA joint review that—

(1) Provides an in-depth evaluation of a contractor's—

(i) Insurance programs;

(ii) Pension plans;

(iii) Other deferred compensation plans; and

(iv) Related policies, procedures, practices, and costs; or

(2) Concentrates on specific areas of the contractor's insurance programs, pension plans, or other deferred compensation plans.

(b) DCMA is the DoD Executive Agency for the performance of all CIPRs.

(c) DCAA is the DoD agency designated for the performance of contract audit responsibilities related to Cost Accounting Standards administration as described in FAR Subparts 30.2 and 30.6 as they relate to a contractor's insurance programs, pension plans, and other deferred compensation plans.

[71 FR 9273, Feb. 23, 2006]

242.7302 Requirements.

Follow the procedures at PGI 242.7302 to determine if a CIPR is needed.

[71 FR 9273, Feb. 23, 2006]

242.7303 Responsibilities.

Follow the procedures at PGI 242.7303 when conducting a CIPR.

[71 FR 9273, Feb. 23, 2006]

Subpart 242.74—Technical Representation at Contractor Facilities

242.7400 General.

(a) Program managers may conclude that they need technical representation in contractor facilities to perform non-contract administration service (CAS) technical duties and to provide liaison, guidance, and assistance on systems and programs. In these cases, the program manager may assign technical representatives under the procedures in 242.7401.

(b) A technical representative is a representative of a DoD program, project, or system office performing non-CAS technical duties at or near a contractor facility. A technical representative is not—

(1) A representative of a contract administration or contract audit component; or

(2) A contracting officer's representative (see 201.602).

[70 FR 67921, Nov. 9, 2005]

242.7401 Procedures.

When the program, project, or system manager determines that a technical representative is required, follow the procedures at PGI 242.7401.

[70 FR 67921, Nov. 9, 2005]

Subpart 242.75—Contractor Accounting Systems and Related Controls

242.7501 Policy.

Contractors receiving cost-reimbursement or incentive type contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, shall maintain an accounting system and related internal controls throughout contract performance which provide reasonable assurance that—

(a) Applicable laws and regulations are complied with;

(b) The accounting system and cost data are reliable;

(c) Risk of misallocations and mischarges are minimized; and

(d) Contract allocations and charges are consistent with invoice procedures.

[60 FR 29500, June 5, 1995. Redesignated at 70 FR 67921, Nov. 7, 2005]

242.7502 Procedures.

(a) Upon receipt of an audit report identifying significant accounting system or related internal control deficiencies, the ACO will—

(1) Provide a copy of the report to the contractor and allow 30 days, or a reasonable extension, for the contractor to respond;

(2) 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.

(3) If the contractor disagrees, the contractor should provide rationale in its written response.

(4) The ACO will consider whether it is appropriate to suspend a percentage of progress payments or reimbursement of costs proportionate to the estimated cost risk to the Government, considering audit reports or other relevant input, until the contractor submits a corrective action plan acceptable to the ACO and corrects the deficiencies. (See FAR 32.503–6 (a) and (b) and FAR 42.302(a)(7)).

[60 FR 29500, June 5, 1995. Redesignated at 70 FR 67921, Nov. 7, 2005]

PART 243—CONTRACT MODIFICATIONS

Subpart 243.1—General

Sec.
243.107–70 Notification of substantial impact on employment.
243.170 Identification of foreign military sale (FMS) requirements.
243.171 Obligation or deobligation of funds.

Subpart 243.2—Change Orders

243.204 Administration.
243.204–70 Certification of requests for equitable adjustment.
243.205 Contract clauses.
243.205–70 Pricing of contract modifications.
243.205–71 Requests for equitable adjustment.

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

SOURCE: 56 FR 36446, July 31, 1991, unless otherwise noted.

Subpart 243.1—General

243.107–70 Notification of substantial impact on employment.

The Secretary of Defense is required to notify the Secretary of Labor if a modification of a major defense contract or subcontract will have a substantial impact on employment. The clause prescribed at 249.7003(c) requires that the contractor notify its employees, its subcontractors, and State and local officials when a contract modification will have a substantial impact on employment.

[56 FR 67220, Dec. 30, 1991, as amended at 70 FR 67922, Nov. 9, 2005]

243.170 Identification of foreign military sale (FMS) requirements.

Follow the procedures at PGI 243.170 for identifying contract modifications that add FMS requirements.

[70 FR 67922, Nov. 9, 2005]

243.171 Obligation or deobligation of funds.

Follow the procedures at PGI 243.171 when obligating or deobligating funds.

[70 FR 67922, Nov. 9, 2005]

Subpart 243.2—Change Orders

243.204 Administration.

Follow the procedures at PGI 243.204 for review and definitization of change orders.

[70 FR 67922, Nov. 9, 2005]

243.204–70 Certification of requests for equitable adjustment.

(a) A request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold may not be paid unless the contract certifies the request in accordance with the clause at 252.243–7002.

(b) To determine if the dollar threshold for requiring certification is met, add together the absolute value of each cost increase and each cost decrease. See PGI 243.204–70(b) for an example.

(c) The certification required by 10 U.S.C. 2410(a), as implemented in the clause at 252.243–7002, is different from the certification required by the Contract Disputes Act of 1978 (41 U.S.C. 605(c)). If the contractor has certified a request for equitable adjustment in accordance with 10 U.S.C. 2410(a), and desires to convert the request to a claim under the Contract Disputes Act, the contractor shall certify the claim in accordance with FAR Subpart 33.2.

[62 FR 37147, July 11, 1997, as amended at 63 FR 11541, Mar. 9, 1998; 70 FR 67922, Nov. 9, 2005]

243.205 Contract clauses.

243.205–70 Pricing of contract modifications.

Use the clause at 252.243–7001, Pricing of Contract Modifications, in solicitations and contracts when anticipating and using a fixed price type contract.

[56 FR 36446, July 31, 1991. Redesignated at 66 FR 49865, Oct. 1, 2001]

243.205–71 Requests for equitable adjustment.

Use the clause at 252.243–7002, Requests for Equitable Adjustment, in solicitations and contracts estimated to exceed the simplified acquisition threshold.

[63 FR 17124, Apr. 8, 1998. Redesignated at 66 FR 49865, Oct. 1, 2001]

PART 244—SUBCONTRACTING POLICIES AND PROCEDURES

Subpart 244.2—Consent to Subcontracts

Sec.
244.202 Contracting officer's evaluation.
244.202–2 Considerations.

Subpart 244.3—Contractors' Purchasing Systems Reviews

244.301 Objective.
244.303 Extent of review.
244.304 Surveillance.
244.305 Granting, withholding, or withdrawing approval.
244.305–70 Granting, withholding, or withdrawing approval.

Subpart 244.4—Subcontracts for Commercial Items and Commercial Components

244.402 Policy requirements.

244.403 Contract clause.

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

SOURCE: 56 FR 36447, July 31, 1991, unless otherwise noted.

Subpart 244.2—Consent to Subcontracts

244.202 Contracting officer's evaluation.

244.202–2 Considerations.

(a) Where other than lowest price is the basis for subcontractor selection, has the contractor adequately substantiated the selection as offering the greatest value to the Government?

[60 FR 29501, June 5, 1995]

Subpart 244.3—Contractors' Purchasing Systems Reviews

244.301 Objective.

The administrative contracting officer (ACO) is solely responsible for initiating reviews of the contractor's purchasing systems, but other organizations may request that the ACO initiate such reviews.

[70 FR 67922, Nov. 9, 2005]

244.303 Extent of review.

Also review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of ''commercial item'' in FAR 2.101.

[67 FR 38023, May 31, 2002]

244.304 Surveillance.

(b) The ACO, or the purchasing system analyst (PSA) with the concurrence of the ACO, may initiate a special review of specific weaknesses in the contractor's purchasing system. See PGI 244.304(b) for guidance on how weaknesses may arise and may be discovered.

[70 FR 67922, Nov. 9, 2005, as amended at 73 FR 4114, Jan. 24, 2008]

244.305 Granting, withholding, or withdrawing approval.

244.305–70 Granting, withholding, or withdrawing approval.

Use this subsection instead of FAR 44.305–2(c) and 44.305–3(b).

(a) At the completion of the in-plant portion of the review, the ACO shall hold an exit conference with the contractor. At the conference, the ACO should—

(1) Present the review team's recommendations, signed by the ACO;

(2) Request the contractor submit its plan for correcting deficiencies or making improvements within 15 days; and

(3) Not comment on the pending or planned decision to grant or withhold approval of the contractor's purchasing system.

(b) The PSA should submit the complete report to the ACO, or any department or agency established review board, within ten days after receipt of the contractor's response under paragraph (a)(2) of this subsection.

(c) The ACO should completely review the report and consider the contractor's response before making a decision on granting, withholding, or withdrawing purchasing system approval. The ACO shall notify the contractor of the decision within ten days after receipt of the report with a copy of the decision to the PSA and the contracting office, when requested.

(d) When a contractor advises that it has corrected deficiencies that led the ACO to withhold or withdraw the purchasing system approval, the ACO—

(1) Shall request the PSA to verify that the contractor has—

(i) Corrected the deficiencies; and

(ii) Implemented any other ACO recommendations.

(2) Should ask for a review of purchasing policies and procedures issued since the last review.

Subpart 244.4—Subcontracts for Commercial Items and Commercial Components

244.402 Policy requirements.

(a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect

the contracting officer's responsibilities or determinations made under FAR 15.403–1(c)(3). Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR part 10.

[67 FR 38023, May 31, 2002]

244.403 Contract clause.

Use the clause at 252.244–7000, Subcontracts for Commercial Items and Commercial Components (DoD Contracts), in solicitations and contracts for supplies or services other than commercial items, that contain any of the following clauses:

(1) 252.225–7014 Preference for Domestic Specialty Metals, Alternate I.

(2) 252.246–7003 Notification of Potential Safety Issues.

(3) 252.247–7023 Transportation of Supplies by Sea.

(4) 252.247–7024 Notification of Transportation of Supplies by Sea.

[72 FR 2636, Jan. 22, 2006]

PART 245—GOVERNMENT PROPERTY

Subpart 245.1—General

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245.104 Review and correction of contractor's property control systems.

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Subpart 245.4—Use and Rental of Government Property

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245.505 Records and reports of Government property.
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245.603 Disposal methods.
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245.607 Scrap.
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245.608–1 General.
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245.608–7 Reimbursement of cost for transfer of contractor inventory.
245.608–70 Contractor inventory redistribution system (CIRS).
245.608–71 Screening industrial plant equipment.
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245.609 Donations.
245.610 Sale of surplus contractor inventory.
245.610–1 Responsibility.
245.610–3 Proceeds of sale.
245.610–4 Contractor inventory in foreign countries.
245.612 Removal and storage.
245.612–3 Special storage at the Government's expense.
245.613 Property disposal determinations.

Subpart 245.70—Appointment of Property Administrators and Plant Clearance Officers

245.7001 Selection, appointment, and termination.
245.7002 Duties and responsibilities of plant clearance officers.

Subpart 245.71—Plant Clearance Forms

245.7101 Forms.
245.7101–1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).
245.7101–2 DD Form 1149, Requisition and Invoice Shipping Document.
245.7101–3 DD Form 1348–1, DoD Single Line Item Release/Receipt Document.
245.7101–4 DD Form 1640, Request for Plant Clearance.

Subpart 245.72—Special Instructions

245.7201 Performing inventory verification and determination of allocability.
245.7202 Establishing a plant clearance case.
245.7203 Assigning plant clearance case numbers.
245.7204 Preparing inventory disposal report.
245.7205 Reporting excess and surplus contractor inventory.
245.7206 Transmitting DD Form 1342, DoD Property Record.

Subpart 245.73—Sale of Surplus Contractor Inventory

245.7301 Policy.
245.7302 Competitive sales.
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245.7302–2 Lotting.
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245.7302–5 Mailing lists.
245.7303 Formal bid procedures.
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245.7306 Sales services.
245.7307 Non-competitive sales.
245.7307–1 General.
245.7307–2 Justification.
245.7308 Antitrust notification.
245.7309 Mandatory terms and conditions—formal invitations.
245.7309–1 Inspection.
245.7309–2 Condition and location of property.
245.7309–3 Consideration of bids.
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245.7310 Special term and conditions.
245.7310–1 Demilitarization.
245.7310–2 Performance bond.
245.7310–3 Liability and insurance.
245.7310–4 Dangerous property.
245.7310–5 Controlled substances.
245.7310–6 Radioactive material.
245.7310–7 Scrap warranty.
245.7310–8 Antitrust clearance.
245.7311 Optional conditions.
245.7311–1 Sales and use tax liability.
245.7311–2 Safety, security, and fire regulations.
245.7311–3 Bid deposits.
245.7311–4 Other special conditions.

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

SOURCE: 56 FR 36448, July 31, 1991, unless otherwise noted.

Subpart 245.1—General

245.104 Review and correction of contractor's property control systems.

(a) The property administrator shall perform property administration in accordance with DoD 4161.2–M, Manual for the Performance of Contract Property Administration.

[56 FR 36448, July 31, 1991, as amended at 56 FR 67220, Dec. 30, 1991]

Subpart 245.3—Providing Government Property to Contractors

245.301 Definitions.

Agency-peculiar property, as used in DoD, means military property and includes end items and integral components of military weapons systems, along with the related peculiar support equipment which is not readily available as a commercial item.

Facilities project means a Government project to provide, modernize or replace facilities for use by a contractor in performing a Government contract or subcontract.

Industrial plant equipment (IPE) means plant equipment in Federal stock group 34 with an acquisition cost of $15,000 or more used for cutting, abrading, grinding, shaping, forming, joining, heating, treating, or otherwise altering the physical properties of materials, components or end items entailed in manufacturing, maintenance, supply, processing, assembly, or research and development operations. IPE is further identified in AR 700–43/NAVSUP PUB 5009/AFM 78–9/DLAM 4215.1, Management of Defense-Owned Industrial Plant Equipment.

Mapping, charting, and geodesy (MC&G) property is defined in the clause at 252.245–7000, Government Furnished Mapping, Charting and Geodesy Property.

Other plant equipment (OPE) means plant equipment regardless of dollar value, used in or in conjunction with the manufacture of components or end items relative to maintenance, supply, processing, assembly or research and development operations. OPE excludes equipment categorized as IPE.

Provide means either to furnish, as in Government-furnished property, or to acquire, as in contractor-acquired property.

245.302 Providing facilities.

245.302–1 Policy.

(a)(4)(A) Comply with DoD Directive 4275.5, Acquisition and Management of Industrial Resources, in processing a request for facilities. Submit requests for approval of facilities projects—

(*1*) To the Secretaries of the Military Departments and the directors of defense agencies for Government-owned facilities projects if the project—

(*i*) Is a research and development-funded effort not exceeding $3 million per fiscal year; or

(*ii*) Is funded from procurement appropriations, approved on a location basis, and does not exceed $5 million for all property efforts during one fiscal year; or

(*iii*) Is in support of a major system or subsystem (including ammunition-related projects) and the total investment will not exceed $25 million during the projected acquisition or maintenance effort.

(*2*) To the Office of the Deputy Under Secretary of Defense (Industrial Affairs and Installations) for projects exceeding the limitations in paragraph (a)(4)(A)(*1*) of this subsection.

(B) The contracting officer shall coordinate the Determination and Finding with the program or project manager.

(C) Departments and agencies must submit reports of facilities projects to the House and Senate Armed Services Committees—

(*1*) At least 30 days before starting facilities projects involving real property (10 U.S.C. 2662); and

(*2*) In advance of starting construction for a facilities project regardless of cost. Use DD Form 1391, FY ___, Military Construction Project Data, to notify congressional committees of projects that are not included in the annual budget.

(b)(1)(A) *Industrial plant equipment.* Before acquiring industrial plant equipment—

(*1*) Submit a DD Form 1419, DoD Industrial Plant Equipment Requisition, to the Defense Supply Center, Richmond (DSCR), Attn: DSCR-JH, 8000 Jefferson Davis Highway, Richmond, Va 23297–5100, in accordance with AR 700–43/NAVSUP PUB 5009/AFM 78–9/DLAM 4215.1, Management of Defense-Owned Industrial Plant Equipment, to determine whether existing, reallocable Government-owned facilities can be used.

(*2*) Do not acquire any item listed on the DD Form 1419 until a certificate of nonavailability is received from DSCR.

(B) *Automatic data processing equipment.* The administrative contracting officer submits contractor requests to acquire automatic data processing equipment to the Defense Information Systems Agency, Chief Information Officer, Defense Automation Resources Management Program Division, Attn: D03D, 701 South Courthouse Road, Arlington, VA 22204–2199, in accordance with the Defense Automation Resources Management Manual.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34127, June 24, 1997; 64 FR 51076, Sept. 21, 1999; 66 FR 49861, Oct. 1, 2001]

245.302–2 Facilities contracts.

Terminate facilities contracts when Government production and research property is no longer required for the performance of Government contracts or subcontracts, unless termination is not in the best interest of the Government. The contractor is not allowed to extend the time for use of property provided under the facilities contract without Government authorization.

245.302–7 Optional property-related clauses for facilities contracts.

Use the clause at 252.225–7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, as prescribed in 225.7017–4.

[57 FR 14995, Apr. 23, 1992]

245.303 Providing material.

245.303–2 Procedures.

When a contractor will be responsible for preparing requisitioning documentation, include in the contract the requirement to prepare the documentation in accordance with DoD 4000.25–1–M, Military Standard Requisitioning and Issue Procedures (MILSTRIP). Copies are available from the address cited at 251.102(e)2.b(2).

245.307 Providing special test equipment.

245.307–2 Acquiring special test equipment.

(b) *Notice and approval.* (1) The review requires a written evaluation from the appropriate technical specialist.

245.310 Providing agency-peculiar property.

(c) All Government-furnished mapping, charting, and geodesy (MC&G) property is under the control of the Director, National Imagery and Mapping Agency (NIMA).

(i) MC&G property shall not be duplicated, copied, or otherwise reproduced for purposes other than those necessary for contract performance.

(ii) Upon completion of contract performance, the contracting officer shall—

(A) Contact the Director, NIMA(PP), 8613 Lee Highway, Fairfax, VA 22031–2137, for disposition instructions;

(B) Direct the contractor to destroy or return all Government-furnished MC&G property not consumed during contract performance; and

(C) Specify the destination and means of shipment for material to be returned to the Government.

[56 FR 36448, July 31, 1991, as amended at 59 FR 27674, May 27, 1994; 64 FR 51076, Sept. 21, 1999]

245.310–70 Contract clause.

Use the clause at 252.245–7000, Government-Furnished Mapping, Charting, and Geodesy Property, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

[57 FR 42632, Sept. 15, 1992]

Subpart 245.4—Use and Rental of Government Property

245.401 Policy.

Government use includes use on contracts for foreign military sales. Use on contracts for foreign military sales shall be on a rent-free basis.

245.403 Rental—Use and charges clause.

(1) The DoD normally recovers a fair share of nonrecurring costs of special tooling and special test equipment by including these costs in its calculation of the nonrecurring cost recoupment charge when major defense equipment is sold by foreign military sales or direct commercial sales to foreign governments or international organizations. Major defense equipment is defined in DODD 2140.2, Recoupment of Nonrecurring Costs on Sales of U.S. Items, as any item of significant military equipment on the United States Munitions List having a nonrecurring RDT&E cost of more than $50 million or a total production cost of more than $200 million.

(2) When these cost thresholds are not met, the contracting officer shall assess rental charges for use of special tooling and special test equipment pursuant to the Use and Charges clause when administratively practicable.

[56 FR 36448, July 31, 1991, as amended at 67 FR 61517, Oct. 1, 2002]

245.405 Contracts with foreign governments or international organizations.

(1) *Approval.* A contractor may use Government production and research property on work for foreign governments and international organizations only when approved in writing by the contracting officer having cognizance of the property. The contracting officer shall grant approval only if—

(i) The use will not interfere with foreseeable requirements of the United States;

(ii) The work is undertaken as a DoD foreign military sale; or

(iii) For a direct commercial sale, the foreign country or international organization would be authorized to contract with the department concerned under the Arms Export Control Act.

(2) *Use charges.* (i) The Use and Charges clause is applicable on direct commercial sales to foreign governments or international organizations.

(ii) When a particular foreign government or international organization has funded the acquisition of specific production and research property, do not assess the foreign government or international organization rental charges or nonrecurring recoupments for the use of such property.

(3) *Waivers.* (i) Rental charges for use of U.S. production and research property on commercial sales transactions to the Government of Canada are waived for all commercial contracts. This waiver is based on an understanding wherein the Government of Canada has agreed to waive its rental charges.

(ii) Requests for waivers or reduction of charges for the use of Government facilities on work for foreign governments or international organizations shall be submitted to the contracting officer who shall refer the matter through contracting channels. In response to these requests, approvals may be granted only by the Director, Defense Security Cooperation Agency for particular sales that are consistent with paragraph (1)(iii) of this section.

[56 FR 36448, July 31, 1991, as amended at 64 FR 51077, Sept. 21, 1999]

245.407 Non-Government use of plant equipment.

(a)(i) Non-Government use of industrial plant equipment (IPE) exceeding 25 percent requires prior approval of the—

(A) Assistant Secretary of the Army (AL&T);

(B) Assistant Secretary of the Navy (RD&A);

(C) Assistant Secretary of the Air Force (Acquisition); or

(D) Director, Defense Logistics Agency.

(ii) The authority in paragraph (a)(i) of this section may be delegated to the head of a contracting activity. Any redelegation requires the approval of the Office of the Deputy Under Secretary of Defense (Industrial Affairs and Installations).

(iii) To determine percentage—

(A) Compute the percentage of non-Government use on time available for use. Use contractor's normal work schedule as represented by the scheduled production shift hours.

(B) Use a base time period which is neither less than three months nor more than one year.

(C) Use may be averaged at a single plant for all items costing less than $25,000.

(iv) Contractors should submit requests for non-Government use of IPE to the contract administration office at least six weeks before the projected use. The requests shall include:

(A) Total number and acquisition cost of IPE items; and

(B) For each unit of IPE with an acquisition cost of $25,000 or more, an itemized list including nomenclature, plant equipment code, year of manufacture and acquisition cost.

(v) Approving officials shall retain for periodic review, documentation of the circumstances justifying non-Government use of IPE.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34127, June 24, 1997; 68 FR 23088, Apr. 30, 2003]

Subpart 245.5—Management of Government Property in the Possession of Contractors

245.505 Records and reports of Government property.

245.505–3 Records of material.

If adequate controls are in place to meet the requirements of the clause at 252.242–7004, Material Management and Accounting System, the contractor's material control system may physically commingle inventories that may include materials for which costs are charged or allocated to fixed-price, cost-reimbursement, and commercial

contracts. Government-furnished material (GFM) may not be physically commingled with other material, nor may GFM be used on contractor's commercial work.

245.505–5 Records of plant equipment.

(a) The contractor may use DD Form 1342, DoD Property Record, as a source document for setting up prescribed records.

245.505–6 Special reports of plant equipment.

The contractor shall prepare a DD Form 1342 in accordance with instructions contained in AR 700–43/NAVSUP PUB 5009/AFM 78–9/DLAM 4215.1, Management of Defense-Owned Industrial Plant Equipment (IPE)—

(1) Upon receipt and acceptance of each item of IPE including items which, though part of a manufacturing system, would otherwise qualify as IPE;

(2) Whenever major changes occur in the data initially submitted to Defense Supply Center Richmond (DSCR) (as specified by DLAM 4215.1);

(3) When IPE, including general purpose components of special test equipment which otherwise qualify as IPE, is no longer required for the purpose authorized or provided; or

(4) When disposal is completed.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34127, June 24, 1997]

Subpart 245.6—Reporting, Redistribution, and Disposal of Contractor Inventory

245.601 Definitions.

(1) *Controlled substances* means—

(i) Narcotic, depressant, stimulant, or hallucinogenic drug or substance;

(ii) Any other drug or substance controlled under Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970; or

(iii) A drug or substance required to be controlled by international treaty, convention or protocol.

(2) *Demilitarization* means the act of destroying the offensive or defensive characteristics of equipment or material to prevent its further military or lethal use.

(3) *Production scrap* means material left over from the normal production process that has only remelting or reprocessing value, e.g., textile and metal clippings, borings, and faulty castings and forgings.

(4) *Serviceable or usable property* means property that has a potential for use or sale value ''as is'' or with minor repairs or alterations; only property in Federal Condition Codes A1, A2, A4, A5, B1, B2, B4, B5, F7, or F8.

245.603 Disposal methods.

245.603–70 Contractor performance of plant clearance duties.

(a) *Authorization.* (1) Contract administration offices (CAOs) may, with head of the contracting activity approval and contractor concurrence, authorize selected contractors to perform certain plant clearance functions if the volume of plant clearance warrants performance by the contractor.

(2) The written authorization shall, as a minimum—

(i) Designate the contractor as an ''accredited contractor'';

(ii) Identify the plant clearance actions to be performed;

(iii) State that the Government may cancel part of or all of the authorization to perform plant clearance actions; and

(iv) Provide for plant clearance officer participation when required.

(b) *Government oversight and assistance.* (1) The contract administration office will ensure regular evaluation of the contractor's performance of the plant clearance function and any corrective action required.

(2) The plant clearance officer shall—

(i) Evaluate the adequacy and ensure compliance with contractor procedures;

(ii) Ensure discrepancies are promptly resolved;

(iii) Advise the contractor of screening and inventory schedule requirements;

(iv) Respond to contractor requests to withdraw Government-furnished property from inventory schedules;

(v) Evaluate physical, quantitative, and technical allocability of contractor inventory prior to disposal using Standard Form 1423, Inventory Verification Survey, as a guide;

(vi) Direct contractor to delay disposition of nonallocable inventory pending a contracting officer decision;

(vii) With the contractor's assistance, establish criteria for review and approval of selected contractor disposal decisions;

(viii) Complete first endorsement section of DD Form 1640, Request for Plant Clearance, on referrals from plant clearance officers at prime contract administration offices for the disposal of subcontractor inventory; forward inventory schedules to the contractor for processing; and forward completed case file to the referring activity; and

(ix) Work with the contractor, screeners, and buyers to ensure that the Government receives maximum reutilization and disposal proceeds.

(c) *Accredited contractor plant clearance duties.* The accredited contractor shall—

(1) Ensure inventory schedule acceptability. Use DD Form 1637, Notice of Acceptance of Inventory, if desired;

(2) Suspend disposition of property when assets are determined nonallocable (FAR 45.606–3);

(3) Withdraw property from inventory schedules and notify the affected screening activities. Obtain plant clearance officer approval for withdrawal of Government furnished property from inventory schedules (FAR 45.606–4);

(4) Determine method of disposal under established priorities and document disposal decisions and actions;

(5) Assign the automatic release date and the surplus release date;

(6) Initiate prescribed screening and effect resulting transfers and donations;

(7) Account for disposal of all contractor inventory and application of proceeds and submit to the plant clearance officer a Standard Form 1424, Inventory Disposal Report, or equivalent;

(8) Maintain the donable file and release property to eligible donees (FAR 45.609);

(9) Prepare, approve, sign, and maintain official plant clearance files and required forms (245.7101);

(10) Not conduct noncompetitive sales of surplus contractor inventory; and

(11) Notify the plant clearance officer in advance when bidding on property.

[56 FR 36448, July 31, 1991, as amended at 56 FR 67220, Dec. 30, 1991]

245.603–71 Disposal of contractor inventory for NATO cooperative projects.

(a) North Atlantic Treaty Organization (NATO) cooperative project agreements may include disposal provisions of jointly acquired property without regard to any applicable disposal laws of the United States.

(b) Disposal of such property may include a transfer of the U.S. interest in the property to one of the other governments participating in the agreement, or the sale of the property.

(c) Payment for the transfer or sale of any U.S. interest shall be made in accordance with the terms of the project agreement.

245.604 Restrictions on purchase or retention of contractor inventory.

(1) Contractors authorized to sell inventory may not knowingly sell the inventory to any person or that person's agent, employee, or household member if that person—

(i) Is a civilian employee of the DoD or the U.S. Coast Guard; or

(ii) Is a member of the armed forces of the United States, including the Coast Guard; and

(iii) Has any functional or supervisory responsibilities for or within the Defense Reutilization and Marketing Program, or for the disposal of contractor inventory.

(2)(i) A contractor's authority to approve a subcontractor's sale, purchase, or retention at less than cost, and the subcontractor's authority to sell, purchase, or retain at less than cost if approved by a higher-tier contractor, does not include authority to approve—

(A) A sale by a subcontractor to the next-higher tier contractor or to an affiliate of such contractor or of the subcontractor; or

(B) A sale, purchase, or retention at less than cost, by a subcontractor affiliated with the next higher-tier contractor.

(ii) The written approval of the plant clearance officer is required for each

excluded sale, purchase, or retention at less than cost.

(3) *Demilitarization*. The contractor shall demilitarize contractor inventory possessing offensive or defense characteristics, and not required within the DoD, in accordance with Defense Demilitarization Manual, DoD 4160.21–M–1. In unusual cases the plant clearance officer may authorize the purchaser to perform the demilitarization; however, the purchaser shall not be granted such authorization if the inventory is dangerous.

(4) *Classified inventory*. Classified contractor inventory shall be disposed of in accordance with applicable security regulations or as directed by the contracting officer.

(5) *Dangerous inventory*. Contractor inventory dangerous to public health or safety shall not be donated or otherwise disposed of unless rendered innocuous or until adequate safeguards have been provided.

245.606 Inventory schedules.

245.606–3 Acceptance.

(a) If the schedules are acceptable, the plant clearance officer shall, within 15 days, complete and send the contractor a DD Form 1637, Notice of Acceptance of Inventory.

(b) To assist in verifying inventory allocability, the plant clearance officer shall follow the instructions in 245.7201.

245.606–5 Instructions for preparing and submitting schedules of contractor inventory.

(d) *General instructions for completing forms*.

(4) The contractor shall use the following codes together with the disposal codes 1 through 9, X, and S (e.g., A1, F7, SS) to indicate the condition of the property—

A—New, used, repaired, or reconditioned property; serviceable and issuable to all customers without limitations or restrictions; includes material with remaining shelf life of more than six months.

B—New, used, repaired, or reconditioned property; serviceable and issuable or for its intended purpose but restricted from issue to specific units, activities, or geographical areas because of its limited usefulness or short service-life expectancy; includes material and remaining shelf life of three to six months.

F—Economically reparable property which requires repair, overhaul or reconditioning; includes reparable items which are radioactively contaminated.

H—Property which has been determined to be unserviceable and does not meet repair criteria.

S—Property that has no value except for its basic material content.

(e) *Instructions for completing specific forms*.

(4) *Inventory Schedule D (Special Tooling and Special Test Equipment) (SF 1432)*.

(ii) *Description*. For termination inventory included in a settlement proposal, include cost of inventory acquired for performance of the entire contract in column F1 and cost of inventory acquired solely for the terminated portion of the contract in column F2. Cost of inventory acquired for the entire contract must be prorated between the terminated and nonterminated portions.

245.606–70 Instructions for completing DD Form 1342, DoD Property Record.

(a) The contractor shall list excess industrial plant equipment (IPE) on DD Form 1342, DoD Property Record, and submit it to the Government property administrator for review and transmittal to the plant clearance officer. For numerically controlled IPE, the contractor shall prepare and submit DD Form 1342, section VI, (page 2), Numerically Controlled Machine Data.

(b) Upon receipt of the DD Form 1342, the plant clearance officer will—

(1) Designate the 75th day from the date of receipt as the automatic release date (ARD) and the 90th day as the screening completion date (SCD); and

(2) Enter the ARD in Block 24 of the DD Form 1342.

245.607 Scrap.

245.607–1 General.

(a)(i) The contractor may request a pre-inventory scrap determination, made by the plant clearance officer after an on-site survey, if inventory is

considered without value except for scrap. If approved, the contractor may make a single descriptive entry on an inventory schedule, generally describing the property and indicating its approximate total cost. The plant clearance officer will establish a plant clearance case and perform limited screening.

(ii) If the contractor has an approved scrap procedure, routine disposal of production scrap and spoilage is authorized, and a plant clearance case is unnecessary. The contractor may similarly dispose of worn, broken, mutilated, or otherwise rejected parts from overhaul and repair contracts with the approval of the plant clearance officer.

(iii) In addition to segregating scrap to maximize proceeds, the contractor may also consolidate sales of Government and contractor scrap if approved by the plant clearance officer. When a consolidated sale is approved, the plant clearance officer shall waive the scrap warranty required at 245.607–70.

(iv) When a contractor's approved scrap procedure does not require physical segregation of Government and contractor scrap, the plant clearance officer shall ensure the proceeds of scrap sale are equitably distributed.

245.607–2 Recovering precious metals.

(b) Precious metals are silver, gold, platinum, palladium, rhodium, iridium, osmium, and ruthenium.

(i) At the beginning of every fiscal year, the Defense Reutilization and Marketing Service (DRMS) will provide each contract administration office with disposition instructions for certain categories of precious metals-bearing property, including scrap and usable items containing recoverable quantities of these metals. The disposition instructions—

(A) Will remain in effect for the entire fiscal year, unless modified by DRMS; and

(B) Will contain a fund citation to be used when disposition requires shipment of precious metals-bearing property for recovery.

(ii) Plant clearance officers shall obtain disposition instructions for precious metals-bearing property not covered by the annual disposition instructions from the Defense Reutilization and Marketing Service, Attn: DRMS-OC, 74 N. Washington Avenue, Battle Creek, MI 49017–3092.

[59 FR 27674, May 27, 1994]

245.607–70 Scrap warranty.

(a) If the contractor sells its inventory as scrap to anyone, including a holding contractor, the contractor shall include in the sales contract a signed copy of DD Form 1639, Scrap Warranty.

(b) The contracting officer may release the contractor from the terms of the scrap warranty in return for consideration paid to the Government. The consideration will represent the difference between—

(1) The sale price of the scrap; and

(2) A fair and reasonable price for the material if it had been sold for purposes other than scrap.

(c) The contractor shall pay the consideration to the Government and the Government may execute the release even though the contract containing the warranty was not made directly with the Government.

(d) If the scrap is resold to a second buyer, the first buyer shall obtain a scrap warranty from the second buyer. Upon receipt of the second buyer's scrap warranty, the Government will release the first buyer from liability under the original warranty.

245.608 Screening of contractor inventory.

245.608–1 General.

(a) The plant clearance officer shall arrange for inspection of property at the contractor's plant if requested by a prospective transferee, in such a manner as to avoid interruption of the contractor's operations.

245.608–2 Standard screening.

(b)(1) For the first 30 days, property screening will be limited to the contracting agency and the requiring agency, when they are not the same. The requiring agency shall have priority for retention of listed items.

245.608–5 Special items screening.

(a) *Special test equipment with standard components.* (1) The contractor shall

report any excess special test equipment (STE) using SF 1432, Inventory Schedule D (Special Tooling and Special Test Equipment). The contractor shall list and describe on the inventory schedule all general-purpose components which, if economically severable from the STE, would otherwise be classified as industrial plant equipment (IPE), other plant equipment (OPE), or automatic data processing equipment (ADPE).

(2) The plant clearance officer will perform the initial screening of the composite STE unit.

(A) If the contracting department/agency and the requiring department/agency decline the STE or the standard components or do not approve their transfer to another contract; then,

(B) The plant clearance officer will screen the STE and any severable components with the—

(*1*) General Services Administration—STE unit, less any standard components, and nonreportable standard components;

(*2*) Defense Supply Center Richmond—IPE components;

(*3*) Contractor Inventory Redistribution System—OPE components; and

(*4*) Defense Information Systems Agency, Chief Information Officer, Defense Automation Resources Management Program Division—ADPE components.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34128, June 24, 1997]

245.608–7 Reimbursement of cost for transfer of contractor inventory.

The Defense Logistics Agency will pay for the movement of industrial plant equipment under the direction and control of the Defense Industrial Plant Equipment Center.

245.608–70 Contractor inventory redistribution system (CIRS).

(a) Screen serviceable and usable contractor inventory through CIRS when it—

(1) Is listed on SF 1428, Inventory Schedule B, or SF 1434, Inventory Schedule E; and

(2) Has a national stock number, and line item acquisition value in excess of $50; or

(3) Has a line item acquisition value in excess of $1,000 ($500 for furniture) but no national stock number.

(b) Using Standard Form 120, Report of Excess Personal Property, the plant clearance officer will send two copies of SF 1428 or SF 1434 (or authorized substitutes) to the Defense Reutilization and Marketing Service (DRMS). DRMS will notify the plant clearance officer of items processed, not accepted, or available for local area screening.

(c) Property subject to CIRS processing will be screened within DoD for 30 days. On the 31st day, unless otherwise specified on SF Form 120, appropriate items not requisitioned by DoD will be reported to the General Services Administration (GSA) for standard Federal agency and donation screening. Examples of items which are not reportable to GSA include usable hazardous cleaners and solvents.

(d) For requisitioned items, DRMS will issue shipping instructions to the plant clearance officer. During the first 45 days of the screening period, the plant clearance officer forwards any requisitions received to DRMS. After 45 days, the plant clearance officer forwards the requisition directly to GSA.

(e) The contractor sends one copy of the shipping document to DRMS when shipment has been made.

(f) Unless directed by the contracting officer, motor vehicles excess to Army and Navy contracts shall not be screened through CIRS.

[56 FR 36448, July 31, 1991, as amended at 60 FR 29501, June 5, 1995]

245.608–71 Screening industrial plant equipment.

(a) *Reporting.* Within 15 days of receipt, the plant clearance officer will forward two copies of the DD Form 1342, DoD Property Record, to the Defense Supply Center Richmond (DSCR), ATTN: JH, 8000 Jefferson Davis Highway, Richmond, VA 23297–5100, for all IPE not condition coded ''X'' or ''S.'' Process IPE condition coded ''X'' or ''S'' in accordance with department or agency procedures.

(b) *Screening*—(1) First 30 days. DSCR will—

(i) Screen excess IPE against all DoD requirements with priority given to requirements of the owning department/agency through the 30th day.

(ii) For items selected, issue shipping instructions containing accounting, funding, transportation, routing recommendations, and preservation instructions.

(2) *31st through 75th day*. (i) DSCR will report excess IPE to GSA on 31st day.

(ii) GSA will—

(A) Approve department/agency requests on first come-first served basis;

(B) Approve and forward transfer orders to the contract administration office; and

(C) Forward copies of approved transfer orders to DSCR.

(3) *76th through 90th day*. GSA will—

(i) Provide for screening for donation;

(ii) Receive, approve and forward donation applications to the contract administration office; and

(iii) Send copies of approved applications to DSCR.

(4) *After 90th day*. If DoD requirement is identified, and item is available, ship item against the requirement unless compelling reasons exist for not shipping item.

(c) The plant clearance officer shall ensure that a copy of the shipping document is submitted to DSCR when IPE is transferred use-to-use or use-to-storage within DoD.

(d) When GSA sells IPE that is excess to ownership but not to DoD requirements, report the sale to DSCR in accordance with department/agency procedures.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34128, June 24, 1997]

245.608–72 Screening excess automatic data processing equipment (ADPE).

Report ADPE that is Government-owned or leased by the contractor (with Government purchase option or other interests, including use rights) to the Defense Information Systems Agency, Defense Automation Resources Management Program Division (DARMP). DARMP does all required screening, including General Services Administration screening, for ADPE. (See the Defense Automation Resources Management Manual.)

[62 FR 34128, June 24, 1997]

245.609 Donations.

Agencies may donate, with GSA approval and without expense to the United States, certain material not needed by DoD to certain organizations such as veterans' organizations, soldiers' monument associations, State museums, and incorporated educational, not for profit museums. For further guidance, see DoD 4160 .21–M, Defense Materiel Disposition Manual.

[56 FR 36448, July 31, 1991, as amended at 67 FR 61517, Oct. 1, 2002]

245.610 Sale of surplus contractor inventory.

245.610–1 Responsibility.

(a) See Subpart 245.73 for sales of contractor inventory under the control of DoD.

245.610–3 Proceeds of sale.

(1) Unless otherwise provided in the contract, the proceeds of any sale, purchase, or retention shall be—

(i) Credited to the Government as part of the settlement agreement;

(ii) Credited to the price or cost of the contract;

(iii) Applied as otherwise directed by the contracting officer; or

(iv) Forwarded to the plant clearance officer. The plant clearance officer—

(A) Within two days after receipt will send the proceeds and a DD Form 1131, Cash Collection Voucher, to the designated disbursing officer. Identify on the DD Form 1131 the contractor name and contract number; or

(B) For contractors with an approved scrap procedure, will ensure the proceeds are appropriately applied to an overhead account. The plant clearance officer may assign a representative who, with the assistance of the contract auditor, shall periodically validate that proceeds from sales of production generated scrap are collected and applied to the appropriate account.

(2) Except as prescribed in paragraph (1)(iv)(B) of this subsection, the plant clearance officer will not close the plant clearance case until verification is received that the credit has, in fact, been properly applied.

245.610–4 Contractor inventory in foreign countries.

(1) Normally, DRMS disposal activities shall be used to dispose of surplus contractor inventory located outside the United States or Canada. However, if authorized by the contracting officer, a contractor may sell or make other disposition of inventory in foreign countries.

(2) Sale or other disposition of foreign inventory by the contractor, including sale to foreign governments, requires that—

(i) The sales contract or other document transferring title include the following certificate:

The Purchaser certifies that the property covered by this contract will be used in (*name of country*). In the event of resale or export by the Purchaser of any of the property acquired at a price in excess of $1,000 United States dollars or equivalent in other currency at the official exchange rate, the Purchaser agrees to obtain the approval of (*name and address of Contracting Officer*); and

(ii) The contracting officer approve sales contracts, resales, or exports. Approval is permitted only if—

(A) The proposed purchaser's name is not on the list of Parties Excluded from Procurement Programs; and

(B) The sales contract or other document forbids exports by purchasers and subpurchasers to communist areas (FAR 25.702) or other prohibited destinations.

245.612 Removal and storage.

245.612–3 Special storage at the Government's expense.

(a) Before authorizing storage, the contracting officer shall ensure funds are available to pay for the storage and related tasks. In addition, the contracting officer shall ensure an annual review of the need for continued storage at Government expense.

(b) All storage contracts or agreements shall be fully funded and separately priced and shall include all allocable costs.

245.613 Property disposal determinations.

The plant clearance officer shall—

(1) Record the reason for disposing of the property—

(i) As scrap and salvage;

(ii) By abandonment or destruction; and

(iii) By noncompetitive sale;

(2) Use DD Form 1641, Disposal Determination/Approval, to record disposal determinations; and

(3) File the completed form in the plant clearance case file.

Subpart 245.70—Appointment of Property Administrators and Plant Clearance Officers

245.7001 Selection, appointment, and termination.

(a) The head of a contracting activity for the Defense Logistics Agency, or the head of the contract administration office for other departments and agencies shall select, appoint, or terminate (in writing) property administrators and plant clearance officers.

(b) In selecting qualified property administrators and plant clearance officers, the appointment authority shall consider experience, training, education, business acumen, judgment, character, and ethics.

245.7002 Duties and responsibilities of plant clearance officers.

The plant clearance officer shall—

(a) Instruct the contractor on the preparation of inventory schedules;

(b) Make pre-inventory scrap determinations;

(c) Determine the acceptability of inventory schedules and DD Forms 1342, DoD Property Record;

(d) Prepare and maintain plant clearance cases and disposal documents;

(e) Initiate screening and provide technical support to screeners in the selection of assets;

(f) Conduct or arrange for verification of the following—

(1) Quantity, condition, description, and special processing requirements of property listed on inventory schedules;

(2) Technical and quantitative allocability of property;

(g) Ensure the timely shipment or release by the contractor of property selected for transfer and donation;

(h) Determine the appropriate method of disposal for items not selected for

Federal agency use or donation and ensure final plant clearance is accomplished;

(i) Evaluate and monitor the contractor's surplus property sales program;

(j) For individual surplus property sales—

(1) Approve method of sale;

(2) Ensure the sales offerings meet prescribed requirements;

(3) Witness bid openings;

(4) Evaluate bids;

(5) Approve sale awards;

(6) Secure anti-trust clearances, as required;

(7) Recommend the reasonableness of selling expenses; and

(8) Ensure that sales proceeds are collected and property credited;

(k) Monitor ongoing plant clearance actions to ensure delays are minimized and, when necessary, work with the contractor and property administrator to implement improvements;

(l) Evaluate the adequacy of the contractor's property disposal procedures;

(m) Support the property administrator during the compliance analysis of the disposition portion of the contractor's property control procedures;

(n) Report all disposal deficiencies to the property administrator;

(o) Account for all contractor inventory reported for disposal by the contractor and prepare prescribed plant clearance reports; and

(p) Advise and assist the contractor, contracting officer, inventory manager, Federal agencies, and eligible donees in actions related to the proper and timely disposal of contractor inventory.

[57 FR 42632, Sept. 15, 1992]

Subpart 245.71—Plant Clearance Forms

245.7101 Forms.

Use the forms listed below in performance of plant clearance actions.

245.7101–1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).

Use for transfers, donations, and sales of motor vehicles. The contracting officer shall execute the SF 97 and furnish it to the purchaser.

245.7101–2 DD Form 1149, Requisition and Invoice Shipping Document.

Use for transfer and donation of contractor inventory. Donations of industrial plant equipment may be shipped via DD Form 1149. This form may also be used to consolidate contractor inventory redistribution system-directed shipments going to the same destination.

245.7101–3 DD Form 1348–1, DoD Single Line Item Release/Receipt Document.

Use for shipments of excess industrial plant equipment and contractor inventory redistribution system (CIRS) inventory.

245.7101–4 DD Form 1640, Request for Plant Clearance.

Use to request plant clearance assistance or transfer plant clearance.

Subpart 245.72—Special Instructions

245.7201 Performing inventory verification and determination of allocability.

Use the following guidance for verifying inventory schedules—

(a) *Allocability*. (1) Review contract requirements, delivery schedules, bills of material, and other pertinent material. Determine whether schedules include material which—

(i) Is more than required or reasonably expected to be required for completion of the contract; or

(ii) Might be usable on the current contract, or diverted to other commercial work or Government use.

(2) Review the contractor's—

(i) Recent purchases of similar material;

(ii) Plans for current and scheduled production;

(iii) Stock record entries; and

(iv) Bills of material for similar items.

(b) *Quantity*. Ensure available inventory is in accordance with quantities listed on the inventory schedules. While a complete physical count of each item is not required, perform sufficient checks to ensure accurate quantities.

(c) *Condition.* Ensure the inventory condition matches that shown on the inventory schedules.

245.7202 Establishing a plant clearance case.

(a) Upon receipt of an acceptable inventory schedule or a DD Form 1342, DoD Property Record, the plant clearance officer shall establish a plant clearance case file. The case folder will—

(1) Identify the case number (see 245.7203);

(2) Indicate the contractor's name and contract number;

(3) Note the word ''Termination'' if applicable; and

(4) Consolidate all inventory schedules applicable to one contract at the same location, if possible.

(b) As a minimum, include in the plant clearance case file—

(1) Inventory schedules or DD Form 1342, DoD Property Record, annotated to show all disposal actions;

(2) Copies of documents forwarding inventory schedules to the appropriate screening activity;

(3) Shipping or other instructions and correspondence directing disposition of contractor inventory;

(4) Shipping documents transferring inventory;

(5) Inventory verification survey or other documents showing completion of allocability review;

(6) Forms authorizing donation or sale;

(7) Document showing disposition of proceeds from plant clearance actions; and

(8) Any other documents pertinent to disposal actions, including review board cases, antitrust clearances, and inventory disposal reports.

245.7203 Assigning plant clearance case numbers.

(a) Use a three-part, 11-character number constructed as follows:

(1) Part 1: DoD Activity Address Number (6-character alphanumeric code) assigned to the contract administering activity.

(2) Part 2: Locally assigned 4-character consecutive alphanumeric code, beginning each calendar year with 001 continuing as necessary through ZZZ. The fourth digit is the last number of the calendar year.

(3) Part 3: The 11th character is a single letter identifying the department/agency:

C—Army
Q—Navy
E—Air Force
L—Marine Corps
U—Defense Logistics Agency
N—Defense Nuclear Agency
M—National Imagery and Mapping Agency
S—NASA
D—Other DoD Activities
O—Non-DoD Activities

(b) Record the plant clearance number on DD Form 1635, Plant Clearance Case Register, or mechanized equivalent.

[56 FR 36448, July 31, 1991, as amended at 64 FR 51077, Sept. 21, 1999]

245.7204 Preparing inventory disposal report.

(a) Prepare Standard Form 1424, Inventory Disposal Report, for each completed plant clearance case. For terminated contracts, prepare a consolidated Inventory Disposal Report for each termination docket.

(b) Distribute the report to the contracting officer and to any other activities having an interest in the inventory disposal.

(c) Items on the form are self-explanatory except:

(1) Item 12—Insert net change due to shortages, overages, errors, pricing, or withdrawals, etc. Explain in item 16, Remarks.

(2) Item 14—Insert amount contractor is retaining or purchasing at full acquisition cost (see FAR 45.605–1).

(3) Item 15—Insert acquisition cost and net credit (full credit less approved handling, transportation, and restocking charges for items returned to supplier).

(4) Item 16—Insert the acquisition cost for all transfers accomplished. For lines 16A and 16B, insert subtotals as indicated.

(5) Item 18—Insert acquisition cost and gross proceeds. When approved sale costs are reimbursed from proceeds, show net proceeds in Item 26, Remarks.

(6) Items 20 and 21—Use to identify and report transactions not otherwise identified, such as assets shipped to a

Government precious metals reclamation activity, etc. Further explanation may be provided in Item 26, Remarks, if necessary.

(7) Item 25—Totals dispositions must equal amounts on line 13 and must reflect all disposal actions within the case.

(8) Item 26—Show the specific disposition of proceeds reported in Items 14, 15, and 18. Also indicate amounts deleted for specific contractor claims, or applied as a credit to the claim. Explain any entry requiring explanation.

245.7205 Reporting excess and surplus contractor inventory.

(a) Contract administration offices with plant clearance responsibilities will—

(1) Use DD Form 1638, Report of Excess and Surplus Contractor Inventory, or mechanized equivalent, to report the disposition of contractor inventory. Do not include disposition actions transferred to other offices. Unless headquarters of the administering activity directs otherwise, complete only the column total for each line of this report.

(2) Prepare quarterly reports for periods ending March 31, June 30, September 30, and December 31. Activities preparing manual reports will submit duplicate reports to the headquarters of the administering activity within ten working days after the close of the report period. (Report Control Symbol DD(I&L)(Q)1430).

(b) Items on the report are self-explanatory except:

(1) Line 1—Insert totals from line 7 of the preceding report.

(2) Line 2—Insert net changes due to shortages, overages, errors, or withdrawals (other than purchases or retention at cost).

(3) Line 3—Insert total excess inventory reported by contractors during the report period.

(4) Line 5—Insert total plant clearance cases completed during the report period. Do not report cases as completed until all property is disposed. Acquisition cost must equal line 19.

(5) Line 8—Insert amount retained or withdrawn at full cost.

(6) Line 9—Insert acquisition cost in the ''Acquisition Cost'' column and insert acquisition cost less handling, transportation, or restocking charges, in the ''Proceeds'' column.

(7) Line 10—Insert acquisition cost of all transfers completed during the report period. On lines 10A through 10H, insert subtotals representing transfers to the agency indicated. Exclude amounts on lines 10A through 10H when computing line 19 totals.

(8) Line 12—Insert the acquisition cost and gross proceeds. When sale costs are reimbursed from proceeds, show net proceeds in remarks.

(9) Lines 14 and 15—Used to identify and report other transactions.

(10) Line 18—Insert Section II totals. Line 18 acquisition cost must equal acquisition cost on line 5.

245.7206 Transmitting DD Form 1342, DoD Property Record.

As a minimum, the plant clearance officer will provide the following information in a letter forwarding DD Forms 1342 to DSCR—

(a) Number of DD Forms 1342 included;

(b) Automatic release date;

(c) Screening complete date;

(d) Contractor's name and address;

(e) Contract number;

(f) Contracting activity that awarded the contract under which the contractor acquired the equipment;

(g) Location of the industrial plant equipment;

(h) Total acquisition cost;

(i) A statement advising that the automatic release date will not be extended;

(j) A note stating that—

(1) Request for transfer or shipment must include appropriate fund citations for packing, crating, and handling charges; and

(2) Government bills of lading (GBLs) should be furnished or, if shipment will be accomplished by other than GBL, DSCR must cite transportation funds; and

(k) The plant clearance officer's signature block.

[56 FR 36448, July 31, 1991, as amended at 62 FR 34128, June 24, 1997]

Subpart 245.73—Sale of Surplus Contractor Inventory

245.7301 Policy.

(a) Screening must be completed before any surplus contractor inventory sale.

(b) Except as provided in 245.7307, sales of surplus contractor inventory shall be competitive.

(c) The commander of the contract administration office must approve the use of auctions, spot bids, or retail sales.

[56 FR 36448, July 31, 1991, as amended at 63 FR 31938, June 11, 1998]

245.7302 Competitive sales.

245.7302–1 Property descriptions.

(a) Describe the property as ''used'' or ''unused.'' Indicate if unused property is still in the manufacturer's original containers. Qualifying statements such as ''well-preserved'' or ''repairs required'' are authorized. Do not use condition codes or the terms ''new'' or ''salvage.''

(b) Property descriptions must be accurate and adequate for identification by prospective bidders. Use commercial terminology and original manufacturer and brand name, if applicable.

245.7302–2 Lotting.

(a) Consider combining property into lots when the quantities, value, or nature of the property makes it uneconomical to sell separately.

(b) When lotting is appropriate and economically practical—

(1) Size the lots to encourage bidding by small businesses or individuals;

(2) Lot unused items by make or manufacturer, except when quantities or dollar values are small;

(3) Lot commercially similar items when practicable;

(4) Lot used and unused items separately unless quantities, value, or nature of property makes it uneconomical to sell separately;

(5) Size lots large enough to ensure the selling costs are not disproportionate to the anticipated proceeds.

245.7302–3 Alternate bids.

Offerors may be solicited to bid for groups or for the entire offering by use of the following:

Item _____ (Alternate Bid)

This item consists of all property listed and described in Items _____ to _____, inclusive. Award under this item will be made only if the highest acceptable bid on this item is equal to, or greater than, the total of the highest acceptable bids on Items _____ to _____, inclusive.

245.7302–4 Basis for sale.

(a) *Unit price basis*—requires the offeror to state the bid price in terms of the quantity or weight generally applied in commercial sales of similar items.

(b) *Lot price basis*—requires the offeror to submit a bid for the entire lot. Use the lot price basis of sale only when property cannot be sold by unit measure or the potential sales return is small.

245.7302–5 Mailing lists.

(a) The plant clearance officer will ensure the contractor solicits a sufficient number of bidders to obtain adequate competition.

(b) When large quantities of property, special commodities, or unusual geographic locations are involved, the plant clearance officer is encouraged to obtain additional listings from: Defense Reutilization and Marketing Service, Attn: DRMS-OCR, 74 North Washington Avenue, Battle Creek, MI 49017–3092.

245.7303 Formal bid procedures.

(a) The contractor will use formal invitations for bid unless the plant clearance officer approves use of informal bid procedures.

(b) The contractor shall solicit bids at least 15 calendar days before bid opening to allow adequate opportunity to inspect property and prepare bids.

(c) For large sales, the contractor may use summary lists of items offered as bid sheets with detailed descriptions attached.

(d) In addition to mailing or delivering notice of the proposed sale to prospective bidders, the contractor may, when the results are expected to justify the additional expense—

(1) Display a notice of the proposed sale in appropriate public places.

(2) Publish a sales notice in appropriate trade journals or magazines and local newspapers.

(e) When the acquisition cost of the property to be sold at one time, in one place, is $250,000 or more, the contractor shall send a notice of the proposed sale to: U.S. Department of Commerce, Commerce Business Daily, Sales Section, P.O. Box 5999, Chicago, IL 60680.

(1) The contractor shall send the CBD notice at least 20 days before bid opening, or date of sale.

(2) CBD notices shall be—

(i) Double spaced and in synopsis form suitable for printing;

(ii) Transmitted by fastest mail available; and

(iii) Contain the following information in the order listed:

(A) Name and address of contractor issuing the invitation for bids;

(B) Name or title, address, and telephone number of the official from whom copies of the sales offering and other information can be obtained;

(C) Description of the property to be sold including, when desired, the total estimated acquisition cost;

(D) The number of the invitation or sale;

(E) The date of the sale or bid opening;

(F) The type of sale, i.e., sealed bid, spot bid, auction; and

(G) The location of the property.

(f) The plant clearance officer or representative will witness the bid opening. Within two working days after bid opening, the contractor will submit to the plant clearance officer two copies of an abstract of all bids, signed by the witnessing Government representative.

245.7304 Informal bid procedures.

(a) Upon approval of the plant clearance officer, the contractor may issue informal invitations to bid (orally, telephonically, or by other informal media), provided—

(1) Maximum practical competition is maintained;

(2) Sources solicited are recorded; and

(3) Informal bids are confirmed in writing.

(b) Bids by the contractor or its employees shall be submitted to the plant clearance officer prior to soliciting bids from other prospective bidders.

245.7305 Sale approval and award.

The plant clearance officer will—

(1) Evaluate bids to establish that the sale price is fair and reasonable, taking into consideration—

(i) Knowledge or tests of the market;

(ii) Current published prices for the property;

(iii) The nature, condition, quantity, and location of the property; and

(iv) Information from the Defense Reutilization and Marketing Service.

(2) Approve award to the responsible bidder whose bid is most advantageous to the Government, price and other factors considered. Award shall not be approved to any bidder who is not eligible to enter into a contract with the DoD due to inclusion on the list of Parties Excluded from Procurement Programs. If a compelling reason exists to award to a bidder on the excluded list, the plant clearance officer shall request approval from the headquarters of the administering activity.

(3) Notify the contractor within five working days of the bidder to whom an award shall be made. The contractor shall make the award, collect the proceeds of the sale, and release the property to the purchaser. The contractor shall provide the plant clearance officer with evidence of delivery reflecting actual quantities released to the purchaser.

245.7306 Sales services.

When sale services are needed, the plant clearance officer will document the reasons in the case file and make arrangements directly with the Defense Reutilization and Marketing Service (DRMS) or General Services Administration (GSA). The arrangements will include a requirement to return all proceeds to the plant clearance officer for crediting in compliance with FAR 45.610–3.

245.7307 Non-competitive sales.

245.7307–1 General.

(a) Non-competitive sales include purchases or retention at less than cost by the contractor.

(b) Non-competitive sales may be made when—

(1) The contracting department/agency or the plant clearance officer determines that this method is essential to expeditious plant clearance;

(2) The sale is otherwise justified on the basis of circumstances listed in 245.7307–2;

(3) The Government's interests are adequately protected; and

(4) FAR subpart 1.7 requirements are met.

(c) Non-competitive sales shall be at fair and reasonable prices not less than those reasonably expected under competitive sale.

245.7307–2 Justification.

(a) Conditions justifying non-competitive sales are—

(1) Scientific equipment allocated to terminated research and development contracts with educational institutions;

(2) No acceptable bids received under an advertised competitive sale;

(3) Property value so small that anticipated proceeds would not warrant formal competitive sale;

(4) Sale to States, territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained;

(5) Specialized nature of the property would not create bidder interest;

(6) Removal of the property would reduce its value or result in disproportionate handling expenses; or

(7) Such action is essential to the Government's interests.

(b) The contracting department/agency will provide the contract administration office the sales justification and any special sales provisions when the department/agency decides to sell production equipment to the contractor by non-competitive sale.

245.7308 Antitrust notification.

(a) When contractor inventory with an estimated fair market value of $3 million or more or any patents, processes, techniques, or inventions, regardless of cost, are sold or otherwise disposed of to private interests notify the Attorney General and the General Services Administration (GSA) of the proposed terms and conditions of disposal. Submit the following information to the Department of Justice and the GSA through the contract administration agency channels. Report Control Symbol DD-ACQ(AR) 1492 applies.

(1) Location and description of property (specify tonnage if scrap);

(2) Proposed sale price (explain if the proposed purchaser was not highest bidder);

(3) Acquisition cost of property;

(4) Manner of sale, indicating whether by—

(i) Sealed bid (specify number of bidders solicited and bids received);

(ii) Auction or spot bid (state how sale was advertised); or

(iii) Negotiation (explain why property was not sold competitively);

(5) Proposed purchaser's name, address, and trade name (if any) under which proposed purchaser is doing business;

(6) If a corporation, provide state and date of incorporation, and name and address of—

(i) Each holder of 25 percent or more of the corporate stock;

(ii) Each subsidiary; and

(iii) Each company under common control with proposed purchaser;

(7) If a partnership, provide—

(i) Name and address of each partner; and

(ii) Other business connections of each partner;

(8) Nature of proposed purchaser's business (indicate whether its scope is local, statewide, regional, or national);

(9) Estimated dollar volume of sales of proposed purchaser (as of latest calendar or fiscal year);

(10) Estimated net worth of proposed purchaser; and

(11) Intended use of property.

(b) Do not dispose of property until the Attorney General determines whether the proposed disposal action

would tend to create or maintain a situation inconsistent with the antitrust laws.

(c) If the Attorney General advises that the proposed disposition is inconsistent with the antitrust laws, do not continue with the proposed disposition.

(d) Under non-competitive sales, the prospective purchaser shall be informed that final consummation of the sale is subject to determination by the Attorney General.

(e) Under competitive or non-competitive sales, the purchaser is required to provide the information required in paragraph (a) of this subsection.

[56 FR 36448, July 31, 1991, as amended at 57 FR 42633, Sept. 15, 1992; 57 FR 53601, Nov. 12, 1992]

245.7309 Mandatory terms and conditions—formal invitations.

Sale by formal invitation shall include, as a minimum, the terms and conditions in this section.

245.7309–1 Inspection.

The Bidder is invited to inspect the property prior to submitting a bid. Property will be available for inspection at the places and times specified in the Invitation. Failure to inspect property does not constitute grounds for the withdrawal of a bid after opening.

245.7309–2 Condition and location of property.

(a) Unless otherwise specifically provided in the Invitation, all property is offered for sale ''as is'' and ''where is.'' If the Invitation provides that the Contractor will load, then ''where is'' means f.o.b. conveyance at the point specified in the Invitation.

(b) The description is based on the best available information. However, the Contractor makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of the property or its fitness for any use or purpose.

(c) Except as provided in Conditions 245.7306–8, Variations in Quantity or Weight, and 245.7306–10, Risk of Loss, no request for adjustment in price or for rescission of the sale will be considered. This is not a sale by sample.

245.7309–3 Consideration of bids.

(a) Bidder agrees that this bid is firm and irrevocable within the acceptance period specified in the Invitation (or, if not specified, not less than ten or more than 60 days).

(b) The right is reserved to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified in the offering or by the Bidder, to accept any one item or group of items in the bid. Unless the invitation provides otherwise, bids—

(1) May be on any or all items;

(2) Must be submitted on the unit basis specified for that item;

(3) Must cover the total number of units designated for that item; and

(4) Unit prices govern.

245.7309–4 Payment.

(a) Purchaser agrees to pay the full purchase price for awarded property at the prices quoted in the bid. Unless an adjustment is required pursuant to Condition 245.7306–8, Variations in Quantity or Weight, payment must be made within the time specified for removal and prior to delivery of any of the property. In the event that any adjustment is made, payment must be made immediately after such adjustment.

(b) The full purchase price, or balance if a bid deposit was required, shall be paid to the Contractor in cash or by certified check, cashier's check, traveler's check, bank draft, or postal or express money order. The Contractor is not required to extend credit to any purchaser.

(c) The Contractor reserves the right to apply any bid deposits made under this Invitation by a bidder against any amounts due under a contract awarded by the Contractor under this Invitation. If the total sum due to the contractor is less than the amount deposited with the bid, the difference shall be promptly refunded. Deposits accompanying bids which are not accepted shall be promptly returned.

245.7309–5 Title.

(a) Unless otherwise specified in the Invitation, title to property sold under this Invitation shall vest in the Purchaser when full payment is made. If the Invitation provides for loading by

the Contractor, title shall not vest until payment and loading are completed.

(b) A Standard Form 97, Certificate of Release of a Motor Vehicle, (or a State certificate of title) shall be furnished for motor vehicles and motor-propelled or motor-drawn equipment requiring licensing.

245.7309–6 Delivery and removal of property.

(a) Unless otherwise specified in the Invitation, the Purchaser shall be entitled to obtain the property upon vesting of title in the Purchaser. Delivery shall be made at the designated location, and removal will be at the Purchaser's expense within the time frame specified in the Invitation or any additional time allowed by the Contractor.

(b) The Purchaser shall reimburse the Contractor for any damage to the Contractor's property caused by Purchaser's removal operations. If additional time is required to remove the property, the Contractor, without limiting any other rights, may require the Purchaser to pay reasonable storage charges.

245.7309–7 Default.

If the successful Bidder fails to make full payment, remove property by the specified date, or comply with any other terms and conditions of sale, the Contractor reserves the right to sell or otherwise dispose of any or all such property and to charge losses and incidental expenses to the defaulting Bidder. Bid deposits received (if required in the Invitation) shall be applied against such losses and expenses.

245.7309–8 Variations in quantity or weight.

When property is sold on a ''unit price'' basis, the Contractor reserves the right to vary by up to 15 percent the quantity or weight listed in the Invitation and the Purchaser agrees to accept delivery of any quantity or weight within these limits. The purchase price shall be adjusted in accordance with the unit price and on the basis of the quantity or weight delivered.

245.7309–9 Weighing.

(a) When weighing is necessary to determine the exact purchase price, the Purchaser shall arrange for and pay all weighing expenses. When removal is by truck, weighing shall be subject to supervision and accomplished on—

(1) Contractor scales;

(2) Certified scales; or

(3) Other scales acceptable to both parties.

(b) When removal is by rail, weighing shall be on railroad scales or by other means acceptable to the railroad for freight purposes. The Purchaser shall pay switching charges.

245.7309–10 Risk of loss.

The Contractor is responsible for reasonable care and protection of the property until the date specified for removal. All risk of loss, damage, or destruction from any cause whatsoever shall be borne by the Purchaser after passage of title.

245.7309–11 Liability.

Contractor and Government liability, when liability has been established, shall not exceed the refund of any portion of the purchase price already received by the Contractor.

245.7309–12 Oral statements.

Any oral statement by the Contractor changing or supplementing the contract or any condition thereof is unauthorized.

245.7309–13 Eligibility of bidders.

The Bidder shall certify that the Bidder is not—

(a) A civilian employee of the Department of Defense or the United States Coast Guard whose duties include any functional or supervisory responsibility for disposal of contractor inventory;

(b) A member of the United States Armed Forces, including the Coast Guard, whose duties include any functional or supervisory responsibility for disposal of contractor inventory;

(c) An agent, employee or immediate member of the household of personnel in paragraphs (a) and (b).

245.7309–14 Claims liability.

The Purchaser or Bidder agrees to save the Contractor and Government harmless from any and all claims, demands, actions, debts, liabilities, judgments, costs, and attorney's fees arising out of, claimed on account of, or in any manner predicated upon loss of or damage to property of, and injuries to or the death of any and all persons whatsoever, in any manner caused or contributed to by the Purchaser or Bidder, their agents, servants or employees, while in, upon, or about the sale site on which the property sold or offered for sale is located, or while going to or departing from such areas; and to save the Contractor and Government harmless from and on account of damages of any kind which the Contractor may suffer as the result of the acts of any of the Purchaser's agents, servants, or employees while in or about the said sites.

245.7310 Special term and conditions.

When necessary, include the special conditions of this section in formal invitations.

245.7310–1 Demilitarization.

When demilitarization of property is required, whether on or off contractor or Government premises, the invitation must include the following clause:

(a) *Demilitarization.*

Item(s) _____ require demilitarization by the Purchaser in the manner and to the degree set forth below:

(1) For property located in the United States insert item number(s) and specific demilitarization requirements for item(s) shown in Attachment 1, Part 2 of Defense, Demilitarization Manual;

(2) For property located outside the United States, insert item number(s) and specific demilitarization requirements for item(s) shown in Attachment 1, Part 3 of DoD 4160.21–M–1, Defense Demilitarization Manual.

(b) *Demilitarization on Government Premises.* Property requiring demilitarization shall not be removed, and title shall not pass to the Purchaser, until demilitarization has been completed and approved by an authorized Contractor and Government representative. Demilitarization will be accomplished as specified in the contract. Component parts vital to the military or lethal purpose of the property shall be rendered unusable. The Purchaser agrees to assume all cost incident to the demilitarization and to restore the working area to its present condition after removing the demilitarized property.

(c) *Demilitarization on Non-Government Premises.* Property requiring demilitarization shall be demilitarized by the Purchaser under supervision of qualified Department of Defense personnel. Title shall not pass to the Purchaser until demilitarization has been completed by the Purchaser and approved by an authorized Contractor and Government representative. Demilitarization will be accomplished as specified in the contract. Component parts vital to the military or lethal purpose of the property shall be rendered unusable. The Purchaser agrees to assume all costs incident to the demilitarization.

(d) *Failure to Demilitarize.* If the Purchaser fails to demilitarize the property as specified in the contract, the Contractor may, upon giving ten days written notice from date of mailing to the Purchaser—

(1) Repossess, demilitarize, and return the property to the Purchaser. The Purchaser hereby agrees to pay to the Contractor, prior to the return of the property, all costs incurred by the Contractor in repossessing, demilitarizing, and returning the property to the Purchaser.

(2) Repossess, demilitarize, and resell the property, and charge the defaulting Purchaser will all excess costs incurred by the Contractor. The Contractor shall deduct these costs from the purchase price and refund the balance of the purchase price, if any, to the Purchaser. In the event the excess costs exceed the purchase price, the defaulting Purchaser hereby agrees to pay these excess costs to the Contractor.

(3) Repossess and resell the property under similar terms and conditions. In the event this option is exercised, the Contractor shall charge the defaulting Purchaser with all excess costs incurred by the Contractor. The Contractor shall deduct these excess costs from the original purchase price and refund the balance of the purchase price, if any, to the defaulting Purchaser. Should the excess costs to the Contractor exceed the purchase price, the defaulting Purchaser hereby agrees to pay these excess costs to the Contractor.

245.7310–2 Performance bond.

Performance bonds are required when work, other than loading, is to be performed by the purchaser and a bond is considered necessary to ensure performance. Generally, performance bonds shall be 100 percent of the estimated cost of the work to be performed. If a 100 percent performance bond would be disadvantageous to the Contractor or to the Government, the

amount may be reduced to not less than 50 percent of the estimated cost of the work. Include the following condition when performance bonds are required:

PERFORMANCE BOND

Within ten days after notice of award, the Purchaser shall furnish a performance bond in the sum of $_____ to cover the Purchaser's obligations. Such bond shall remain in full force and effect during the term of the contract and any extensions as may be agreed upon. The Purchaser shall not be permitted to begin performance until the bond has been received.

245.7310–3 Liability and insurance.

When the work to be performed by the purchaser warrants, use the following:

LIABILITY AND INSURANCE

The Purchaser shall at the Purchaser's own expense purchase and maintain during the term of the contract insurance as follows:

(a) Standard workers' compensation and employer's liability insurance required under State and Federal statutes. However, the Contractor may waive this requirement upon receipt of satisfactory evidence that the Purchaser is qualified as a self-insurer under applicable provisions of law.

(b) Bodily injury liability insurance in an amount not less than $300,000 for any one occurrence; and

(c) Property damage liability insurance.

245.7310–4 Dangerous property.

The following warning shall be included when it cannot be certified that the property is completely harmless:

DANGEROUS PROPERTY

Purchasers are warned that the property purchased may contain items of an explosive, toxic, or inflammable nature, notwithstanding reasonable care exercised by the Contractor to render the property harmless. The Contractor and the Government assume no liability for damage to the property of the Purchaser, or for personal injuries or disabilities to the Purchaser or the Purchaser's employees, or to any other person, arising from or incident to the purchase of the property, or its use or disposition by the Purchaser. The Purchaser shall save the Contractor and the Government harmless from any and all such claims.

245.7310–5 Controlled substances.

The sale of controlled substances, e.g., narcotics, stimulants, depressants, or hallucinogenic drugs, shall be subject to the following special conditions:

(a) *Controlled Substances.* Bids will be rejected unless the Bidder submits the following certification with its bid:

The undersigned represents and warrants that it is registered under The Comprehensive Drug Abuse Prevention and Control Act of 1970, and is authorized under the law and by the Attorney General, U.S. Department of Justice (Bureau of Narcotics and Dangerous Drugs) to buy controlled substances as a medical practitioner, dealer or manufacturer of controlled substances.

(b) *Narcotic Drugs and Chemicals.* Bids will be rejected unless the Bidder submits the following certification with its bid:

The undersigned represents and warrants that it is registered under Federal narcotics laws and is authorized by law and by the Bureau of Narcotics, United States Treasury Department, as a manufacturer of narcotics.

245.7310–6 Radioactive material.

The following shall be used whenever the property offered for sale is capable of emitting ionized radiation:

RADIOACTIVE MATERIAL

Purchasers are warned that the property may be capable of emitting ionized radiation. The Contractor and the Government assume no liability for damage to the property of the Purchaser, or for personal injuries or disabilities to the Purchaser or the Purchaser's employees, or to any other person arising from or incident to the purchase of the property or its use or disposition by the Purchaser. The Purchaser shall hold the Contractor and the Government harmless from all such claims. The Purchase should warn possessors or users of the property that it may be capable of emitting ionized radiation.

245.7310–7 Scrap warranty.

The following condition shall be used whenever property, other than production scrap, is offered for sale as scrap:

SCRAP WARRANTY

The Purchaser represents and warrants that the property will be used only as scrap, and will not be resold until—

(a) Scrapping has been accomplished; or

(b) The Purchaser obtains an identical warranty from any subsequent purchaser.

245.7310–8 Antitrust clearance.

When property with an acquisition cost of $3 million or more is to be sold, include the following in the invitation:

ANTITRUST

When the property offered for sale has an acquisition cost of $3 million or more, or consists of patents, processes, techniques, or inventions, irrespective of cost, the successful Bidder shall be required to furnish additional information and shall allow up to 60 days for acceptance of its bid. Award shall be made only upon advice from the Department of Justice that the proposed sale would not create or maintain a situation inconsistent with the antitrust laws.

245.7311 Optional conditions.

The following special conditions of sale may be added at the option of the contractor:

245.7311–1 Sales and use tax liability.

For purchases of property subject to a state sales or use tax, a special condition of sale may stipulate that the Purchaser shall pay and the Contractor shall collect the amount of the tax, which shall be itemized separately on the billing document.

245.7311–2 Safety, security, and fire regulations.

245.7311–3 Bid deposits.

245.7311–4 Other special conditions.

Other special conditions considered necessary by the Contractor are subject to the prior approval of the plant clearance officer. Approval will normally be granted provided the prescribed conditions of sale are not altered or affected and the interest of the Government is not adversely affected.

PART 246—QUALITY ASSURANCE

Subpart 246.1—General

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

SOURCE: 56 FR 36460, July 31, 1991, unless otherwise noted.

Subpart 246.1—General

246.102 Policy.

Departments and agencies shall also—

(1) Develop and manage a systematic, cost-effective Government contract quality assurance program to ensure that contract performance conforms to specified requirements. Apply Government quality assurance to all contracts for services and products designed, developed, purchased, produced, stored,

distributed, operated, maintained, or disposed of by contractors.

(2) Conduct quality audits to ensure the quality of products and services meet contractual requirements.

(3) Base the type and extent of Government contract quality assurance actions on the particular acquisition.

(4) Provide contractors the maximum flexibility in establishing efficient and effective quality programs to meet contractual requirements. Contractor quality programs may be modeled on military, commercial, national, or international quality standards.

[56 FR 36460, July 31, 1991, as amended at 60 FR 33145, June 27, 1995; 71 FR 27646, May 12, 2006]

246.103 Contracting office responsibilities.

(1) The contracting office must coordinate with the quality assurance activity before changing any quality requirement.

(2) The activity responsible for technical requirements may prepare instructions covering the type and extent of Government inspections for acquisitions that are complex, have critical applications, or have unusual requirements. Follow the procedures at PGI 246.103(2) for preparation of instructions.

[71 FR 27647, May 12, 2006]

Subpart 246.2—Contract Quality Requirements

246.202 Types of contract quality requirements.

246.202–4 Higher-level contract quality requirements.

(1) Higher-level contract quality requirements are used in addition to a standard inspection requirement.

(2) Higher-level contract quality requirements, including nongovernment quality system standards adopted to meet DoD needs, are listed in the DoD Index of Specifications and Standards.

[60 FR 33145, June 27, 1995. Redesignated and amended at 60 FR 61599, Nov. 30, 1995]

Subpart 246.3—Contract Clauses

246.370 Material inspection and receiving report.

(a) Use the clause at 252.246–7000, Material Inspection and Receiving Report, in solicitations and contracts when there will be separate and distinct deliverables, even if the deliverables are not separately priced.

(b) When contract administration is retained by the contracting office, the clause at 252.246–7000, Material Inspection and Receiving Report, is not required for—

(1) Contracts awarded using simplified acquisition procedures;

(2) Negotiated subsistence contracts;

(3) Contracts for fresh milk and related fresh dairy products;

(4) Contracts for which the deliverable is a scientific or technical report;

(5) Research and development contracts not requiring the delivery of separately priced end items;

(6) Base, post, camp, or station contracts;

(7) Contracts in overseas areas when the preparation and distribution of the DD Form 250, Material Inspection and Receiving Report, by the contractor would not be practicable. In these cases, arrange for the contractor to provide the information necessary for the contracting office to prepare the DD Form 250;

(8) Contracts for services when hardware is not acquired as an item in the contract; and

(9) Indefinite delivery type contracts placed by central contracting offices which authorize only base, post, camp, or station activities to issue orders.

[56 FR 36460, July 31, 1991, as amended at 64 FR 2598, Jan. 15, 1999]

246.371 Notification of potential safety issues.

(a) Use the clause at 252.246–7003, Notification of Potential Safety Issues, in solicitations and contracts for the acquisition of—

(1) Repairable or consumable parts identified as critical safety items;

(2) Systems and subsystems, assemblies, and subassemblies integral to a system; or

(3) Repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, subassemblies, and parts integral to a system.

(b) Follow the procedures at PGI 246.371 for the handling of notifications received under the clause at 252.246–7003.

[72 FR 2636, Jan. 22, 2007]

Subpart 246.4—Government Contract Quality Assurance

246.402 Government contract quality assurance at source.

Do not require Government contract quality assurance at source for contracts or delivery orders valued below $250,000, unless—

(1) Mandated by DoD regulation;

(2) Required by a memorandum of agreement between the acquiring department or agency and the contract administration agency; or

(3) The contracting officer determines that—

(i) Contract technical requirements are significant (*e.g.*, the technical requirements include drawings, test procedures, or performance requirements);

(ii) The product being acquired—

(A) Has critical characteristics;

(B) Has specific features identified that make Government contract quality assurance at source necessary; or

(C) Has specific acquisition concerns identified that make Government contract quality assurance at source necessary; and

(iii) The contract is being awarded to—

(A) A manufacturer or producer; or

(B) A non-manufacturer or non-producer and specific Government verifications have been identified as necessary and feasible to perform.

[70 FR 8543, Feb. 22, 2005]

246.404 Government contract quality assurance for acquisitions at or below the simplified acquisition threshold.

Do not require Government contract quality assurance at source for contracts or delivery orders valued at or below the simplified acquisition threshold unless the criteria at 246.402 have been met.

[70 FR 8543, Feb. 22, 2005]

246.406 Foreign governments.

(1) *Quality assurance among North Atlantic Treaty Organization (NATO) countries.* (i) NATO Standardization Agreement (STANAG) 4107, Mutual Acceptance of Government Quality Assurance and Usage of the Allied Quality Assurance Publications—

(A) Contains the processes, procedures, terms, and conditions under which one NATO member nation will perform quality assurance for another NATO member nation or NATO organization;

(B) Standardizes the development, updating, and application of the Allied Quality Assurance Publications; and

(C) Has been ratified by the United States and other nations in NATO with certain reservations identified in STANAG 4107.

(ii) Departments and agencies shall follow STANAG 4107 when—

(A) Asking a NATO member nation to perform quality assurance; or

(B) Performing quality assurance when requested by a NATO member nation or NATO organization.

(2) *International military sales (non-NATO).* Departments and agencies shall—

(i) Perform quality assurance services on international military sales contracts or in accordance with existing agreements;

(ii) Inform host or U.S. Government personnel and contractors on the use of quality assurance publications; and

(iii) Delegate quality assurance to the host government when satisfactory services are available.

(3) *Reciprocal quality assurance agreements.* A Memorandum of Understanding (MOU) with a foreign country may contain an annex that provides for the reciprocal performance of quality assurance services. MOUs should be checked to determine whether such an annex exists for the country where a defense contract will be performed. (See subpart 225.8 for more information about MOUs.)

[56 FR 36460, July 31, 1991, as amended at 63 FR 43890, Aug. 17, 1998; 63 FR 47439, Sept. 8, 1998; 71 FR 27647, May 12, 2006]

246.407 Nonconforming supplies or services.

(f) If nonconforming material or services are discovered after acceptance, the defect appears to be the fault of the contractor, any warranty has expired, and there are no other contractual remedies, the contracting officer—

(i) Shall notify the contractor in writing of the nonconforming material or service;

(ii) Shall request that the contractor repair or replace the material, or perform the service, at no cost to the Government; and

(iii) May accept consideration if offered. For guidance on solicitation of a refund, see subpart 242.71.

(S–70) The head of the design control activity is the approval authority for acceptance of any nonconforming aviation or ship critical safety items or nonconforming modification, repair, or overhaul of such items (see 209.270). Authority for acceptance of minor nonconformances in aviation or ship critical safety items may be delegated as determined appropriate by the design control activity. See additional information at PGI 246.407.

[56 FR 36460, July 31, 1991, as amended at 67 FR 4208, Jan. 29, 2002; 69 FR 55989, Sept. 17, 2004; 70 FR 57190, Sept. 30, 2005; 73 FR 1828, Jan. 10, 2008]

246.408 Single-agency assignments of Government contract quality assurance.

246.408–70 Subsistence.

(a) The Surgeons General of the military departments are responsible for—

(1) Acceptance criteria;

(2) Technical requirements; and

(3) Inspection procedures needed to assure wholesomeness of foods.

(b) The contracting office may designate any Federal activity, capable of assuring wholesomeness and quality in food, to perform quality assurance for subsistence contract items. The designation may—

(1) Include medical service personnel of the military departments; and

(2) Be on a reimbursable basis.

246.408–71 Aircraft.

(a) The Federal Aviation Administration (FAA) has certain responsibilities and prerogatives in connection with some commercial aircraft and of aircraft equipment and accessories (Pub. L. 85–726 (72 Stat 776, 49 U.S.C. 1423)). This includes the issuance of various certificates applicable to design, manufacture, and airworthiness.

(b) FAA evaluations are not a substitute for normal DoD evaluations of the contractor's quality assurance measures. Actual records of FAA evaluations may be of use to the contract administration office (CAO) and should be used to their maximum advantage.

(c) The CAO shall ensure that the contractor possesses any required FAA certificates prior to acceptance.

[56 FR 36460, July 31, 1991, as amended at 71 FR 27647, May 12, 2006]

246.470 Government contract quality assurance actions.

246.470–1 Assessment of additional costs.

(a) Under the clause at FAR 52.246–2, Inspection of Supplies—Fixed-Price, after considering the factors in paragraph (c) of this subsection, the quality assurance representative (QAR) may believe that the assessment of additional costs is warranted. If so, the representative shall recommend that the contracting officer take the necessary action and provide a recommendation as to the amount of additional costs. Costs are based on the applicable Federal agency, foreign military sale, or public rate in effect at the time of the delay, reinspection, or retest.

(b) If the contracting officer agrees with the QAR, the contracting officer shall—

(1) Notify the contractor, in writing, of the determination to exercise the Government's right under the clause at FAR 52.246–2, Inspection of Supplies—Fixed-Price; and

(2) Demand payment of the costs in accordance with the collection procedures contained in FAR Subpart 32.6.

(c) In making a determination to assess additional costs, the contracting officer shall consider—

(1) The frequency of delays, reinspection, or retest under both current and prior contracts;

(2) The cause of such delay, reinspection, or retest; and

(3) The expense of recovering the additional costs.

[71 FR 27647, May 12, 2006]

246.470–2 Quality evaluation data.

The contract administration office shall establish a system for the collection, evaluation, and use of the types of quality evaluation data specified in PGI 246.470–2.

[71 FR 27647, May 12, 2006]

246.471 Authorizing shipment of supplies.

(a) *General.* (1) Ordinarily, a representative of the contract administration office signs or stamps the shipping papers that accompany Government source-inspected supplies to release them for shipment. This is done for both prime and subcontracts.

(2) An alternative procedure (see paragraph (b) of this section) permits the contractor to assume the responsibility for releasing the supplies for shipment.

(3) The alternative procedure may include prime contractor release of supplies inspected at a subcontractor's facility.

(4) The use of the alternative procedure releases DoD manpower to perform technical functions by eliminating routine signing or stamping of the papers accompanying each shipment.

(b) *Alternative Procedures—Contract Release for Shipment.* (1) The contract administration office may authorize, in writing, the contractor to release supplies for shipment when—

(i) The stamping or signing of the shipping papers by a representative of the contract administration office interferes with the operation of the Government contract quality assurance program or takes too much of the Government representative's time;

(ii) There is sufficient continuity of production to permit the Government to establish a systematic and continuing evaluation of the contractor's control of quality; and

(iii) The contractor has a record of satisfactory quality, including that pertaining to preparation for shipment.

(2) The contract administration office shall withdraw, in writing, the authorization when there is an indication that the conditions in paragraph (b)(1) of this subsection no longer exist.

(3) When the alternative procedure is used, require the contractor to—

(i) Type or stamp, and sign, the following statement on the required copy or copies of the shipping paper(s), or on an attachment—

The supplies in this shipment—

1. Have been subjected to and have passed all examinations and tests required by the contract;

2. Were shipped in accordance with authorized shipping instructions;

3. Conform to the quality, identity, and condition called for by the contract; and

4. Are of the quantity shown on this document.

This shipment was—

1. Released in accordance with section 246.471 of the Defense FAR Supplement; and

2. Authorized by (name and title of the authorized representative of the contract administration office) in a letter dated (date of authorizing letter). (Signature and title of contractor's designated official.)

(ii) Release and process, in accordance with established instructions, the DD Form 250, Material Inspection and Receiving Report, or other authorized receiving report.

246.472 Inspection stamping.

(a) DoD quality inspection approval marking designs (stamps) may be used for both prime contracts and subcontracts. Follow the procedures at PGI 246.472(a) for use of DoD inspection stamps.

(b) Policies and procedures regarding the use of National Aeronautics and Space Administration (NASA) quality status stamps are contained in NASA publications. When requested by NASA centers, the DoD inspector shall use NASA quality status stamps in accordance with current NASA requirements.

[71 FR 27647, May 12, 2006]

Subpart 246.5—Acceptance

246.504 Certificate of conformance.

Before authorizing a certificate of conformance for aviation or ship critical safety items, obtain the concurrence of the head of the design control activity (see 209.270).

[73 FR 1828, Jan. 10, 2008]

Subpart 246.6—Material Inspection and Receiving Reports

246.601 General.

See Appendix F, Material Inspection and Receiving Report, for procedures and instructions for the use, preparation, and distribution of—

(1) The Material Inspection and Receiving Report (DD Form 250 series); and

(2) Supplier's commercial shipping/packing lists used to evidence Government contract quality assurance.

[71 FR 27647, May 12, 2006]

Subpart 246.7—Warranties

246.701 Definitions.

Acceptance, as defined in FAR 46.701 and as used in this subpart and in the warranty clauses at FAR 52.246–17, Warranty of Supplies of a Noncomplex Nature; FAR 52.246–18, Warranty of Supplies of a Complex Nature; FAR 52.246–19, Warranty of Systems and Equipment Under Performance Specifications or Design Criteria; and FAR 52.246–20, Warranty of Services, includes the execution of an official document (e.g., DD Form 250, Material Inspection and Receiving Report) by an authorized representative of the Government.

Defect, as used in this subpart, means any condition or characteristic in any supply or service furnished by the contractor under the contract that is not in compliance with the requirements of the contract.

246.704 Authority for use of warranties.

(1) The chief of the contracting office must approve use of a warranty, except in acquisitions for—

(i) Commercial items (*see* FAR 46.709);

(ii) Technical data, unless the warranty provides for extended liability (*see* 246.708);

(iii) Supplies and services in fixed-price type contracts containing quality assurance provisions that reference higher-level contract quality requirements (*see* 246.202–4); or

(iv) Supplies and services in construction contracts when using the warranties that are contained in Federal, military, or construction guide specifications.

(2) The chief of the contracting office shall approve the use of a warranty only when the benefits are expected to outweigh the cost.

[71 FR 27647, May 12, 2006]

246.705 Limitations.

(a) In addition to the exceptions provided in FAR 46.705(a), warranties in the clause at 252.246–7001, Warranty of Data, may be used in cost-reimbursement contracts.

[71 FR 27647, May 12, 2006]

246.706 Warranty terms and conditions.

(b)(5) *Markings.* For non-commercial items, use MIL–STD–129, Marking for Shipments and Storage, and MIL–STD–130, Identification Marking of U.S. Military Property, when marking warranty items.

[71 FR 27647, May 12, 2006]

246.708 Warranties of data.

Obtain warranties on technical data when practicable and cost effective. Consider the factors in FAR 46.703 in deciding whether to obtain warranties of technical data. Consider the following in deciding whether to use extended liability provisions—

(1) The likelihood that correction or replacement of the nonconforming data, or a price adjustment, will not give adequate protection to the Government; and

(2) The effectiveness of the additional remedy as a deterrent against furnishing nonconforming data.

246.710 Contract clauses.

(1) Use a clause substantially the same as the clause at 252.246–7001, Warranty of Data, in solicitations and contracts that include the clause at 252.227–7013, Rights in Technical Data and Computer Software, when there is a need for greater protection or period of liability than provided by the inspection and warranty clauses prescribed in FAR Part 46.

(2) Use the clause at 252.246–7001, Warranty of Data, with its Alternate I when extended liability is desired and a

fixed price incentive contract is contemplated.

(3) Use the clause at 252.246–7001, Warranty of Data, with its Alternate II when extended liability is desired and a firm fixed price contract is contemplated.

(4) Use the clause at 252.246–7002, Warranty of Construction (Germany), instead of the clause at FAR 52.246–21, Warranty of Construction, in solicitations and contracts for construction when a fixed-price contract will be awarded and contract performance will be in Germany.

[56 FR 36460, July 31, 1991, as amended at 62 FR 34128, June 24, 1997; 64 FR 51077, Sept. 21, 1999; 71 FR 27647, May 12, 2006]

PART 247—TRANSPORTATION

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

SOURCE: 56 FR 36466, July 31, 1991, unless otherwise noted.

247.001 Definitions.

For definitions of ''Civil Reserve Air Fleet'' and ''Voluntary Intermodal Sealift Agreement,'' see Joint Pub. 1–02, DoD Dictionary of Military and Associated Terms.

[65 FR 50144, Aug. 17, 2000]

Subpart 247.1—General

247.104 Government rate tenders under section 10721 of the Interstate Commerce Act.

247.104–5 Citation of Government rate tenders.

(a) See DoD 4500.9–R, Defense Transportation Regulation, Part II, Chapter 206, for instructions on converting commercial bills of lading to Government bills of lading within CONUS.

[65 FR 50144, Aug. 17, 2000]

247.105 Transportation assistance.

(b)(i) Transportation assistance includes all transportation factors, such as—

(A) Rates and prices (for evaluation of bids or routing purposes);

(B) Other transportation costs;

(C) Transit agreements;

(D) Time in transit;

(E) Port handling charges; and

(F) Port capabilities.

(ii) Within CONUS, the Military Traffic Management Command (MTMC) is responsible for the performance of traffic management functions. These functions include the direction, control, and supervision of all functions incident to the acquisition and use of commercial freight and passenger transportation services.

(iii) For assistance with international shipments—

(A) Originating in CONUS, request assistance from the appropriate military activity; i.e., the Air Mobility Command (AMC), Military Sealift Command (MSC), MTMC, or the military service sponsoring the cargo;

(B) For all modes of transportation originating overseas, request assistance from the overseas Theater Commander assigned responsibility for common-user, military-operated land transportation;

(C) Of bulk petroleum via ocean tanker, request assistance, rates, or other costs from the MSC;

(D) Of supplies between points outside CONUS, including Alaska and Hawaii, request assistance, rates, or other costs from the military service sponsoring the cargo. Direct the requests to:

Army: Deputy Chief of Staff for Logistics, ATTN: DALO-TSP, Washington, DC 20310–0500

Navy: Naval Supply Systems Command, Code 4D, 5450 Carlisle Pike, PO Box 2050, Mechanicsburg, PA 17055–0791

Air Force: Applicable Overseas Air Force Command:

HQ PACAF/LGT, 25 East Street, Suite I–305, Hickam AFB, HI 96853–5427

HQ USAFE/LGT, Unit 305, Box 105, APO AE 09094–0105

HQ AFSPACECOM/LGT, 150 Vandenberg Street, Suite 1105, Peterson AFB, CO 80914–4540

Marine Corps: HQ, U.S. Marine Corps, Traffic Management Branch (LFT1), 2 Navy Annex, Washington, DC 20380–1775

[56 FR 36466, July 31, 1991, as amended at 59 FR 27674, May 27, 1994; 65 FR 50144, Aug. 17, 2000]

Subpart 247.2—Contracts for Transportation or for Transportation-Related Services

247.200 Scope of subpart.

This subpart does not apply to the operation of vessels owned by, or bareboat chartered by, the Government.

[65 FR 50144, Aug. 17, 2000]

247.206 Preparation of solicitations and contracts.

(1) Consistent with FAR 15.304 and 215.304, consider using the following as evaluation factors or subfactors:

(i) Record of claims involving loss or damage;

(ii) Provider availability; and

(iii) Commitment of transportation assets to readiness support (e.g., Civil Reserve Air Fleet and Voluntary Intermodal Sealift Agreement).

(2) To the maximum extent practicable, structure contracts and agreements to allow for their use by DoD contractors.

[65 FR 50144, Aug. 17, 2000]

247.270 Stevedoring contracts.

247.270–1 Scope of section.

This section contains procedures unique to stevedoring. Other portions of the FAR and DFARS dealing with service contracting also apply to stevedoring contracts.

[56 FR 36466, July 31, 1991, as amended at 65 FR 50144, Aug. 17, 2000]

247.270–2 Definitions.

Commodity rate is—

(1) The price quoted for handling a ton (weight or measurement) of a specified commodity; and

(2) Computed by dividing the hourly stevedoring gang cost by the estimated number of tons of the specified commodity that can be handled in 1 hour.

Gang cost is—

(1) The total hourly wages paid to the workers in the gang, in accordance with the collective bargaining agreement between the maritime industry and the unions at a specific port; and

(2) Payments for workmen's compensation, social security taxes, unemployment insurance, taxes, liability

and property damage insurance, general and administrative expenses, and profit.

Stevedoring is the—

(1) Loading of cargo from an agreed point of rest on a pier or lighter and its storage aboard a vessel; or

(2) Breaking out and discharging of cargo from any space in the vessel to an agreed point of rest dockside or in a lighter.

[56 FR 36466, July 31, 1991, as amended at 65 FR 50144, Aug. 17, 2000]

247.270–3 Technical provisions.

(a) Because conditions vary at different ports, and sometimes within the same port, it is not practical to develop standard technical provisions covering all phases of stevedoring operations.

(b) When including rail car, truck, or intermodal equipment loading and unloading, or other dock and terminal work under a stevedoring contract, include these requirements as separate items of work.

[65 FR 50144, Aug. 17, 2000]

247.270–4 Evaluation of bids and proposals.

As a minimum, require that offers include—

(a) Tonnage or commodity rates that apply to the bulk of the cargo worked under normal conditions;

(b) Labor-hour rates that apply to services not covered by commodity rates, or to work performed under hardship conditions; and

(c) Rates for equipment rental.

[65 FR 50144, Aug. 17, 2000]

247.270–5 Award of contract.

Make the award to the offeror submitting the offer most advantageous to the Government, considering cost or price and other factors specified in the solicitation. Evaluation will include, but is not limited to—

(a) Total estimated cost of tonnage to be moved at commodity rates;

(b) Estimated cost at labor-hour rates; and

(c) Cost of equipment rental.

[65 FR 50144, Aug. 17, 2000]

247.270–6 Contract clauses.

Use the following clauses in solicitations and contracts for stevedoring services as indicated:

(a) 252.247–7000, Hardship Conditions, in all solicitations and contracts.

(b) 252.247–7001, Price Adjustment, when using sealed bidding.

(c) 252.247–7002, Revision of Prices, when using negotiation.

(d) 252.247–7004, Indefinite Quantities—Fixed Charges, when the contract is an indefinite-quantity type and will provide for the payment of fixed charges.

(e) 252.247–7005, Indefinite Quantities—No Fixed Charges, when the contract is an indefinite-quantity type and will not provide for the payment of fixed charges.

(f) 252.247–7006, Removal of Contractor's Employees, in all solicitations and contracts.

(g) 252.247–7007, Liability and Insurance, in all solicitations and contracts.

[65 FR 50144, Aug. 17, 2000]

247.271 Contracts for the preparation of personal property for shipment or storage.

247.271–1 Scope of section.

This section contains procedures unique to the preparation of personal property for shipment or storage, and for the performance of intra-area or intra-city movement. Other portions of the FAR and DFARS dealing with service contracting also apply to these services.

[56 FR 36466, July 31, 1991, as amended at 65 FR 50145, Aug. 17, 2000]

247.271–2 Policy.

(a) *Annual contracts.* Normally—

(1) Use requirements contracts to acquire services for the—

(i) Preparation of personal property for shipment or storage; and

(ii) Performance of intra-area movement.

(2) Award contracts on a calendar year basis.

(3) Provide for option years.

(4) Award contracts, or exercise option years, before November 1 of each year, if possible.

(b) *Areas of performance.* Define clearly in the solicitation each area of performance.

(1) Establish one or more areas; however, hold the number to a minimum consistent with local conditions.

(2) Each schedule may provide for the same or different areas of performance. Determine the areas as follows—

(i) Use political boundaries, streets, or any other features as lines of demarcation. Consider such matters as—

(A) Total volume;

(B) Size of overall area; and

(C) The need to service isolated areas of high population density.

(ii) Specifically identify frequently used terminals, and consider them as being included in each area of performance described in the solicitation.

(c) *Maximum requirements-minimum capability.* The contracting officer must—

(1) Establish realistic quantities on the Estimated Quantities Report in DoD 4500.9–R, Defense Transportation Regulation, Part IV;

(2) Ensure that the Government's minimum acceptable daily capability—

(i) Will at least equal the maximum authorized individual weight allowance as prescribed by the Joint Federal Travel Regulations; and

(ii) Will encourage maximum participation of small business concerns as offerors.

[56 FR 36466, July 31, 1991, as amended at 65 FR 50145, Aug. 17, 2000]

247.271–3 Procedures.

(a) *CONUS military activities assigned multi-service personal property areas of responsibility.* (1) When two or more military installations or activities have personal property responsibilities in a given area, one activity must contract for the estimated requirements of all activities in the area. The installation commanders concerned must designate the activity by mutual agreement.

(2) The Commander, Military Traffic Management Command (MTMC), must designate the contracting activity when local commanders are unable to reach agreement.

(b) *Additional services and excess requirements.* (1) Excess requirements are those services that exceed contractor capabilities available under contracts. Use simplified acquisition procedures to satisfy excess requirements.

(2) Additional services are those not specified in the bid items.

(i) Additional services may include—

(A) Hoisting or lowering of articles;

(B) Waiting time;

(C) Special packaging; and

(D) Stuffing or unstuffing of sea van containers.

(ii) Consider contracting for local moves that do not require drayage by using hourly rate or constructive weight methods. The rate will include those services necessary for completion of the movement, including—

(A) Packing and unpacking;

(B) Movement;

(C) Inventorying; and

(D) Removal of debris.

(iii) Each personal property shipping activity must determine if local requirements exist for any additional services.

(iv) The contracting officer may obtain additional services by—

(A) Including them as items within the contract; provided, they are not used in the evaluation of bids (see 252.247–7008, Evaluation of Bids); or

(B) Using simplified acquisition procedures.

(v) Either predetermine prices for additional services with the contractor, or negotiate them on a case-by-case basis.

(vi) The contracting officer must authorize the contractor to perform any additional services, other than attempted pick up or delivery, regardless of the contracting method.

(vii) To the maximum extent possible, identify additional services required that are incidental to an order before placing the order; or, when applicable, during the premove survey.

(c) *Contract distribution.* In addition to the distribution requirements of FAR subpart 4.2, furnish one copy of each contract as follows:

(1) CONUS personal property shipping activities must send the copy to the Commander, Military Traffic Management Command, Attn: MTPP-CI, Room 408, 5611 Columbia Pike, Falls Church, VA 22041–5050.

(2) In the European and Pacific areas, personal property shipping activities

must send the copy to either the Property Directorate, MTMC Europe, or the MTMC Field Office-Pacific.

(3) Other overseas personal property shipping activities must send the copy to the Commander, Military Traffic Management Command, Attn: MTPP-Q, 5611 Columbia Pike, Falls Church, VA 22041–5050.

[56 FR 36466, July 31, 1991, as amended at 64 FR 2598, Jan. 15, 1999; 65 FR 50145, Aug. 17, 2000]

247.271–4 Solicitation provisions, schedule formats, and contract clauses.

When acquiring services for the preparation of personal property for movement or storage, and for performance of intra-city or intra-area movement, use the following provisions, clauses, and schedules. Revise solicitation provisions and schedules, as appropriate, if using negotiation rather than sealed bidding. Overseas commands, except those in Alaska and Hawaii, may modify these clauses to conform to local practices, laws, and regulations.

(a) The provision at 252.247–7008, Evaluation of Bids. When adding ''additional services'' items to any schedule, use the basic clause with Alternate I.

(b) The provision at 252.247–7009, Award.

(c) In solicitations and resulting contracts, the schedules contained in DoD 4500.9–R, Defense Transportation Regulation, Part IV, as provided by the installation personal property shipping office.

(1) When there is no requirement for an item or subitem in a schedule, indicate that item or subitem number, in its proper numerical sequence, and add the statement ''No Requirement.''

(2) Within Schedules I (Outbound) and II (Inbound), item numbers are reserved to permit inclusion of additional items as required by local conditions.

(3) Overseas activities, except those in Alaska and Hawaii, may modify the schedules when necessary to conform with local trade practices, laws, and regulations.

(4) All generic terminology, schedule, and item numbers in proper sequence must follow those contained in the basic format.

(5) When it is in the Government's best interest to have both outbound and inbound services within a given area of performance furnished by the same contractor, modify the schedule format to combine both services in a single schedule. However, items must follow the same sequential order as in the basic format.

(6) Process any modification of schedule format, other than those authorized in paragraphs (c)(1) through (5) of this subsection, as a request for deviation to the Commander, MTMC.

(d) The clause at 252.247–7010, Scope of Contract.

(e) The clause at 252.247–7011, Period of Contract. When the period of performance is less than a calendar year, modify the clause to indicate the beginning and ending dates. However, the contract period must not end later than December 31 of the year in which the contract is awarded.

(f) In addition to designating each ordering activity, as required by the clause at FAR 52.216–18, Ordering, identify by name or position title the individuals authorized to place orders for each activity. When provisions are made for placing oral orders in accordance with FAR 16.505(a)(4), document the oral orders in accordance with department or agency instructions.

(g) The clause at 252.247–7012, Ordering Limitation.

(h) The clause at 252.247–7013, Contract Areas of Performance.

(i) The clause at 252.247–7014, Demurrage.

(j) When using the clause at FAR 52.216–21, Requirements, see 216.506(d), which prescribes an alternate to the clause.

(k) The clause at 252.247–7016, Contractor Liability for Loss and Damage.

(l) The clause at 252.247–7017, Erroneous Shipments.

(m) The clause at 252.247–7018, Subcontracting.

(n) The clause at 252.247–7019, Drayage.

(o) The clause at 252.247–7020, Additional Services.

(p) The clauses at FAR 52.247–8, Estimated Weight or Quantities Not Guaranteed, and FAR 52.247–13, Accessorial Services—Moving Contracts.

[56 FR 36466, July 31, 1991, as amended at 65 FR 50145, Aug. 17, 2000]

Subpart 247.3—Transportation in Supply Contracts

247.301 General.

247.301–70 Definition.

''Integrated logistics managers'' or ''third-party logistics providers'' means providers of multiple logistics services. Some examples of logistics services are the management of transportation, demand forecasting, information management, inventory maintenance, warehousing, and distribution.

[65 FR 50145, Aug. 17, 2000]

247.301–71 Evaluation factor or subfactor.

For contracts that will include a significant requirement for transportation of items outside CONUS, include an evaluation factor or subfactor that favors suppliers, third-party logistics providers, and integrated logistics managers that commit to using carriers that participate in one of the readiness programs (e.g., Civil Reserve Air Force Fleet and Voluntary Intermodal Sealift Agreement).

[65 FR 50145, Aug. 17, 2000]

247.305 Solicitation provisions, contract clauses, and transportation factors.

247.305–10 Packing, marking, and consignment instructions.

(b) Consignment instructions must include, as a minimum—

(i) The clear text and coded MILSTRIP data as follows:

(A) Consignee code and clear text identification of consignee and destination as published in—

(*1*) DoD 4000.25–6–M, Department of Defense Activity Address Directory (DODAAD);

(*2*) DoD 4000.25–8–M, Military Assistance Program Address Directory (MAPAD) System; or

(*3*) Transportation Control and Movement Document. Reporting procedures and instructions must comply with DoD 4500.9–R, Defense Transportation Regulation.

(B) Project code, when applicable.

(C) Transportation priority.

(D) Required delivery date.

(ii) Non-MILSTRIP shipments must include data similar to that described in paragraphs (b)(i)(A) through (D) of this subsection.

(iii) In amended shipping instructions include, in addition to the data requirements of paragraphs (b)(i)(A) through (D) of this subsection, the following, when appropriate:

(A) Name of the activity originally designated, from which the stated quantities are to be deducted.

(B) Any other features of the amended instructions not contained in the basic contract.

(iv) When assigning contract administration responsibility in accordance with FAR 42.202, include in instructions the—

(A) Modification serial number; and

(B) If a new line item is created by the issuance of shipping instructions—

(*1*) New line item number; and

(*2*) Existing line item number, if affected.

(v) For petroleum, oil, and lubricant products, instructions for diversions need not include the modification serial number and new line item number, when the instructions are—

(A) For diversions overseas to new destinations;

(B) Issued by an office other than that issuing the contract or delivery order; and

(C) Issued by telephone or electronic media.

[65 FR 50145, Aug. 17, 2000, as amended at 67 FR 61517, Oct. 1, 2002]

247.305–70 Returnable containers other than cylinders.

Use the clause at 252.247–7021, Returnable Containers Other Than Cylinders, in solicitations and contracts for supplies involving contractor-furnished returnable reels, spools, drums, carboys, liquid petroleum gas containers, or

other returnable containers if the contractor is to retain title to the containers.

[60 FR 29501, June 5, 1995]

247.370 Use of Standard Form 30 for consignment instructions.

When complete consignment instructions are not known initially, use the Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract, to issue or amend consignment instructions, and when necessary, to confirm consignment instructions issued by telephone or electronic media.

(a) When using the SF 30 to confirm delivery instructions—

(1) Stamp or mark ''CONFIRMATION'' in block letters on the form, and specify in detail those instructions being confirmed.

(2) Do not change the instructions being confirmed.

(b) Process the confirming SF 30 as follows—

(1) For contracts assigned for any contract administration function listed in FAR subpart 42.3 to any office listed in the Federal Directory of Contract Administration Services Components, within five working days;

(2) For diversions of petroleum, oil, and lubricant products overseas to new destinations, within 30 days of instructions being confirmed; and

(3) For other contracts—

(i) Telephone—within 5 working days; and

(ii) Electronic media—consolidate on a monthly basis.

[56 FR 36466, July 31, 1991, as amended at 64 FR 61030, Nov. 9, 1999; 65 FR 50146, Aug. 17, 2000]

247.371 DD Form 1384, Transportation Control and Movement Document.

Reporting procedures and instructions for this form will be in compliance with DoD 4500.9–R, Defense Transportation Regulation.

[56 FR 36466, July 31, 1991, as amended at 67 FR 61517, Oct. 1, 2002]

247.372 DD Form 1653, Transportation Data for Solicitations.

(a) The transportation specialist prepares the DD Form 1653 at the request of the contracting officer. The completed form will contain recommendations concerning f.o.b. terms best suited for a particular acquisition, and other suggested transportation provisions for inclusion in the solicitation.

(b) When appropriate, the DD Form 1653 will also include information on combined port handling and transportation charges for inclusion in the solicitation in connection with export shipments.

247.373 DD Form 1654, Evaluation of Transportation Cost Factors.

Contracting personnel may use the DD Form 1654 to furnish information to the transportation office for development of cost factors for use by the contracting officer in the evaluation of f.o.b. origin offers.

Subpart 247.5—Ocean Transportation by U.S.-Flag Vessels

247.570 Scope.

This subpart—

(a) Implements—(1) The Cargo Preference Act of 1904 (''the 1904 Act''), 10 U.S.C. 2631, which applies to the ocean transportation of cargo owned by, or destined for use by, DoD; and

(2) Section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364), which requires consideration of the extent to which offerers have had overhaul, repair, and maintenance work performed in shipyards located in the United States or Guam;

(b) Does not specifically implement the Cargo Preference Act of 1954 (''the 1954 Act''), 46 U.S.C. 1241(b). The 1954 Act is applicable to DoD, but DFARS coverage is not required because compliance with the 1904 Act historically has resulted in DoD exceeding the 1954 Act's requirements; and

(c) Does not apply to ocean transportation of the following products, in which case FAR subpart 47.5 applies:

(1) Products obtained for contributions to foreign assistance programs.

(2) Products owned by agencies other than DoD, unless the products are clearly identifiable for eventual use by DoD.

[65 FR 50146, Aug. 17, 2000, as amended at 72 FR 49205, Aug. 28, 2007]

247.571 Definitions.

Covered vessel, overhaul, repair, and maintenance work, and *shipyards*, as used in this subpart, have the meaning given in the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade.

[72 FR 49206, Aug. 28, 2007]

247.572 Policy.

(a) DoD contractors must transport supplies, as defined in the clause at 252.247–7023, Transportation of Supplies by Sea, exclusively on U.S.-flag vessels unless—

(1) Those vessels are not available, and the procedures at 247.573–1(c)(1) or 247.573–2(d)(1) are followed;

(2) The proposed charges to the Government are higher than charges to private persons for the transportation of like goods, and the procedures at 247.573–1(c)(2) or 247.573–2(d)(2) are followed; or

(3) The Secretary of the Navy or the Secretary of the Army determines that the proposed freight charges are excessive or unreasonable in accordance with 247.573–1(c)(3) or 247.573–2(d)(3).

(b) Contracts must provide for the use of Government-owned vessels when security classifications prohibit the use of other than Government-owned vessels.

(c)(1) Any vessel used under a time charter contract for the transportation of supplies under this section shall have any reflagging or repair work, as defined in the clause at 252.247–7025, Reflagging or Repair Work, performed in the United States or its outlying areas, if the reflagging or repair work is performed—

(i) On a vessel for which the contractor submitted an offer in response to the solicitation for the contract; and

(ii) Prior to the acceptance of the vessel by the Government.

(2) The Secretary of Defense may waive this requirement if the Secretary determines that such waiver is critical to the national security of the United States.

(d) In accordance with Section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364)—

(1) When obtaining carriage by vessel, DoD must consider the extent to which offerors have had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam; and

(2) DoD must submit an annual report to the congressional defense committees, addressing the information provided by offerors with regard to overhaul, repair, and maintenance for covered vessels performed in the United States or Guam.

[65 FR 50146, Aug. 17, 2000, as amended at 70 FR 35545, June 21, 2005. Redesignated and amended at 72 FR 49206, Aug. 28, 2007]

247.573 Procedures.

[72 FR 49206, Aug. 28, 2007]

247.573–1 Ocean transportation incidental to a contract for supplies, services, or construction.

(a) This subsection applies when ocean transportation is not the principal purpose of the contract, and the cargo to be transported is owned by DoD or is clearly identifiable for eventual use by DoD.

(b) The contracting officer must obtain assistance from the congnizant transportation activity (see 247.105) in developing—

(1) The Government estimate for transportation costs, irrespective of whether freight will be paid directly by the Government; and

(2) Shipping instructions and delivery terms for inclusion in solicitations and contracts that may involve transportation of supplies by sea.

(c) If the contractor notifies the contracting officer that the contractor or a subcontractor considers that—

(1) No U.S.-flag vessels are available, the contracting officer must request confirmation of the nonavailability from—

(i) The Commander, Military Sealift Command (MSC), through the Contracts and Business Management Directorate, MSC; or

(ii) The Commander, Military Traffic Management Command (MTMC), through the Principal Assistant Responsible for Contracting, MTMC.

(2) The proposed freight charges to the Government, the contractor, or any subcontractor are higher than charges for transportation of like goods to private persons, the contracting officer may approve a request for an exception to the requirement to ship on U.S.-flag vessels for a particular shipment.

(i) Prior to granting an exception, the contracting officer must request advice, oral or written, from the Commander, MSC, or the Commander, MTMC.

(ii) In advising the contracting officer whether to grant the exception, the Commander, MSC, or the Commander, MTMC, must consider, as appropriate, evidence from—

(A) Published tariffs;

(B) Industry publications;

(C) The Maritime Administration; and

(D) Any other available sources.

(3) The freight charges proposed by U.S.-flag carriers are excessive or otherwise unreasonable—

(i) The contracting officer must prepare a report in determination and finding format, and must—

(A) Take into consideration that the 1904 Act is, in part, a subsidy of the U.S.-flag commercial shipping industry that recognizes that lower prices may be available from foreign-flag carriers. Therefore, a lower price for use of a foreign-flag vessel is not a sufficient basis, on its own, to determine that the freight rate proposed by the U.S.-flag carrier is excessive or otherwise unreasonable. However, such a price differential may indicate a need for further review;

(B) Consider, accordingly, not only excessive profits to the carrier (to include vessel owner or operator), if ascertainable, but also excessive costs to the Government (i.e., costs beyond the economic penalty normally incurred by excluding foreign competition) resulting from the use of U.S.-flag vessels in extraordinarily inefficient circumstances; and

(C) Include an analysis of whether the cost is excessive, taking into account factors such as—

(*1*) The differential between the freight charges proposed by the U.S.-flag carrier and an estimate of what foreign-flag carriers would charge based upon a price analysis;

(*2*) A comparison of U.S.-flag rates charged on comparable routes;

(*3*) Efficiency of operation regardless of rate differential (e.g., suitability of the vessel for the required transportation in terms of cargo requirements or vessel capacity, and the commercial reasonableness of vessel positioning required); and

(*4*) Any other relevant economic and financial considerations.

(ii) The contracting officer must forward the report to—

(A) The Commander, MSC, through the Contracts and Business Management Directorate, MSC; or

(B) The Commander, MTMC, through the Principal Assistant Responsible for Contracting, MTMC.

(iii) If in agreement with the contracting officer, the Commander, MSC, or the Commander, MTMC, will forward the report to the Secretary of the Navy or the Secretary of the Army, respectively, for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable.

[65 FR 50146, Aug. 17, 2000, as amended at 67 FR 38021, May 31, 2002. Redesignated at 72 FR 49206, Aug. 28, 2007]

247.573–2 Direct purchase of ocean transportation services.

(a) This subsection applies when ocean transportation is the principal purpose of the contract, including—

(1) Time charters;

(2) Voyage charters;

(3) Contracts for charter vessel services;

(4) Dedicated contractor contracts for charter vessel services;

(5) Ocean bills of lading; and

(6) Subcontracts under Government contracts or agreements for ocean transportation services.

(b) Coordinate these acquisitions, as appropriate, with the U.S. Transportation Command, the DoD single manager for commercial transportation and related services, other than Service-unique or theater-assigned transportation assets, in accordance with DoD 5158.4, United States Transportation Command.

(c) All solicitations within the scope of this subsection must provide—(1) A preference for U.S.-flag vessels in accordance with the 1904 Act;

(2) An evaluation factor or subfactor for offeror participation in the Voluntary Intermodal Sealift Agreement; and

(3) An evaluation factor or subfactor considering the extent to which offerors have had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam.

(d) Do not award a contract of the type described in paragraph (a) of this subsection for a foreign-flag vessel unless—

(1) The Commander, MSC, or the Commander, MTMC, determines that no U.S.-flag vessels are available.

(i) The Commander, MSC, and the Commander, MTMC, are authorized to make any determinations as to the availability of U.S.-flag vessels to ensure the proper use of Government and private U.S. vessels.

(ii) The contracting officer must request such determinations—

(A) For voyage and time charters, through the Contracts and Business Management Directorate, MSC; and

(B) For ocean and intermodal transportation of DoD and DoD-sponsored cargoes, as applicable under contracts awarded by MTMC, including contracts for shipment of military household goods, through the Chiefs of the MTMC Ocean Cargo Clearance Authority.

(iii) In the absence of regularly scheduled U.S.-flag service to fulfill stated DoD requirements under MTMC solicitations or rate requests, the Commander, MTMC, may grant, on a case-by-case basis, an on-going nonavailability determination for foreign-flag service approval with pre-determined review date(s);

(2) The contracting officer determines that the U.S.-flag carrier has proposed to the Government freight charges that are higher than charges to private persons for transportation of like goods, and obtains the approval of the Commander, MSC, or the Commander, MTMC; or

(3) The Secretary of the Navy or the Secretary of the Army determines that the proposed freight charges for U.S.-flag vessels are excessive or otherwise unreasonable.

(i) After considering the factors in 247.573–1(d)(3)(i)(A) and (B), if the contracting officer concludes that the freight charges proposed by U.S.-flag carriers may be excessive or otherwise unreasonable, the contracting officer must prepare a report in determination and finding format that includes, as appropriate—

(A) An analysis of the carrier's costs in accordance with FAR Subpart 15.4, or profit in accordance with 215.404–4. The costs or profit should not be so high as to make it unreasonable to apply the preference for U.S.-flag vessels;

(B) A description of efforts taken pursuant to FAR 15.405, to negotiate a reasonable price. For the purpose of FAR 15.405(d), this report is the referral to a level above the contracting officer; and

(C) An analysis of whether the costs are excessive (i.e., costs beyond the economic penalty normally incurred by excluding foreign competition), taking into consideration factors such as those listed at 247.573–1(d)(3)(i)(C).

(ii) The contracting officer must forward the report to—

(A) The commander, MSC, through the Contracts and Business Management Directorate, MSC; or

(B) The Commander, MTMC, through the Principal Assistant Responsible for Contracting, MTMC.

(iii) If an agreement with the contracting officer, the Commander, MSC, or the Commander, MTMC, will forward the report to the Secretary of the Navy or the Secretary of the Army, respectively, for a determination as to whether the proposed freight charges are excessive or otherwise unreasonable.

[65 FR 50147, Aug. 17, 2000. Redesignated and amended at 72 FR 49206, Aug. 28, 2007]

247.573–3 Annual reporting requirement.

(a) No later than February 15th of each year, departments and agencies shall—

(1) Prepare a report containing all information received from offerors in response to the provision at 252.247–7026 during the previous calendar year; and

(2) Submit the report to: Directorate of Acquisition, U.S. Transportation Command, ATTN: TCAQ, 508 Scott Drive, Scott AFB, IL 62225–5357.

(b) The Director of Acquisition, U.S. Transportation Command, will submit a consolidated report to the congressional defense committees in accordance with Section 1017 of Public Law 109–364.

[72 FR 49206, Aug. 28, 2007]

247.574 Solicitation provisions and contract clauses.

(a) Use the provision at 252.247–7022, Representation of Extent of Transportation by Sea, in all solicitations except—

(1) Those for direct purchase of ocean transportation services; or

(2) Those with an anticipated value at or below the simplified acquisition threshold.

(b)(1) Use the clause at 252.247–7023, Transportation of Supplies by Sea, in all solicitations and resultant contracts, except those for direct purchase of ocean transportation services.

(2) Use the clause with its Alternate I in other than construction contracts, if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations.

(3) Use the clause with its Alternate II in other than construction contracts, if any of the supplies to be transported are commercial items that are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

(4) Use the clause with its Alternate III in solicitations and contracts with an anticipated value at or below the simplified acquisition threshold.

(c) Use the clause at 252.247–7024, Notification of Transportation of Supplies by Sea, in all contracts for which the offeror made a negative response to the inquiry in the provision at 252.247–7022, Representation of Extent of Transportation by Sea.

(d) Use the clause at 252.247–7025, Reflagging or Repair Work, in all time charter solicitations and contracts for the use of a vessel for the transportation of supplies, unless a waiver has been granted in accordance with 247.572(c).

(e) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, in solicitations for carriage of cargo by vessel for DoD. See 247.573–3 for reporting of the information received from offerors in response to the provision.

[56 FR 36466, July 31, 1991, as amended at 59 FR 10580, Mar. 7, 1994; 60 FR 29501, June 5, 1995; 64 FR 2598, Jan. 15, 1999; 65 FR 14401. Mar. 16, 2000; 67 FR 38021, May 31, 2002. Redesignated and amended at 72 FR 49206, Aug. 28, 2007]

PART 249—TERMINATION OF CONTRACTS

Subpart 249.1—General Principles

Sec.
249.105 Duties of termination contracting officer after issuance of notice of termination.
249.105–1 Termination status reports.
249.105–2 Release of excess funds.
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Subpart 249.5—Contract Termination Clauses

249.501 General.
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Subpart 249.70—Special Termination Requirements

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249.7001 Congressional notification on significant contract terminations.
249.7002 [Reserved]
249.7003 Notification of anticipated contract terminations or reductions.

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

SOURCE: 56 FR 36471, July 31, 1991, unless otherwise noted.

Subpart 249.1—General Principles

249.105 Duties of termination contracting officer after issuance of notice of termination.

249.105–1 Termination status reports.

Follow the procedures at PGI 249.105–1 for reporting status of termination actions.

[71 FR 27645, May 12, 2006]

249.105–2 Release of excess funds.

See PGI 249.105–2 for guidance on recommending the release of excess funds.

[71 FR 27645, May 12, 2006]

249.109 Settlement agreements.

249.109–7 Settlement by determination.

Follow the procedures at PGI 249.109–7 for settlement of a convenience termination by determination.

[71 FR 27645, May 12, 2006]

249.110 Settlement negotiation memorandum.

Follow the procedures at PGI 249.110 for preparation of a settlement negotiation memorandum.

[71 FR 27645, May 12, 2006]

Subpart 249.5—Contract Termination Clauses

249.501 General.

249.501–70 Special termination costs.

(a) The clause at 252.249–7000, Special Termination Costs, may be used in an incrementally funded contract when its use is approved by the agency head.

(b) The clause is authorized when—

(1) The contract term is 2 years or more;

(2) The contract is estimated to require—

(i) Total RDT&E financing in excess of $25 million; or

(ii) Total production investment in excess of $100 million; and

(3) Adequate funds are available to cover the contingent reserve liability for special termination costs.

(c) The contractor and the contracting officer must agree upon an amount that represents their best estimate of the total special termination costs to which the contractor would be entitled in the event of termination of the contract. Insert this amount in paragraph (c) of the clause.

(d)(1) Consider substituting an alternate paragraph (c) for paragraph (c) of the basic clause when—

(i) The contract covers an unusually long performance period; or

(ii) The contractor's cost risk associated with contingent special termination costs is expected to fluctuate extensively over the period of the contract.

(2) The alternate paragraph (c) should provide for periodic negotiation and adjustment of the amount reserved for special termination costs. Occasions for periodic adjustment may include—

(i) The Government's incremental assignment of funds to the contract;

(ii) The time when certain performance milestones are accomplished by the contractor; or

(iii) Other specific time periods agreed upon by the contracting officer and the contractor.

Subpart 249.70—Special Termination Requirements

249.7000 Terminated contracts with Canadian Commercial Corporation.

(a) Terminate contracts with the Canadian Commercial Corporation in accordance with—

(1) The Letter of Agreement (LOA) between the Department of Defence Production (Canada) and the U.S. DoD, ''Canadian Agreement'' (for a copy of the LOA or for questions on its currency, contact the Office of the Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), (703) 697–9351, DSN 227–9351);

(2) Policies in the Canadian Agreement and part 249; and

(3) The Canadian Supply Manual, Chapter 11, Section 11.146, available at *http://www.pwgsc.gc.ca/acquisitions/text/sm/sm-e.html.*

(b) Contracting officers shall ensure that the Canadian Commercial Corporation submits termination settlement proposals in the format prescribed in FAR 49.602 and that they

contain the amount of settlements with subcontractors. The termination contracting officer (TCO) shall prepare an appropriate settlement agreement. (See FAR 49.603.) The letter transmitting a settlement proposal must certify—

(1) That disposition of inventory has been completed; and

(2) That the Contract Claims Resolution Board of the Public Works and Government Services Canada has approved settlements with Canadian subcontractors when the Procedures Manual on Termination of Contracts requires such approval.

(c)(1) The Canadian Commercial Corporation will—

(i) Settle all Canadian subcontractor termination claims under the Canadian Agreement; and

(ii) Submit schedules listing serviceable and usable contractor inventory for screening to the TCO (see FAR 45.6).

(2) After screening, the TCO must provide guidance to the Canadian Commercial Corporation for disposition of the contractor inventory.

(3) Settlement of Canadian subcontractor claims are not subject to the approval and ratification of the TCO. However, when the proposed negotiated settlement exceeds the total contract price of the prime contract, the TCO shall obtain from the U.S. contracting officer prior to final settlement—

(i) Ratification of the proposed settlement; and

(ii) A contract modification increasing the contract price and obligating the additional funds.

(d) The Canadian Commercial Corporation should send all termination settlement proposals submitted by U.S. subcontractors and suppliers to the TCO of the cognizant contract administration office of the Defense Contract Management Agency for settlement. The TCO will inform the Canadian Commercial Corporation of the amount of the net settlement of U.S. subcontractors and suppliers so that this amount can be included in the Canadian Commercial Corporation termination proposal. The Canadian Commercial Corporation is responsible for execution of the settlement agreement with these subcontractors.

(e) The Canadian Commercial Corporation will continue administering contracts that the U.S. contracting officer terminates.

(f) The Canadian Commercial Corporation will settle all Canadian subcontracts in accordance with the policies, practices, and procedures of the Canadian Government.

(g) 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 will be in accordance with this regulation.

[56 FR 36471, July 31, 1991, as amended at 65 FR 39706, June 27, 2000; 68 FR 7440, Feb. 14, 2003; 71 FR 27645, May 12, 2006; 72 FR 30278, May 31, 2007]

249.7001 Congressional notification on significant contract terminations.

Congressional notification is required for any termination involving a reduction in employment of 100 or more contractor employees. Proposed terminations must be cleared through department/agency liaison offices before release of the termination notice, or any information on the proposed termination, to the contractor. Follow the procedures at PGI 249.7001 for congressional notification and release of information.

[71 FR 27645, May 12, 2006]

249.7002 [Reserved]

249.7003 Notification of anticipated contract terminations or reductions.

(a) Section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160) and Section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104–201) are intended to help establish benefit eligibility under the Job Training Partnership Act (29 U.S.C. 1661 and 1662) for employees of DoD contractors and subcontractors adversely affected by termination or substantial reductions in major defense programs.

(b) Departments and agencies are responsible for establishing procedures to:

(1) Identify which contracts (if any) under major defense programs will be terminated or substantially reduced as a result of the funding levels provided in an appropriations act.

(2) Within 60 days of the enactment of such an act, provide notice of the anticipated termination of or substantial reduction in the funding of affected contracts—

(i) Directly to the Secretary of Labor; and

(ii) Through the contracting officer to each prime contractor.

(c) Use the clause at 252.249–7002, Notification of Anticipated Contract Termination or Reduction, in all contracts under a major defense program.

[61 FR 64637, Dec. 6, 1996; 61 FR 66077, Dec. 16, 1996; 62 FR 49304, Sept. 19, 1997]

PART 250—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Subpart 250.1—Extraordinary Contractual Actions

Sec.

250.100 Definitions.
250.101 General.
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250.104–3–70 Indemnification under contracts involving both research and development and other work.

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

SOURCE: 73 FR 46815, Aug. 12, 2008, unless otherwise noted.

Subpart 250.1—Extraordinary Contractual Actions

250.100 Definitions.

Secretarial level, as used in this subpart, means—

(1) An official at or above the level of an Assistant Secretary (or Deputy) of Defense or of the Army, Navy, or Air Force; and

(2) A contract adjustment board established by the Secretary concerned.

250.101 General.

250.101–2 Policy.

250.101–2–70 Limitations on payment.

See 10 U.S.C. 2410(b) for limitations on Congressionally directed payment of a request for equitable adjustment to contract terms or a request for relief under Public Law 85–804.

250.101–3 Records.

Follow the procedures at PGI 250.101–3 for preparation of records.

250.102 Delegation of and limitations on exercise of authority.

250.102–1 Delegation of authority.

(b) Authority under FAR 50.104 to approve actions obligating $55,000 or less may not be delegated below the level of the head of the contracting activity.

(d) In accordance with the acquisition authority of the Under Secretary of Defense (Acquisition, Technology, and Logistics (USD (AT&L)) under 10 U.S.C. 133, in addition to the Secretary of Defense and the Secretaries of the military departments, the USD (AT&L) may exercise authority to indemnify against unusually hazardous or nuclear risks.

250.102–1–70 Delegations.

(a) *Military departments.* The Departments of the Army, Navy, and Air Force will specify delegations and levels of authority for actions under the Act and the Executive Order in departmental supplements or agency acquisition guidance.

(b) *Defense agencies.* Subject to the restrictions on delegations of authority

in 250.102–1(b) and FAR 50.102–1, the directors of the defense agencies may exercise and redelegate the authority contained in the Act and the Executive Order. The agency supplements or agency acquisition guidance shall specify the delegations and levels of authority.

(1) Requests to obligate the Government in excess of $55,000 must be submitted to the USD (AT&L) for approval.

(2) Requests for indemnification against unusually hazardous or nuclear risks must be submitted to the USD(AT&L) for approval before using the indemnification clause at FAR 52.250–1, Indemnification Under Public Law 85–804.

(c) *Approvals.* The Secretary of the military department or the agency director must approve any delegations in writing.

250.102–2 Contract adjustment boards.

The Departments of the Army, Navy, and Air Force each have a contract adjustment board. The board consists of a Chair and not less than two nor more than six other members, one of whom may be designated the Vice-Chair. A majority constitutes a quorum for any purpose and the concurring vote of a majority of the total board membership constitutes an action of the board. Alternates may be appointed to act in the absence of any member.

250.103 Contract adjustments.

250.103–3 Contract adjustment.

(a) Contractor requests should be filed with the procuring contracting officer (PCO). However, if filing with the PCO is impractical, requests may be filed with an authorized representative, an administrative contracting officer, or the Office of General Counsel of the applicable department or agency, for forwarding to the cognizant PCO.

250.103–5 Processing cases.

(1) At the time the request is filed, the activity shall prepare the record described at PGI 250.101–3(1)(i) and forward it to the appropriate official within 30 days after the close of the month in which the record is prepared.

(2) The officer or official responsible for the case shall forward to the contract adjustment board, through departmental channels, the documentation described at PGI 250.103–5.

(3) Contract adjustment boards will render decisions as expeditiously as practicable. The Chair shall sign a memorandum of decision disposing of the case. The decision shall be dated and shall contain the information required by FAR 50.103–6. The memorandum of decision shall not contain any information classified ''Confidential'' or higher. The board's decision will be sent to the appropriate official for implementation.

250.103–6 Disposition.

For requests denied or approved below the Secretarial level, follow the disposition procedures at PGI 250.103–6.

250.104 Residual powers.

250.104–3 Special procedures for unusually hazardous or nuclear risks.

250.104–3–70 Indemnification under contracts involving both research and development and other work.

When indemnification is to be provided on contracts requiring both research and development work and other work, the contracting officer shall insert an appropriate clause using the authority of both 10 U.S.C. 2354 and Public Law 85–804.

(a) The use of Public Law 85–804 is limited to work which cannot be indemnified under 10 U.S.C. 2354 and is subject to compliance with FAR 50.104.

(b) Indemnification under 10 U.S.C. 2354 is covered by 235.070.

PART 251—USE OF GOVERNMENT SOURCES BY CONTRACTORS

Subpart 251.1—Contractor Use of Government Supply Sources

Sec.
251.102 Authorization to use Government supply sources.
251.107 Contract clause.

Subpart 251.2—Contractor Use of Interagency Fleet Management System (IFMS) Vehicles

251.202 Authorization.

251.205 Contract clause.

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

SOURCE: 56 FR 36479, July 31, 1991, unless otherwise noted.

Subpart 251.1—Contractor Use of Government Supply Sources

251.102 Authorization to use Government supply sources.

(e) When authorizing contractor use of Government supply sources, follow the procedures at PGI 251.102.

(3)(ii) The contracting officer may also authorize the contractor to use the DD Form 1155 when requisitioning from the Department of Veterans Affairs.

(f) The authorizing agency is also responsible for promptly considering requests of the DoD supply source for authority to refuse to honor requisitions from a contractor that is indebted to DoD and has failed to pay proper invoices in a timely manner.

[69 FR 67858, Nov. 22, 2004]

251.107 Contract clause.

Use the clause at 252.251–7000, Ordering From Government Supply Sources, in solicitations and contracts which include the clause at FAR 52.251–1, Government Supply Sources.

Subpart 251.2—Contractor Use of Interagency Fleet Management System (IFMS) Vehicles

251.202 Authorization.

(a)(2)(A) See FAR 28.307–2(c) for policy on contractor insurance.

(B) See FAR 28.308 for policy on self-insurance.

(C) See FAR 31.205–19 for allowability of insurance costs.

(5) Paragraph (d) of the clause at 252.251–7001 satisfies the requirement of FAR 51.202(a)(5) for a written statement.

251.205 Contract clause.

Use the clause at 252.251–7001, Use of Interagency Fleet Management System (IFMS)Vehicles and Related Services, in solicitations and contracts which include the clause at FAR 52.251–2, Interagency Fleet Management System (IFMS) Vehicles and Related Services.

SUBCHAPTER H—CLAUSES AND FORMS

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 252.1—Instructions for Using Provisions and Clauses

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Subpart 252.2—Text of Provisions and Clauses

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

SOURCE: 56 FR 36479, July 31, 1991, unless otherwise noted.

Subpart 252.1—Instructions for Using Provisions and Clauses

252.101 Using part 252.

(b) *Numbering.*

(2) *Provisions or clauses that supplement the FAR.*

(ii)(B) DFARS provisions or clauses use a four digit sequential number in the 7000 series, e.g., –7000, –7001, –7002. Department or agency supplemental provisions or clauses use four digit sequential numbers in the 9000 series.

Subpart 252.2—Text of Provisions And Clauses

252.201–7000 Contracting officer's representative.

As prescribed in 201.602–70, use the following clause:

CONTRACTING OFFICER'S REPRESENTATIVE (DEC 1991)

(a) *Definition. Contracting officer's representative* means an individual designated in accordance with subsection 201.602–2 of the Defense Federal Acquisition Regulation Supplement and authorized in writing by the contracting officer to perform specific technical or administrative functions.

(b) If the Contracting Officer designates a contracting officer's representative (COR), the Contractor will receive a copy of the written designation. It will specify the extent of the COR's authority to act on behalf of the contracting officer. The COR is not authorized to make any commitments or changes that will affect price, quality, quantity, delivery, or any other term or condition of the contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 57 FR 42633, Sept. 15, 1992]

252.203–7000 [Reserved]

252.203–7001 Prohibition on persons convicted of fraud or other defense-contract-related felonies.

As prescribed in 203.570–3, use the following clause:

PROHIBITION ON PERSONS CONVICTED OF FRAUD OR OTHER DEFENSE-CONTRACT-RELATED FELONIES (DEC 2004)

(a) *Definitions.* As used in this clause—

(1) *Arising out of a contract with the DoD* means any act in connection with—

(i) Attempting to obtain;

(ii) Obtaining; or

(iii) Performing a contract or first-tier subcontract of any agency, department, or component of the Department of Defense (DoD).

(2) *Conviction of fraud or any other felony* means any conviction for fraud or a felony in violation of state or Federal criminal statutes, whether entered on a verdict or plea, including a plea of *nolo contendere,* for which sentence has been imposed.

(3) *Date of conviction* means the date judgment was entered against the individual.

(b) Any individual who is convicted after September 29, 1988, of fraud or any other felony arising out of a contract with the DoD is prohibited from serving—

(1) In a management or supervisory capacity on this contract;

(2) On the board of directors of the Contractor;

(3) As a consultant, agent, or representative for the Contractor; or

(4) In any other capacity with the authority to influence, advise, or control the decisions of the Contractor with regard to this contract.

(c) Unless waived, the prohibition in paragraph (b) of this clause applies for not less than 5 years from the date of conviction.

(d) 10 U.S.C. 2408 provides that the Contractor shall be subject to a criminal penalty of not more than $500,000 if convicted of knowingly—

(1) Employing a person under a prohibition specified in paragraph (b) of this clause; or

(2) Allowing such a person to serve on the board of directors of the contractor or first-tier subcontractor.

(e) In addition to the criminal penalties contained in 10 U.S.C. 2408, the Government may consider other available remedies, such as—

(1) Suspension or debarment;

(2) Cancellation of the contract at no cost to the Government; or

(3) Termination of the contract for default.

(f) The Contractor may submit written requests for waiver of the prohibition in paragraph (b) of this clause to the Contracting Officer. Requests shall clearly identify—

(1) The person involved;

(2) The nature of the conviction and resultant sentence or punishment imposed;

(3) The reasons for the requested waiver; and

(4) An explanation of why a waiver is in the interest of national security.

(g) The Contractor agrees to include the substance of this clause, appropriately modified to reflect the identity and relationship of the parties, in all first-tier subcontracts exceeding the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation, except those for commercial items or components.

(h) Pursuant to 10 U.S.C. 2408(c), defense contractors and subcontractors may obtain information as to whether a particular person has been convicted of fraud or any other felony arising out of a contract with the DoD by contacting The Office of Justice Programs, The Denial of Federal Benefits Office, U.S. Department of Justice, telephone (301) 809–4904.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 58 FR 28471, May 13, 1993; 59 FR 27675, May 27, 1994; 60 FR 61600, Nov. 30, 1995; 62 FR 34128, June 24, 1997; 64 FR 14398, Mar. 25, 1999; 69 FR 74990, Dec. 15, 2004]

252.204–7000 Disclosure of information.

As prescribed in 204.404–70(a), use the following clause:

DISCLOSURE OF INFORMATION (DEC 1991)

(a) The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless—

(1) The Contracting Officer has given prior written approval; or

(2) The information is otherwise in the public domain before the date of release.

(b) Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.

(c) The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 57 FR 14996, Apr. 23, 1992]

252.204–7001 Commercial and Government Entity (CAGE) code reporting.

As prescribed in 204.7207, use the following provision:

COMMERCIAL AND GOVERNMENT ENTITY (CAGE) CODE REPORTING (AUG 1999)

(a) The offeror is requested to enter its CAGE code on its offer in the block with its name and address. The CAGE code entered must be for that name and address. Enter ''CAGE'' before the number.

(b) If the offeror does not have a CAGE code, it may ask the Contracting Officer to request one from the Defense Logistics Information Service (DLIS). The Contracting Officer will—

(1) Ask the Contractor to complete section B of a DD Form 2051, Request for Assignment of a Commercial and Government Entity (CAGE) Code;

(2) Complete section A and forward the form to DLIS; and

(3) Notify the Contractor of its assigned CAGE code.

(c) Do not delay submission of the offer pending receipt of a CAGE code.

(End of provision)

[64 FR 43101, Aug. 9, 1999, as amended at 66 FR 47097, Sept. 11, 2001]

252.204–7002 Payment for subline items not separately priced.

As prescribed in 204.7104–1(b)(3)(iv), use the following clause:

PAYMENT FOR SUBLINE ITEMS NOT SEPARATELY PRICED (DEC 1991)

(a) If the schedule in this contract contains any contract subline items or exhibit subline items identified as not separately priced (NSP), it means that the unit price for that subline item is included in the unit price of another, related line or subline item.

(b) The Contractor shall not invoice the Government for any portion of a contract line item or exhibit line item which contains an NSP until—

(1) The Contractor has delivered the total quantity of all related contract subline items or exhibit subline items; and

(2) The Government has accepted them.

(c) This clause does not apply to technical data.

(End of clause)

252.204–7003 Control of government personnel work product.

As prescribed in 204.404–70(b), use the following clause:

CONTROL OF GOVERNMENT PERSONNEL WORK PRODUCT (APR 1992)

The Contractor's procedures for protecting against unauthorized disclosure of information shall not require Department of Defense employees or members of the Armed Forces to relinquish control of their work products, whether classified or not, to the contractor.

(End of clause)

[57 FR 14996, Apr. 23, 1992]

252.204–7004 Alternate A, Central Contractor Registration.

ALTERNATE A, CENTRAL CONTRACTOR REGISTRATION (SEP 2007)

As prescribed in 204.1104, substitute the following paragraph (a) for paragraph (a) of the clause at FAR 52.204–7:

(a) *Definitions.* As used in this clause—

''Central Contractor Registration (CCR) database'' means the primary Government repository for contractor information required for the conduct of business with the Government.

''Commercial and Government Entity (CAGE) code'' means—

(1) A code assigned by the Defense Logistics Information Service (DLIS) to identify a commercial or Government entity; or

(2) A code assigned by a member of the North Atlantic Treaty Organization that DLIS records and maintains in the CAGE master file. This type of code is known as an ''NCAGE code.''

''Data Universal Numbering System (DUNS) number'' means the 9-digit number assigned by Dun and Bradstreet, Inc. (D&B) to identify unique business entities.

''Data Universal Numbering System +4 (DUNS+4) number'' means the DUNS number assigned by D&B plus a 4-character suffix that may be assigned by a business concern. (D&B has no affiliation with this 4-character suffix.) This 4-character suffix may be assigned at the discretion of the business concern to establish additional CCR records for identifying alternative Electronic Funds Transfer (EFT) accounts (see Subpart 32.11 of the Federal Acquisition Regulation) for the same parent concern.

''Registered in the CCR database'' means that—

(1) The Contractor has entered all mandatory information, including the DUNS number or the DUNS+4 number, into the CCR database;

(2) The Contractor's CAGE code is in the CCR database; and

(3) The Government has validated all mandatory data fields, to include validation of the Taxpayer Identification Number (TIN) with the Internal Revenue Service, and has marked the records ''Active.'' The Contractor will be required to provide consent for TIN validation to the Government as part of the CCR registration process.

[68 FR 64558, Nov. 14, 2003, as amended at 72 FR 51194, Sept. 6, 2007]

252.204–7005 Oral attestation of security responsibilities.

As prescribed in 204.404–70(c), use the following clause:

ORAL ATTESTATION OF SECURITY RESPONSIBILITIES (NOV 2001)

(a) Contractor employees cleared for access to Top Secret (TS), Special Access Program (SAP), or Sensitive Compartmented Information (SCI) shall attest orally that they will conform to the conditions and responsibilities imposed by law or regulation on those granted access. Reading aloud the first paragraph of Standard Form 312, Classified Information Nondisclosure Agreement, in the presence of a person designated by the Contractor for this purpose, and a witness, will satisfy this requirement. Contractor employees currently cleared for access to TS, SAP, or SCI may attest orally to their security responsibilities when being briefed into a new program or during their annual refresher briefing. There is no requirement to retain a separate record of the oral attestation.

(b) If an employee refuses to attest orally to security responsibilities, the Contractor shall deny the employee access to classified information and shall submit a report to the Contractor's security activity.

(End of clause)

[64 FR 45197, Aug. 19, 1999, as amended at 66 FR 55121, Nov. 1, 2001]

252.204–7006 Billing Instructions.

As prescribed in 204.7109, use the following clause:

BILLING INSTRUCTIONS (OCT 2005)

When submitting a request for payment, the Contractor shall—

(a) Identify the contract line item(s) on the payment request that reasonably reflect contract work performance; and

(b) Separately identify a payment amount for each contract line item included in the payment request.

(End of clause)

[70 FR 58983, Oct. 11, 2005]

252.204–7007 Alternate A, Annual Representations and Certifications.

Alternate A, Annual Representations and Certifications (JAN 2008)

As prescribed in 204.1202, substitute the following paragraph (c) for paragraph (c) of the provision at FAR 52.204–8:

(c) The offeror has completed the annual representations and certifications electronically via the Online Representations and Certifications Application (ORCA) Web site at *https://orca.bpn.gov/*. After reviewing the ORCA database information, the offeror verifies by submission of the offer that the representations and certifications currently posted electronically have been entered or updated within the last 12 months, are current, accurate, complete, and applicable to this solicitation (including the business size standard applicable to the NAICS code referenced for this solicitation), as of the date of this offer, and are incorporated in this offer by reference (see FAR 4.1201); except for the changes identified below [*offeror to insert changes, identifying change by clause number, title, date*]. These amended representation(s) and/or certification(s) are also incorporated in this offer and are current, accurate, and complete as of the date of this offer.

FAR/DFARS clause No.	Title	Date	Change

Any changes provided by the offeror are applicable to this solicitation only, and do not result in an update to the representations and certifications posted on ORCA.

[73 FR 1823, Jan. 10, 2008]

252.204–7008 Requirements for contracts involving export–controlled items.

As prescribed in 204.7305(a), use the following clause:

REQUIREMENTS FOR CONTRACTS INVOLVING EXPORT–CONTROLLED ITEMS (JUL 2008)

(a) *Definition. Export–controlled items,* as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730–774) or the International Traffic in Arms Regulations (22 CFR Parts 120–130). The term includes:

(1) *Defense items,* defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data. The term ''defense items'' includes information and technology.

(2) *Items,* defined in the EAR as ''commodities, software, and technology,'' terms that are also defined in the EAR, 15 CFR 772.1. Regarding the release of items subject to the EAR to foreign nationals within the United States, ''items'' only include technology and software source code (and not commodities) subject to the EAR.

(b) The parties anticipate that, in the performance of this contract, the Contractor will generate or need access to export–controlled items.

(c) The Contractor shall comply with all applicable laws and regulations regarding export–controlled items, including the requirement for contractors to register with the Department of State in accordance with the ITAR. The Contractor shall consult with the Department of State regarding any questions relating to the ITAR and with the Department of Commerce regarding any questions relating to the EAR.

(d) The Contractor's responsibility to comply with all applicable laws and regulations regarding export–controlled items exists independent of, and is not established or limited by, the information provided by this clause.

(e) Nothing in the terms of this contract is intended to change, supersede, or waive any of the requirements of applicable Federal laws, Executive orders, and regulations, including but not limited to—

(1) The Export Administration Act of 1979, as amended (50 U.S.C. App. 2401–2420);

(2) The Arms Export Control Act of 1976 (22 U.S.C. 2751 *et seq.*);

(3) The International Emergency Economic Powers Act (50 U.S.C. 1701–1707);

(4) The Export Administration Regulations (15 CFR Parts 730–774);

(5) The International Traffic in Arms Regulations (22 CFR Parts 120–130);

(6) Executive Order 13222, as extended;

(7) DoD Directive 2040.2, International Transfers of Technology, Goods, Services, and Munitions; and

(8) DoD Industrial Security Regulation (DoD 5220.22–R).

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts that are expected to involve access to or generation of export–controlled items.

(End of clause)

[73 FR 42278, July 21, 2008]

252.204–7009 Requirements regarding potential access to export-controlled items.

As prescribed in 204.7305(b), use the following clause:

REQUIREMENTS REGARDING POTENTIAL ACCESS TO EXPORT–CONTROLLED ITEMS (JUL 2008)

(a) *Definition. Export–controlled items,* as used in this clause, means items subject to the Export Administration Regulations (EAR) (15 CFR Parts 730–774) or the International Traffic in Arms Regulations (22 CFR Parts 120–130). The term includes:

(1) *Defense items,* defined in the Arms Export Control Act, 22 U.S.C. 2778(j)(4)(A), as defense articles, defense services, and related technical data. The term ''defense items'' includes information and technology.

(2) *Items,* defined in the EAR as ''commodities, software, and technology,'' terms that are also defined in the EAR, 15 CFR 772.1. Regarding the release of items subject to the EAR to foreign nationals within the United States, ''items'' only include technology and software source code (and not commodities) subject to the EAR.

(b) The parties do not anticipate that, in the performance of this contract, the Contractor will generate or need access to export–controlled items.

(c) If, during the performance of this contract, the Contractor becomes aware that the Contractor will generate or need access to export-controlled items—

(1) The Contractor shall notify the Contracting Officer in writing; and

(2) The Contracting Officer will expeditiously—

(i) Modify the contract to include the Defense Federal Acquisition Regulation Supplement clause 252.204–7008, Requirements for Contracts Involving Export-Controlled Items;

(ii) Negotiate a contract modification that eliminates the requirement for performance of work that would involve export–controlled items; or

(iii) Terminate the contract, in whole or in part, as may be appropriate, for the convenience of the Government, in accordance with the Termination clause of the contract.

(End of clause)

[73 FR 42278, July 21, 2008]

252.205–7000 Provision of information to cooperative agreement holders.

As prescribed in 205.470, use the following clause:

PROVISION OF INFORMATION TO COOPERATIVE AGREEMENT HOLDERS (DEC 1991)

(a) Definition.

Cooperative agreement holder means a State or local government; a private, nonprofit organization; a tribal organization (as defined in section 4(c) of the Indian Self-Determination and Education Assistance Act (Pub. L. 93–268; 25 U.S.C. 450(c))); or an economic enterprise (as defined in section 3(e) of the Indian Financing Act of 1974 (Pub. L. 93–362; 25 U.S.C. 1452(e))) whether such economic enterprise is organized for profit or nonprofit purposes; which has an agreement with the Defense Logistics Agency to furnish procurement technical assistance to business entities.

(b) The Contractor shall provide cooperative agreement holders, upon their request, with a list of those appropriate employees or offices responsible for entering into subcontracts under defense contracts. The list shall include the business address, telephone number, and area of responsibility of each employee or office.

(c) The Contractor need not provide the listing to a particular cooperative agreement holder more frequently than once a year.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 69 FR 63328, Nov. 1, 2004]

252.206–7000 Domestic source restriction.

As prescribed at 206.302–3–70, use the following provision:

DOMESTIC SOURCE RESTRICTION (DEC 1991)

This solicitation is restricted to domestic sources under the authority of 10 U.S.C. 2304(c)(3). Foreign sources, except Canadian sources, are not eligible for award.

(End of provision)

252.208–7000 Intent to furnish precious metals as Government-furnished material.

As prescribed in 208.7305(a), use the following clause:

INTENT TO FURNISH PRECIOUS METALS AS GOVERNMENT-FURNISHED MATERIAL (DEC 1991)

(a) The Government intends to furnish precious metals required in the manufacture of items to be delivered under the contract if the Contracting Officer determines it to be in the Government's best interest. The use of Government-furnished silver is mandatory when the quantity required is one hundred troy ounces or more. The precious metal(s) will be furnished pursuant to the Government Furnished Property clause of the contract.

(b) The Offeror shall cite the type (silver, gold, platinum, palladium, iridium, rhodium, and ruthenium) and quantity in whole troy ounces of precious metals required in the performance of this contract (including precious metals required for any first article or production sample), and shall specify the national stock number (NSN) and nomenclature, if known, of the deliverable item requiring precious metals.

Precious metal*	Quantity	Deliverable item (NSN and nomenclature)!!rs

*If platinum or palladium, specify whether sponge or granules are required.

(c) Offerors shall submit two prices for each deliverable item which contains precious metals—one based on the Government furnishing precious metals, and one based on the Contractor furnishing precious metals. Award will be made on the basis which is in the best interest of the Government.

(d) The Contractor agrees to insert this clause, including this paragraph (d), in solicitations for subcontracts and purchase orders issued in performance of this contract, unless the Contractor knows that the item being purchased contains no precious metals.

(End of clause)

252.209–7000 [Reserved]

252.209–7001 Disclosure of ownership or control by the government of a terrorist country.

As prescribed in 209.104–70(a), use the following provision:

DISCLOSURE OF OWNERSHIP OR CONTROL BY THE GOVERNMENT OF A TERRORIST COUNTRY (OCT 2006)

(a) *Definitions.* As used in this provision—

(1) *Government of a terrorist country* includes the state and the government of a terrorist country, as well as any political subdivision, agency, or instrumentality thereof.

(2) *Terrorist country* means a country determined by the Secretary of State, under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(i)(A)), to be a country the government of which has repeatedly provided support for acts of international terrorism. As of the date of this provision, terrorist countries subject to this provision include: Cuba, Iran, North Korea, Sudan, and Syria.

(3) *Significant interest* means—

(i) Ownership of or beneficial interest in 5 percent or more of the firm's or subsidiary's securities. Beneficial interest includes holding 5 percent or more of any class of the firm's securities in ''nominee shares,'' ''street names,'' or some other method of holding securities that does not disclose the beneficial owner;

(ii) Holding a management position in the firm, such as a director or officer;

(iii) Ability to control or influence the election, appointment, or tenure of directors or officers in the firm;

(iv) Ownership of 10 percent or more of the assets of a firm such as equipment, buildings, real estate, or other tangible assets of the firm; or

(v) Holding 50 percent or more of the indebtedness of a firm.

(b) *Prohibition on award.* In accordance with 10 U.S.C. 2327, no contract may be awarded to a firm or a subsidiary of a firm if the government of a terrorist country has a significant interest in the firm or subsidiary or, in the case of a subsidiary, the firm that owns the subsidiary, unless a waiver is granted by the Secretary of Defense.

(c) *Disclosure.* If the government of a terrorist country has a significant interest in the Offeror or a subsidiary of the Offeror, the Offeror shall disclose such interest in an attachment to its offer. If the Offeror is a subsidiary, it shall also disclose any significant interest the government of a terrorist country has in any firm that owns or controls the subsidiary. The disclosure shall include—

(1) Identification of each government holding a significant interest; and

(2) A description of the significant interest held by each government.

(End of provision)

[59 FR 51131, Oct. 7, 1994, as amended at 63 FR 14837, Mar. 27, 1998; 69 FR 55993, Sept. 17, 2004; 71 FR 62567, Oct 26, 2006]

252.209–7002 Disclosure of ownership or control by a foreign government.

As prescribed in 209.104–70(b), use the following provision:

DISCLOSURE OF OWNERSHIP OR CONTROL BY A FOREIGN GOVERNMENT (JUN 2005)

(a) *Definitions.* As used in this provision—

(1) *Effectively owned or controlled* means that a foreign government or any entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control the election, appointment, or tenure of the Offeror's officers or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law (or equivalent power for unincorporated organizations).

(2) *Entity controlled by a foreign government*—

(i) Means—

(A) Any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government; or

(B) Any individual acting on behalf of a foreign government.

(ii) Does not include an organization or corporation that is owned, but is not controlled, either directly or indirectly, by a foreign government if the ownership of that organization or corporation by that foreign government was effective before October 23, 1992.

(3) *Foreign government* includes the state and the government of any country (other than the United States and its outlying areas) as well as any political subdivision, agency, or instrumentality thereof.

(4) *Proscribed information* means—

(i) Top Secret information;

(ii) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);

(iii) Restricted Data as defined in the U.S. Atomic Energy Act of 1954, as amended;

(iv) Special Access Program (SAP) information; or

(v) Sensitive Compartmented Information (SCI).

(b) *Prohibition on award.* No 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, unless the Secretary of Defense or a designee has waived application of 10 U.S.C. 2536(a).

(c) *Disclosure.* The Offeror shall disclose any interest a foreign government has in the Offeror when that interest constitutes control by a foreign government as defined in this provision. If the Offeror is a subsidiary, it shall also disclose any reportable interest a foreign government has in any entity that owns or controls the subsidiary, including reportable interest concerning the Offeror's immediate parent, intermediate parents, and the ultimate parent. Use separate paper as needed, and provide the information in the following format: Offeror's Point of Contact for Questions about Disclosure (Name and Phone Number with Country Code, City Code and Area Code, as applicable)

Name and Address of Offeror.

Name and Address of Entity Controlled by a Foreign Government.	Description of Interest, Ownership Percentage, and Identification of Foreign Government

(End of provision)

[58 FR 28471, May 13, 1993, as amended at 59 FR 51133, Oct. 7, 1994; 70 FR 35546, June 21, 2005]

252.209–7003 [Reserved]

252.209–7004 Subcontracting with firms that are owned or controlled by the government of a terrorist country.

As prescribed in 209.409, use the following clause:

SUBCONTRACTING WITH FIRMS THAT ARE OWNED OR CONTROLLED BY THE GOVERNMENT OF A TERRORIST COUNTY (DEC 2006)

(a) Unless the Government determines that there is a compelling reason to do so, the Contractor shall not enter into any subcontract in excess of $30,000 with a firm, or a subsidiary of a firm, that is identified in the Excluded Parties List System as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country.

(b) A corporate officer or a designee of the Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party that is identified, on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs, as being ineligible for the award of Defense contracts or subcontracts because it is owned or controlled by the government of a terrorist country. The notice must include the name of the proposed subcontractor and the compelling reason(s) for doing business with the subcontractor notwithstanding its inclusion on the List of Parties Excluded From Federal Procurement and Nonprocurement Programs.

(End of clause)

[63 FR 14837, Mar. 27, 1998, as amended at 71 FR 75893, Dec. 19, 2006]

252.209–7005 Reserve Officer Training Corps and military recruiting on campus.

As prescribed in 209.470–4, use the following clause:

RESERVE OFFICER TRAINING CORPS AND MILITARY RECRUITING ON CAMPUS (JAN 2000)

(a) *Definition.* ''Institution of higher education,'' as used in this clause, means an institution that meets the requirements of 20 U.S.C. 1001 and includes all subelements of such an institution.

(b) *Limitation on contract award.* Except as provided in paragraph (c) of this clause, an institution of higher education is ineligible for contract award if the Secretary of Defense determines that the institution has a policy or practice (regardless of when implemented) that prohibits or in effect prevents—

(1) The Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (ROTC) (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution;

(2) A student at that institution from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a military department or the Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

Military recruiters from accessing, for purposes of military recruiting, the following information pertaining to students (who are 17 years of age or older) enrolled at that institution:

(i) Name.

(ii) Address.

(iii) Telephone number.

(iv) Date and place of birth.

(v) Educational level.

(vi) Academic major.

(vii) Degrees received.

(viii) Most recent educational institution enrollment.

(c) *Exception.* The limitation in paragraph (b) of this clause does not apply to an institution of higher education if the Secretary of Defense determines that—

(1) The institution has ceased the policy or practice described in paragraph (b) of this clause; or

(2) The institution has a long-standing policy of pacifism based on historical religious affiliation.

(d) *Agreement.* The Contractor represents that it does not now have, and agrees that during performance of this contract it will not adopt, any policy or practice described in paragraph (b) of this clause, unless the Secretary of Defense has granted an exception in accordance with paragraph (c)(2) of this clause.

(e) Notwithstanding any other clause of this contract, if the Secretary of Defense determines that the Contractor misrepresented its policies and practices at the time of contract award or has violated the agreement in paragraph (d) of this clause—

(1) The Contractor will be ineligible for further payments under this and other contracts with the Department of Defense; and

(2) The Government will terminate this contract for default for the Contractor's material failure to comply with the terms and conditions of award.

(End of clause)

[65 FR 2057, Jan. 13, 2000]

252.209–7006 Limitations on Contractors Acting as Lead System Integrators.

As prescribed in 209.570–4(a), use the following provision:

LIMITATIONS ON CONTRACTORS ACTING AS LEAD SYSTEM INTEGRATORS (JAN 2008)

(a) *Definitions. Lead system integrator, lead system integrator with system responsibility,* and *lead system integrator without system responsibility,* as used in this provision, have the meanings given in the clause of this solicitation entitled ''Prohibited Financial Interests for Lead System Integrators'' (DFARS 252.209–7007).

(b) *General.* Unless an exception is granted, no contractor performing lead system integrator functions in the acquisition of a major system by the Department of Defense may have any direct financial interest in the development or construction of any individual system or element of any system of systems.

(c) *Representations.* (1) The offeror represents that it does

[ ] does not [ ] propose to perform this contract as a lead system integrator with system responsibility.

(2) The offeror represents that it does [ ] does not [ ] propose to perform this contract as a lead system integrator without system responsibility.

(3) If the offeror answered in the affirmative in paragraph (c)(1) or (2) of this provision, the offeror represents that it does [ ]

does not [ ] have any direct financial interest as described in paragraph (b) of this provision with respect to the system(s), subsystem(s), system of systems, or services described in this solicitation.

(d) If the offeror answered in the affirmative in paragraph (c)(3) of this provision, the offeror should contact the Contracting Officer for guidance on the possibility of submitting a mitigation plan and/or requesting an exception.

(e) If the offeror does have a direct financial interest, the offeror may be prohibited from receiving an award under this solicitation, unless the offeror submits to the Contracting Officer appropriate evidence that the offeror was selected by a subcontractor to serve as a lower-tier subcontractor through a process over which the offeror exercised no control.

(f) This provision implements the requirements of 10 U.S.C. 2410p, as added by section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364).

(End of provision)

[73 FR 1825, Jan. 10, 2007]

252.209–7007 Prohibited Financial Interests for Lead System Integrators.

As prescribed in 209.570–4(b), use the following clause:

PROHIBITED FINANCIAL INTERESTS FOR LEAD SYSTEM INTEGRATORS (JAN 2008)

(a) *Definitions.* As used in this clause—

(1) *Lead system integrator* includes *lead system integrator with system responsibility* and *lead system integrator without system responsibility*.

(2) *Lead system integrator with system responsibility* means a prime contractor for the development or production of a major system if the prime contractor is not expected at the time of award, as determined by the Contracting Officer, to perform a substantial portion of the work on the system and the major subsystems.

(3) *Lead system integrator without system responsibility* means a contractor under a contract for the procurement of services whose primary purpose is to perform acquisition functions closely associated with inherently governmental functions (see section 7.503(d) of the Federal Acquisition Regulation) with regard to the development or production of a major system.

(b) *Limitations.* The Contracting Officer has determined that the Contractor meets the definition of lead system integrator with [ ] without [ ] system responsibility. Unless an exception is granted, the Contractor shall not have any direct financial interest in the development or construction of any individual system or element of any system of systems while performing lead system integrator functions in the acquisition of a major system by the Department of Defense under this contract.

(c) *Agreement.* The Contractor agrees that during performance of this contract it will not acquire any direct financial interest as described in paragraph (b) of this clause, or, if it does acquire or plan to acquire such interest, it will immediately notify the Contracting Officer. The Contractor further agrees to provide to the Contracting Officer all relevant information regarding the change in financial interests so that the Contracting Officer can determine whether an exception applies or whether the Contractor will be allowed to continue performance on this contract. If a direct financial interest cannot be avoided, eliminated, or mitigated to the Contracting Officer's satisfaction, the Contracting Officer may terminate this contract for default for the Contractor's material failure to comply with the terms and conditions of award or may take other remedial measures as appropriate in the Contracting Officer's sole discretion.

(d) Notwithstanding any other clause of this contract, if the Contracting Officer determines that the Contractor misrepresented its financial interests at the time of award or has violated the agreement in paragraph (c) of this clause, the Government may terminate this contract for default for the Contractor's material failure to comply with the terms and conditions of award or may take other remedial measures as appropriate in the Contracting Officer's sole discretion.

(e) This clause implements the requirements of 10 U.S.C. 2410p, as added by section 807 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364).

(End of clause)

[73 FR 1825, Jan. 10, 2007]

252.211–7000 Acquisition streamlining.

As prescribed in 211.002–70, use the following clause:

ACQUISITION STREAMLINING (DEC 1991)

(a) The Government's acquisition streamlining objectives are to—

(1) Acquire systems that meet stated performance requirements;

(2) Avoid over-specification; and

(3) Ensure that cost effective requirements are included in future acquisitions.

(b) The Contractor shall—

(1) Prepare and submit acquisition streamlining recommendations in accordance with the statement of work of this contract; and

(2) Format and submit the recommendations as prescribed by data requirements on the contract data requirements list of this contract.

(c) The Government has the right to accept, modify, or reject the Contractor's recommendations.

(d) The Contractor shall insert this clause, including this paragraph (d), in all subcontracts over $1 million, awarded in the performance of this contract.

(End of clause)

[56 FR 36479, July 31, 1991. Redesignated and amended at 60 FR 61600, Nov. 30, 1995]

252.211–7001 Availability of Specifications, Standards, and Data Item Descriptions Not Listed in the Acquisition Streamlining and Standardization Information System (ASSIST), and Plans, Drawings, and Other Pertinent Documents. 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.

As prescribed in 211.204(c), use the following provision:

AVAILABILITY OF SPECIFICATIONS, STANDARDS, AND DATA ITEM DESCRIPTIONS NOT LISTED IN THE ACQUISITION STREAMLINING AND STANDARDIZATION INFORMATION SYSTEM (ASSIST), AND PLANS, DRAWINGS, AND OTHER PERTINENT DOCUMENTS (MAY 2006)

Offerors may obtain the specifications, standards, plans, drawings, data item descriptions, and other pertinent documents cited in this solicitation by submitting a request to:

(Activity) _____

(Complete Address) _____

Include the number of the solicitation and the title and number of the specification, standard, plan, drawing, or other pertinent document.

(End of provision)

[56 FR 36479, July 31, 1991. Redesignated and amended at 60 FR 61600, Nov. 30, 1995; 71 FR 27641, May 12, 2006]

252.211–7002 Availability for examination of specifications, standards, plans, drawings, data item descriptions, and other pertinent documents.

As prescribed in 211.204(c), use the following provision:

AVAILABILITY FOR EXAMINATION OF SPECIFICATIONS, STANDARDS, PLANS, DRAWINGS, DATA ITEM DESCRIPTIONS, AND OTHER PERTINENT DOCUMENTS (DEC 1991)

The specifications, standards, plans, drawings, data item descriptions, and other pertinent documents cited in this solicitation are not available for distribution but may be examined at the following location:

_____

(Insert complete address)

(End of provision)

[56 FR 36479, July 31, 1991. Redesignated and amended at 60 FR 61600, Nov. 30, 1995]

252.211–7003 Item identification and valuation.

As prescribed in 211.274–5(a), use the following clause:

ITEM IDENTIFICATION AND VALUATION (AUG 2008)

(a) *Definitions.* As used in this clause'

Automatic identification device means a device, such as a reader or interrogator, used to retrieve data encoded on machine-readable media.

Concatenated unique item identifier means—

(1) For items that are serialized within the enterprise identifier, the linking together of the unique identifier data elements in order of the issuing agency code, enterprise identifier, and unique serial number within the enterprise identifier; or

(2) For items that are serialized within the original part, lot, or batch number, the linking together of the unique identifier data elements in order of the issuing agency code; enterprise identifier; original part, lot, or batch number; and serial number within the original part, lot, or batch number.

Data qualifier means a specified character (or string of characters) that immediately precedes a data field that defines the general category or intended use of the data that follows.

DoD recognized unique identification equivalent means a unique identification method that is in commercial use and has been recognized by DoD. All DoD recognized unique identification equivalents are listed at *http://www.acq.osd.mil/dpap/pdi/uid/iuid_equivalents.html.*

DoD unique item identification means a system of marking items delivered to DoD with unique item identifiers that have machine-readable data elements to distinguish an item from all other like and unlike items. For items that are serialized within the enterprise identifier, the unique item identifier shall include the data elements of the enterprise identifier and a unique serial number. For items that are serialized within the part,

lot, or batch number within the enterprise identifier, the unique item identifier shall include the data elements of the enterprise identifier; the original part, lot, or batch number; and the serial number.

Enterprise means the entity (*e.g.*, a manufacturer or vendor) responsible for assigning unique item identifiers to items.

Enterprise identifier means a code that is uniquely assigned to an enterprise by an issuing agency.

Government's unit acquisition cost means—

(1) For fixed-price type line, subline, or exhibit line items, the unit price identified in the contract at the time of delivery;

(2) For cost-type or undefinitized line, subline, or exhibit line items, the Contractor's estimated fully burdened unit cost to the Government at the time of delivery; and

(3) For items produced under a time-and-materials contract, the Contractor's estimated fully burdened unit cost to the Government at the time of delivery.

Issuing agency means an organization responsible for assigning a non-repeatable identifier to an enterprise (*i.e.*, Dun & Bradstreet's Data Universal Numbering System (DUNS) Number, GS1 Company Prefix, or Defense Logistics Information System (DLIS) Commercial and Government Entity (CAGE) Code).

Issuing agency code means a code that designates the registration (or controlling) authority for the enterprise identifier.

Item means a single hardware article or a single unit formed by a grouping of subassemblies, components, or constituent parts.

Lot or batch number means an identifying number assigned by the enterprise to a designated group of items, usually referred to as either a lot or a batch, all of which were manufactured under identical conditions.

Machine-readable means an automatic identification technology media, such as bar codes, contact memory buttons, radio frequency identification, or optical memory cards.

Original part number means a combination of numbers or letters assigned by the enterprise at item creation to a class of items with the same form, fit, function, and interface.

Parent item means the item assembly, intermediate component, or subassembly that has an embedded item with a unique item identifier or DoD recognized unique identification equivalent.

Serial number within the enterprise identifier means a combination of numbers, letters, or symbols assigned by the enterprise to an item that provides for the differentiation of that item from any other like and unlike item and is never used again within the enterprise.

Serial number within the part, lot, or batch number means a combination of numbers or letters assigned by the enterprise to an item that provides for the differentiation of that item from any other like item within a part, lot, or batch number assignment.

Serialization within the enterprise identifier means each item produced is assigned a serial number that is unique among all the tangible items produced by the enterprise and is never used again. The enterprise is responsible for ensuring unique serialization within the enterprise identifier.

Serialization within the part, lot, or batch number means each item of a particular part, lot, or batch number is assigned a unique serial number within that part, lot, or batch number assignment. The enterprise is responsible for ensuring unique serialization within the part, lot, or batch number within the enterprise identifier.

Unique item identifier means a set of data elements marked on items that is globally unique and unambiguous. The term includes a concatenated unique item identifier or a DoD recognized unique identification equivalent.

Unique item identifier type means a designator to indicate which method of uniquely identifying a part has been used. The current list of accepted unique item identifier types is maintained at *http://www.acq.osd.mil/dpap/pdi/uid/uii_types.html*.

(b) The Contractor shall deliver all items under a contract line, subline, or exhibit line item.

(c) *Unique item identifier.*

(1) The Contractor shall provide a unique item identifier for the following:

(i) All delivered items for which the Government's unit acquisition cost is $5,000 or more.

(ii) The following items for which the Government's unit acquisition cost is less than $5,000:

Contract line, subline, or exhibit line item No.	Item description

(iii) Subassemblies, components, and parts embedded within delivered items as specified in Attachment Number ____.

(2) The unique item identifier and the component data elements of the DoD unique item identification shall not change over the life of the item.

(3) *Data syntax and semantics of unique item identifiers.* The Contractor shall ensure that—

(i) The encoded data elements (except issuing agency code) of the unique item identifier are marked on the item using one of

the following three types of data qualifiers, as determined by the Contractor:

(A) Application Identifiers (AIs) (Format Indicator 05 of ISO/IEC International Standard 15434), in accordance with ISO/IEC International Standard 15418, Information Technology—EAN/UCC Application Identifiers and Fact Data Identifiers and Maintenance and ANSI MH 10.8.2 Data Identifier and Application Identifier Standard.

(B) Data Identifiers (DIs) (Format Indicator 06 of ISO/IEC International Standard 15434), in accordance with ISO/IEC International Standard 15418, Information Technology—EAN/UCC Application Identifiers and Fact Data Identifiers and Maintenance and ANSI MH 10.8.2 Data Identifier and Application Identifier Standard.

(C) Text Element Identifiers (TEIs) (Format Indicator 12 of ISO/IEC International Standard 15434), in accordance with the Air Transport Association Common Support Data Dictionary; and

(ii) The encoded data elements of the unique item identifier conform to the transfer structure, syntax, and coding of messages and data formats specified for Format Indicators 05, 06, and 12 in ISO/IEC International Standard 15434, Information Technology—Transfer Syntax for High Capacity Automatic Data Capture Media.

(4) *Unique item identifier.*

(i) The Contractor shall—

(A) Determine whether to—

(1) Serialize within the enterprise identifier;

(2) Serialize within the part, lot, or batch number; or

(3) Use a DoD recognized unique identification equivalent; and

(B) Place the data elements of the unique item identifier (enterprise identifier; serial number; DoD recognized unique identification equivalent; and for serialization within the part, lot, or batch number only: original part, lot, or batch number) on items requiring marking by paragraph (c)(1) of this clause, based on the criteria provided in the version of MIL–STD–130, Identification Marking of U.S. Military Property, cited in the contract Schedule.

(ii) The issuing agency code—

(A) Shall not be placed on the item; and

(B) Shall be derived from the data qualifier for the enterprise identifier.

(d) For each item that requires unique item identification under paragraph (c)(1)(i) or (ii) of this clause, in addition to the information provided as part of the Material Inspection and Receiving Report specified elsewhere in this contract, the Contractor shall report at the time of delivery, either as part of, or associated with, the Material Inspection and Receiving Report, the following information:

(1) Unique item identifier.

(2) Unique item identifier type.

(3) Issuing agency code (if concatenated unique item identifier is used).

(4) Enterprise identifier (if concatenated unique item identifier is used).

(5) Original part number (if there is serialization within the original part number).

(6) Lot or batch number (if there is serialization within the lot or batch number).

(7) Current part number (optional and only if not the same as the original part number).

(8) Current part number effective date (optional and only if current part number is used).

(9) Serial number (if concatenated unique item identifier is used).

(10) Government's unit acquisition cost.

(11) Unit of measure.

(e) For embedded subassemblies, components, and parts that require DoD unique item identification under paragraph (c)(1)(iii) of this clause, the Contractor shall report as part of, or associated with, the Material Inspection and Receiving Report specified elsewhere in this contract, the following information:

(1) Unique item identifier of the parent item under paragraph (c)(1) of this clause that contains the embedded subassembly, component, or part.

(2) Unique item identifier of the embedded subassembly, component, or part.

(3) Unique item identifier type.**

(4) Issuing agency code (if concatenated unique item identifier is used).**

(5) Enterprise identifier (if concatenated unique item identifier is used).**

(6) Original part number (if there is serialization within the original part number).**

(7) Lot or batch number (if there is serialization within the lot or batch number).**

(8) Current part number (optional and only if not the same as the original part number).**

(9) Current part number effective date (optional and only if current part number is used).**

(10) Serial number (if concatenated unique item identifier is used).**

(11) Description.

** Once per item.

(f) The Contractor shall submit the information required by paragraphs (d) and (e) of this clause in accordance with the data submission procedures at *http://www.acq.osd.mil/dpap/pdi/uid/data_submission_information.html.*

(g) Subcontracts. If the Contractor acquires by subcontract, any item(s) for which unique item identification is required in accordance with paragraph (c)(1) of this clause, the Contractor shall include this clause, including this paragraph (g), in the applicable subcontract(s).

(End of clause)

Alternate I (AUG 2008) As prescribed in 211.274–4(c) delete paragraphs (c), (d), (e), (f), and (g) of the basic clause, and add the following paragraphs (c) and (d) to the basic clause.

(c) For each item delivered under a contract line, subline, or exhibit line item under paragraph (b) of this clause, in addition to the information provided as part of the Material Inspection and Receiving Report specified elsewhere in this contract, the Contractor shall report the Government's unit acquisition cost.

(d) The Contractor shall submit the information required by paragraph (c) of this clause in accordance with the data submission procedures at *http://www.acq.osd.mil/dpap/pdi/uid/data_submission_information.html.*

[70 FR 20836, Apr. 22, 2005, as amended at 70 FR 35549, June 21, 2005; 72 FR 52298, Sept. 13, 2007; 73 FR 27464, May 13, 2008; 73 FR 46820, Aug. 12, 2008]

252.211–7004 Alternate preservation, packaging, and packing.

As prescribed in 211.272, use the following provision:

ALTERNATE PRESERVATION, PACKAGING, AND PACKING (DEC 1991)

(a) The Offeror may submit two unit prices for each item—one based on use of the military preservation, packaging, or packing requirements of the solicitation; and an alternate based on use of commercial or industrial preservation, packaging, or packing of equal or better protection than the military.

(b) If the Offeror submits two unit prices, the following information, as a minimum, shall be submitted with the offer to allow evaluation of the alternate—

(1) The per unit/item cost of commercial or industrial preservation, packaging, and packing;

(2) The per unit/item cost of military preservation, packaging, and packing;

(3) The description of commercial or industrial preservation, packaging, and packing procedures, including material specifications, when applicable, to include—

(i) Method of preservation;

(ii) Quantity per unit package;

(iii) Cleaning/drying treatment;

(iv) Preservation treatment;

(v) Wrapping materials;

(vi) Cushioning/dunnage material;

(vii) Thickness of cushioning;

(viii) Unit container;

(ix) Unit package gross weight and dimensions;

(x) Packing; and

(xi) Packing gross weight and dimensions; and

(4) Item characteristics, to include—

(i) Material and finish;

(ii) Net weight;

(iii) Net dimensions; and

(iv) Fragility.

(c) If the Contracting Officer does not evaluate or accept the Offeror's proposed alternate commercial or industrial preservation, packaging, or packing, the Offeror agrees to preserve, package, or pack in accordance with the specified military requirements.

(End of provision)

[56 FR 36479, July 31, 1991. Redesignated and amended at 60 FR 61600, Nov. 30, 1995]

252.211–7005 Substitutions for military or Federal specifications and standards.

As prescribed in 211.273–4, use the following clause:

SUBSTITUTIONS FOR MILITARY OR FEDERAL SPECIFICATIONS AND STANDARDS (NOV 2005)

(a) *Definition.* ''SPI process,'' as used in this clause, means a management or manufacturing process that has been accepted previously by the Department of Defense under the Single Process Initiative (SPI) for use in lieu of a specific military or Federal specification or standard at specific facilities. Under SPI, these processes are reviewed and accepted by a Management Council, which includes representatives of the Contractor, the Defense Contract Management Agency, the Defense Contract Audit Agency, and the military departments.

(b) Offerors are encouraged to propose SPI processes in lieu of military or Federal specifications and standards cited in the solicitation. A listing of SPI processes accepted at specific facilities is available via the Internet at *http://guidebook.dcma.mil/20/guidebook_process.htm* (paragraph 4.2).

(c) An offeror proposing to use an SPI process in lieu of military or Federal specifications or standards cited in the solicitation shall—

(1) Identify the specific military or Federal specification or standard for which the SPI process has been accepted;

(2) Identify each facility at which the offeror proposes to use the specific SPI process in lieu of military or Federal specifications or standards cited in the solicitation;

(3) Identify the contract line items, subline items, components, or elements affected by the SPI process; and

(4) If the proposed SPI process has been accepted at the facility at which it is proposed for use, but is not yet listed at the Internet site specified in paragraph (b) of this clause,

submit documentation of Department of Defense acceptance of the SPI process.

(d) Absent a determination that an SPI process is not acceptable for this procurement, the Contractor shall use the following SPI processes in lieu of military or Federal specifications or standards:

(*Offeror insert information for each SPI process*)

SPI Process: _____

Facility: _____

Military or Federal Specification or Standard: _____

Affected Contract Line Item Number, Subline Item Number, Component, or Element: _____

(e) If a prospective offeror wishes to obtain, prior to the time specified for receipt of offers, verification that an SPI process is an acceptable replacement for military or Federal specifications or standards required by the solicitation, the prospective offeror—

(1) May submit the information required by paragraph (d) of this clause to the Contracting Officer prior to submission of an offer; but

(2) Must submit the information to the Contracting Officer at least 10 working days prior to the date specified for receipt of offers.

(End of clause)

[64 FR 14399, Mar. 25, 1999; 64 FR 28875, May 27, 1999, as amended at 65 FR 52953, Aug. 31, 2000; 66 FR 49861, Oct. 1, 2001; 68 FR 7440, Feb. 14, 2003; 70 FR 67924, Nov. 9, 2005]

252.211–7006 Radio Frequency Identification.

As prescribed in 211.275–3, use the following clause:

RADIO FREQUENCY IDENTIFICATION (FEB 2007)

(a) *Definitions.* As used in this clause—

Advance shipment notice means an electronic notification used to list the contents of a shipment of goods as well as additional information relating to the shipment, such as order information, product description, physical characteristics, type of packaging, marking, carrier information, and configuration of goods within the transportation equipment.

Bulk commodities means the following commodities, when shipped in rail tank cars, tanker trucks, trailers, other bulk wheeled conveyances, or pipelines:

(1) Sand.

(2) Gravel.

(3) Bulk liquids (water, chemicals, or petroleum products).

(4) Ready-mix concrete or similar construction materials.

(5) Coal or combustibles such as firewood.

(6) Agricultural products such as seeds, grains, or animal feed.

Case means either a MIL–STD–129 defined exterior container within a palletized unit load or a MIL–STD–129 defined individual shipping container.

Electronic Product Code™ (EPC) means an identification scheme for universally identifying physical objects via RFID tags and other means. The standardized EPC data consists of an EPC (or EPC identifier) that uniquely identifies an individual object, as well as an optional filter value when judged to be necessary to enable effective and efficient reading of the EPC tags. In addition to this standardized data, certain classes of EPC tags will allow user-defined data. The EPC tag data standards will define the length and position of this data, without defining its content.

EPCglobal™ means a joint venture between EAN International and the Uniform Code Council to establish and support the EPC network as the global standard for immediate, automatic, and accurate identification of any item in the supply chain of any company, in any industry, anywhere in the world.

Exterior container means a MIL–STD–129 defined container, bundle, or assembly that is sufficient by reason of material, design, and construction to protect unit packs and intermediate containers and their contents during shipment and storage. It can be a unit pack or a container with a combination of unit packs or intermediate containers. An exterior container may or may not be used as a shipping container.

Palletized unit load means a MIL–STD–129 defined quantity of items, packed or unpacked, arranged on a pallet in a specified manner and secured, strapped, or fastened on the pallet so that the whole palletized load is handled as a single unit. A palletized or skidded load is not considered to be a shipping container. A loaded 463L System pallet is not considered to be a palletized unit load. Refer to the Defense Transportation Regulation, DoD 4500.9–R, Part II, Chapter 203, for marking of 463L System pallets.

Passive RFID tag means a tag that reflects energy from the reader/interrogator or that receives and temporarily stores a small amount of energy from the reader/interrogator signal in order to generate the tag response.

(1) Until February 28, 2007, the acceptable tags are—

(i) EPC Class 0 passive RFID tags that meet the EPCglobal Class 0 specification; and

(ii) EPC Class 1 passive RFID tags that meet the EPCglobal Class 1 specification. This includes both the Generation 1 and Generation 2 Class 1 specifications.

(2) Beginning March 1, 2007, the only acceptable tags are EPC Class 1 passive RFID

tags that meet the EPCglobal Class 1 Generation 2 specification. Class 0 and Class 1 Generation 1 tags will no longer be accepted after February 28, 2007.

Radio Frequency Identification (RFID) means an automatic identification and data capture technology comprising one or more reader/interrogators and one or more radio frequency transponders in which data transfer is achieved by means of suitably modulated inductive or radiating electromagnetic carriers.

Shipping container means a MIL–STD–129 defined exterior container that meets carrier regulations and is of sufficient strength, by reason of material, design, and construction, to be shipped safely without further packing (*e.g.*, wooden boxes or crates, fiber and metal drums, and corrugated and solid fiberboard boxes).

(b)(1) Except as provided in paragraph (b)(2) of this clause, the Contractor shall affix passive RFID tags, at the case and palletized unit load packaging levels, for shipments of items that—

(i) Are in any of the following classes of supply, as defined in DoD 4140.1–R, DoD Supply Chain Materiel Management Regulation, AP1.1.11:

(A) Subclass of Class I—Packaged operational rations.

(B) Class II—Clothing, individual equipment, tentage, organizational tool kits, hand tools, and administrative and housekeeping supplies and equipment.

(C) Class IIIP—Packaged petroleum, lubricants, oils, preservatives, chemicals, and additives.

(D) Class IV—Construction and barrier materials.

(E) Class VI—Personal demand items (nonmilitary sales items).

(F) Subclass of Class VIII—Medical materials (excluding pharmaceuticals, biologicals, and reagents—suppliers should limit the mixing of excluded and non-excluded materials).

(G) Class IX—Repair parts and components including kits, assemblies and subassemblies, reparable and consumable items required for maintenance support of all equipment, excluding medical-peculiar repair parts; and

(ii) Are being shipped to any of the following locations:

(A) Defense Distribution Depot, Susquehanna, PA: DoDAAC W25G1U or SW3124.

(B) Defense Distribution Depot, San Joaquin, CA: DoDAAC W62G2T or SW3224.

(C) Defense Distribution Depot, Albany, GA: DoDAAC SW3121.

(D) Defense Distribution Depot, Anniston, AL: DoDAAC W31G1Z or SW3120.

(E) Defense Distribution Depot, Barstow, CA: DoDAAC SW3215.

(F) Defense Distribution Depot, Cherry Point, NC: DoDAAC SW3113.

(G) Defense Distribution Depot, Columbus, OH: DoDAAC SW0700.

(H) Defense Distribution Depot, Corpus Christi, TX: DoDAAC W45H08 or SW3222.

(I) Defense Distribution Depot, Hill, UT: DoDAAC SW3210.

(J) Defense Distribution Depot, Jacksonville, FL: DoDAAC SW3122.

(K) Defense Distribution Depot, Oklahoma City, OK: DoDAAC SW3211.

(L) Defense Distribution Depot, Norfolk, VA: DoDAAC SW3117.

(M) Defense Distribution Depot, Puget Sound, WA: DoDAAC SW3216.

(N) Defense Distribution Depot, Red River, TX: DoDAAC W45G19 or SW3227.

(O) Defense Distribution Depot, Richmond, VA: DoDAAC SW0400.

(P) Defense Distribution Depot, San Diego, CA: DoDAAC SW3218.

(Q) Defense Distribution Depot, Tobyhanna, PA: DoDAAC W25G1W or SW3114.

(R) Defense Distribution Depot, Warner Robins, GA: DoDAAC SW3119.

(S) Air Mobility Command Terminal, Charleston Air Force Base, Charleston, SC: Air Terminal Identifier Code CHS.

(T) Air Mobility Command Terminal, Naval Air Station, Norfolk, VA: Air Terminal Identifier Code NGU.

(U) Air Mobility Command Terminal, Travis Air Force Base, Fairfield, CA: Air Terminal Identifier Code SUU.

(V) A location outside the contiguous United States when the shipment has been assigned Transportation Priority 1.

(2) The following are excluded from the requirements of paragraph (b)(1) of this clause:

(i) Shipments of bulk commodities.

(ii) Shipments to locations other than Defense Distribution Depots when the contract includes the clause at FAR 52.213–1, Fast Payment Procedures.

(c) The Contractor shall—

(1) Ensure that the data encoded on each passive RFID tag are unique (i.e., the binary number is never repeated on any and all contracts) and conforms to the requirements in paragraph (d) of this clause;

(2) Use passive tags that are readable; and

(3) Ensure that the passive tag is affixed at the appropriate location on the specific level of packaging, in accordance with MIL–STD–129 (Section 4.9.2) tag placement specifications.

(d) *Data syntax and standards.* The Contractor shall encode an approved RFID tag using the instructions provided in the EPC™ Tag Data Standards in effect at the time of contract award. The EPC™ Tag Data Standards are available at *http://www.epcglobalinc.org/standards/.*

(1) If the Contractor is an EPCglobal™ subscriber and possesses a unique EPC™ company prefix, the Contractor may use any

of the identity types and encoding instructions described in the most recent EPC™ Tag Data Standards document to encode tags.

(2) If the Contractor chooses to employ the DoD Identity Type, the Contractor shall use its previously assigned Commercial and Government Entity (CAGE) Code and shall encode the tags in accordance with the tag identity type details located at *http://www.acq.osd.mil/log/rfid/tag_data.htm*. If the Contractor uses a third party packaging house to encode its tags, the CAGE code of the third party packaging house is acceptable.

(3) Regardless of the selected encoding scheme, the Contractor is responsible for ensuring that each tag contains a globally unique identifier.

(e) *Receiving report*. The Contractor shall electronically submit advance shipment notice(s) with the RFID tag identification (specified in paragraph (d) of this clause) in advance of the shipment in accordance with the procedures at *http://www.acq.osd.mil/log/rfid/advance_shipment_ntc.htm*.

(End of Clause)

[70 FR 53968, Sept. 13, 2005, as amended at 71 FR 29086, May 19, 2006; 72 FR 6483, Feb. 12, 2007]

252.211–7007 Item unique identification of Government property.

As prescribed in 211.274–5(b), use the following clause:

ITEM UNIQUE IDENTIFICATION OF GOVERNMENT PROPERTY (SEP 2007)

(a) *Definitions*. As used in this clause—

2D data matrix symbol means the 2-dimensional Data Matrix ECC 200 as specified by International Standards Organization/International Electrotechnical Commission (ISO/IEC) Standard 16022: Information Technology—International Symbology Specification—Data Matrix.

Acquisition cost, for Government-furnished property in the possession of the Contractor (PIPC), means the amount identified in the contract, or in the absence of such identification, the fair market value. For property acquired or fabricated by the Contractor as Contractor-acquired PIPC, and subsequently transferred or delivered as Government-furnished PIPC, it is the original acquisition cost.

Concatenated unique item identifier means—

(1) For items that are serialized within the enterprise identifier, the linking together of the unique identifier data elements in order of the issuing agency code, enterprise identifier, and unique serial number within the enterprise identifier; or

(2) For items that are serialized within the original part, lot, or batch number, the linking together of the unique identifier data elements in order of the issuing agency code; enterprise identifier; original part, lot, or batch number; and serial number within the original part, lot, or batch number.

DoD recognized unique identification equivalent means a unique identification method that is in commercial use and has been recognized by DoD. All DoD recognized unique identification equivalents are listed at *http://www.acq.osd.mil/dpap/UID/equivalents.html*.

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use.

Item unique identification (IUID) means a system of assigning, reporting, and marking DoD property in the possession of the Contractor with unique item identifiers that have machine-readable data elements to distinguish an item from all other like and unlike items.

IUID Registry means the DoD data repository that receives input from both industry and Government sources and provides storage of, and access to, data that identifies and describes tangible Government personal property, including property in the possession of the Contractor.

Material means property that may be consumed or expended during the performance of a contract, component parts of a higher assembly, or items that lose their individual identity through incorporation into an end item. Material does not include equipment, special tooling, or special test equipment.

Parent item means the item assembly, intermediate component, or subassembly that has an embedded item with a unique item identifier or DoD recognized unique identification equivalent.

Property in the possession of the Contractor (PIPC) means tangible personal property, to which the Government has title, that is in the stewardship or possession of, or is controlled by, the Contractor for the performance of a contract. PIPC consists of both tangible Government-furnished property and Contractor-acquired property and includes equipment and material.

Unique item identifier (UII) means a set of data elements marked on items that is globally unique and unambiguous.

Virtual UII means the data elements for an item that have been captured in the IUID Registry, but have not yet been physically marked on an item with a DoD compliant 2D data matrix symbol.

(b) *Procedures for assigning and registering*.

(1) The Contractor shall provide IUID data for the IUID Registry for all Government-

furnished PIPC requiring DoD unique identification under this contract, including Government-furnished PIPC located at subcontractor and alternate locations.

(2) Unless the Government provides the UII, the Contractor shall establish a concatenated UII or a DoD recognized unique identification equivalent for—

(i) Government-furnished PIPC with a unit acquisition cost of $5,000 or more; and

(ii) The following items of Government-furnished PIPC for which the unit acquisition cost is less than $5,000:

Contract line, subline, or exhibit line item number (if applicable)	Item description

(3) Virtual UIIs may be assigned by the Contractor for existing Government-furnished PIPC requiring item unique identification, if the property can be accurately and uniquely identified using existing innate serialized identity until an event occurs requiring physical marking with the DoD compliant 2D data matrix.

(4) The Contractor shall assign and register a UII and the master item data for any subassembly, component, or part that does not have an existing UII when it is removed from a parent item and remains with the Contractor as a stand-alone item.

(5) Contractor-acquired PIPC is excluded from the IUID Registry. The Contractor shall report to the IUID Registry as Government-furnished PIPC any Contractor-acquired PIPC that—

(i) Is delivered to the Government; or

(ii) Is transferred by contract modification or other contract provision/requirement to another contract (including items that are transferred in place).

(6) If the initial transfer of Contractor-acquired PIPC is a delivery to DoD, the requirements of the Item Identification and Valuation clause of this contract (DFARS 252.211–7003) shall be applied when determining the requirement for item unique identification.

(7) The Contractor shall submit the UII and the master item data into the IUID Registry in accordance with the data submission procedures in the Item Unique Identification of Government Property Guidebook at *http://www.acq.osd.mil/dpap/UID/guides.htm.*

(i) The following data is required for Government-furnished PIPC items received without a UII:

(A) UII type.

(B) Concatenated UII.

(C) Item description.

(D) Foreign currency code.

(E) Unit of measure.

(F) Acquisition cost.

(G) Mark information.

(*1*) Bagged or tagged code.

(*2*) Contents.

(*3*) Effective date.

(*4*) Added or removed flag.

(*5*) Marker code.

(*6*) Marker identifier.

(*7*) Medium code.

(*8*) Value.

(H) Custody information.

(*1*) Prime contractor identifier.

(*2*) Accountable contract number.

(*3*) Category code.

(*4*) Received date.

(*5*) Status code.

(ii) The following data is required only for Government-furnished PIPC items received without a UII for specific ''UII types,'' as specified in the Item Unique Identification of Government Property Guidebook:

(A) Issuing agency code.

(B) Enterprise identifier.

(C) Original part number.

(D) Batch/lot number.

(E) Serial number.

(iii) The following data is optional for Government-furnished PIPC items received without a UII:

(A) Acquisition contract number.

(B) Contract line item number/subline item number/exhibit line item number.

(C) Commercial and Government Entity (CAGE) code or Data Universal Numbering System (DUNS) number in the acquisition contract.

(D) Current part number.

(E) Current part number effective date (required if current part number is provided).

(F) Acceptance location.

(G) Acceptance date.

(H) Ship-to code.

(I) Sent date.

(J) Manufacturer identifier.

(K) Manufacturer code (required if manufacturer identifier is provided).

(L) Parent UII (for embedded items).

(c) *Procedures for updating.* (1) The Contractor shall update the IUID Registry for changes in status, mark, custody, or disposition of Government-furnished PIPC under this contract, for PIPC–

(i) Delivered or shipped from the Contractor's plant, under Government instructions, except when shipment is to a subcontractor or other location of the Contractor;

(ii) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract as determined by the Government property administrator, including reasonable inventory adjustments;

(iii) Disposed of; or

(iv) Transferred to a follow-on or other contract.

(2) The Contractor shall update the IUID Registry for changes to the mark information to add or remove other serialized identification marks and to update a virtual UII to a fully compliant UII when the 2D data matrix symbol is added to the item.

(3) The Contractor shall update the IUID Registry for any changes to the current part number or the current part number effective date.

(4) The Contractor shall update the IUID Registry for any changes to the parent item of a DoD serially managed embedded subassembly, component, or part.

(5) The Contractor shall update the IUID Registry for all Government-furnished PIPC under this contract, so that the IUID Registry reflects the same information that is recorded in the Contractor's property records for Government-furnished PIPC as transactions occur, or at least semi-annually by March 31 and September 30 of each year.

(d) *Procedures for marking.* (1) When an event occurs that requires the physical marking of the item with the 2D data matrix symbol, the Contractor shall use the previously assigned virtual UII as the permanent UII.

(2) The Contractor shall use MIL–STD–130M (or later version) when physically marking existing PIPC with the compliant 2D data matrix symbol. The Contractor that has possession of the PIPC shall use due diligence to maintain the integrity of the UII and shall replace a damaged, destroyed, or lost mark with a replacement mark that contains the same UII data elements, as necessary. The Contractor shall apply the required 2D data matrix symbol to an identification plate, band, tag, or label securely fastened to the item, or directly to the surface of the item to be compliant.

(3) When an item cannot be physically marked or tagged due to a lack of available space to mark identifying information or because marking or tagging would have a deleterious effect, the Contractor shall—

(i) Attach to the item a tag that has the identifying information marked on the tag;

(ii) Place the item in a supplemental bag or other package that encloses the item and has a tag attached to the bag or package that has the identifying information marked on the tag; or

(iii) Apply the identifying information to the unit pack in addition to, or in combination with, the identification marking information specified in MIL–STD–129. When combining marking requirements for a unit pack, the Contractor shall follow the manner, method, form, and format of MIL–STD–129 and shall fulfill the informational requirements of that standard.

(4) When the item has the tag removed or the item is removed from the bag to be installed as an embedded item in a parent item, the Contractor shall—

(i) Assign a UII or a virtual UII to the parent item if a UII does not already exist;

(ii) Mark the parent item with the DoD compliant 2D data matrix symbol, if feasible; and

(iii) Update the IUID Registry to indicate that the tagged or bagged UII item has become an embedded item within the parent item.

(5) In the event a previously tagged or bagged embedded item is subsequently removed from use, the Contractor shall tag or bag and mark the item again with the original UII.

(End of clause)

[72 FR 52298, Sept. 13, 2007]

252.212–7000 Offeror representations and certifications—Commercial items.

As prescribed in 212.301(f)(ii), use the following provision:

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (JUN 2005)

(a) *Definitions.* As used in this clause—

(1) *Foreign person* means any person other than a United States person as defined in Section 16(2) of the Export Administration Act of 1979 (50 U.S.C. App. Sec. 2415).

(2) *United States* means the 50 States, the District of Columbia, outlying areas, and the outer Continental Shelf as defined in 43 U.S.C. 1331.

(3) *United States person* is defined in Section 16(2) of the Export Administration Act of 1979 and means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of any foreign concern), and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

(b) *Certification.* By submitting this offer, the Offeror, if a foreign person, company or entity, certifies that it—

(1) Does not comply with the Secondary Arab Boycott of Israel; and

(2) Is not taking or knowingly agreeing to take any action, with respect to the Secondary Boycott of Israel by Arab countries, which 50 U.S.C. App. Sec. 2407(a) prohibits a United States person from taking.

(c) *Representation of Extent of Transportation by Sea.* (This representation does not apply to solicitations for the direct purchase of ocean transportation services).

(1) The Offeror shall indicate by checking the appropriate blank in paragraph (c)(2) of

this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term ''supplies'' is defined in the Transportation of Supplies by Sea clause of this solicitation.

(2) *Representation*. The Offeror represents that it—

_____ Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

_____ Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

(3) Any contract resulting from this solicitation will include the Transportation of Supplies by Sea clause. If the Offeror represents that it will not use ocean transportation, the resulting contract will also include the Defense Federal Acquisition Regulation Supplement clause at 252.247–7024, Notification of Transportation of Supplies by Sea.

(End of provision)

[60 FR 61600, Nov. 30, 1995, as amended at 61 FR 50455, Sept. 26, 1996; 70 FR 35546, June 21, 2005]

252.212–7001 Contract terms and conditions required to implement statutes or Executive orders applicable to Defense acquisitions of commercial items.

As prescribed in 212.301(f)(iii), use the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS (SEP 2008)

(a) The Contractor agrees to comply with the following Federal Acquisition Regulation (FAR) clause which, if checked, is included in this contract by reference to implement a provision of law applicable to acquisitions of commercial items or components.

___52.203–3, Gratuities (APR 1984) (10 U.S.C. 2207).

(b) The Contractor agrees to comply with any clause that is checked on the following list of Defense FAR Supplement clauses which, if checked, is included in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items or components.

(1) ___252.205–7000, Provision of Information to Cooperative Agreement Holders (DEC 1991) (10 U.S.C. 2416).

(2) ___252.219–7003, Small Business Subcontracting Plan (DoD Contracts) (APR 2007) (15 U.S.C. 637).

(3) ___252.219–7004, Small Business Subcontracting Plan (Test Program) (AUG 2008) (15 U.S.C. 637 note).

(4) ___252.225–7001, Buy American Act and Balance of Payments Program (JUN 2005) (41 U.S.C. 10a–10d, E.O. 10582).

(5) ___252.225–7012, Preference for Certain Domestic Commodities (MAR 2008) (10 U.S.C. 2533a).

(6) ___252.225–7014, Preference for Domestic Specialty Metals (JUN 2005) (10 U.S.C. 2533a).

(7) ___252.225–7015, Restriction on Acquisition of Hand or Measuring Tools (JUN 2005) (10 U.S.C. 2533a).

(8) ___252.225–7016, Restriction on Acquisition of Ball and Roller Bearings (MAR 2006) (Section 8065 of Public Law 107–117 and the same restriction in subsequent DoD appropriations acts).

(9) ___252.225–7021, Trade Agreements (MAR 2007) (19 U.S.C. 2501–2518 and 19 U.S.C. 3301 note).

(10) ___252.225–7027, Restriction on Contingent Fees for Foreign Military Sales (APR 2003) (22 U.S.C. 2779).

(11) ___252.225–7028, Exclusionary Policies and Practices of Foreign Governments (APR 2003) (22 U.S.C. 2755).

(12)(i) ___252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program (MAR 2007) (41 U.S.C. 10a–10d and 19 U.S.C. 3301 note).

(ii) Alternate I (OCT 2006) of 252.225–7036.

(13) ___252.225–7038, Restriction on Acquisition of Air Circuit Breakers (JUN 2005) (10 U.S.C. 2534(a)(3)).

(14) ___252.226–7001, Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns (SEP 2004) (Section 8021 of Pub. L. 107–248 and similar sections in subsequent DoD appropriations acts).

(15) ___252.227–7015, Technical Data—Commercial Items (NOV 1995) (10 U.S.C. 2320).

(16) ___252.227–7037, Validation of Restrictive Markings on Technical Data (SEP 1999) (10 U.S.C. 2321).

(17) ___252.232–7003, Electronic Submission of Payment Requests and Receiving Reports (MAR 2008) (10 U.S.C. 2227).

(18) ___252.237–7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Public Law 108–375).

(19) ___252.243–7002, Requests for Equitable Adjustment (MAR 1998) (10 U.S.C. 2410).

(20)(i) ___252.247–7023, Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631).

(ii) ___Alternate I (MAR 2000) of 252.247–7023.

(iii) ___Alternate II (MAR 2000) of 252.247–7023.

(iv) ___Alternate III (MAY 2002) of 252.247–7023.

(21) ___252.247–7024, Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631).

(c) In addition to the clauses listed in paragraph (e) of the Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items clause of this contract (FAR 52.212–5), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(1) 252.225–7014, Preference for Domestic Specialty Metals, Alternate I (APR 2003) (10 U.S.C. 2533a).

(2) 252.237–7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Public Law 108–375).

(3) 252.247–7023, Transportation of Supplies by Sea (MAY 2002) (10 U.S.C. 2631).

(4) 252.247–7024, Notification of Transportation of Supplies by Sea (MAR 2000) (10 U.S.C. 2631).

(End of clause)

[71 FR 39009, July 11, 2006, as amended at 71 FR 53049, Sept. 8, 2006; 71 FR 58542, Oct. 4, 2006; 71 FR 65752, Nov. 9, 2006; 72 FR 2638, Jan. 22, 2007; 72 FR 14243, Mar. 27, 2007; 72 FR 20763, 20765, Apr. 26, 2007; 73 FR 11356, 11358, Mar. 3, 2008; 73 FR 53151, Sept. 15, 2008]

252.215–7000 Pricing adjustments.

As prescribed in 215.408(1), use the following clause:

PRICING ADJUSTMENTS (DEC 1991)

The term ''pricing adjustment,'' as used in paragraph (a) of the clauses entitled ''Price Reduction for Defective Cost or Pricing Data—Modifications,'' ''Subcontractor Cost or Pricing Data,'' and ''Subcontractor Cost or Pricing Data—Modifications,'' means the aggregate increases and/or decreases in cost plus applicable profits.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 40473, July 29, 1997; 63 FR 55052, Oct. 14, 1998]

252.215–7001 [Reserved]

252.215–7002 Cost estimating system requirements.

As prescribed in 215.408(2), use the following clause:

COST ESTIMATING SYSTEM REQUIREMENTS (DEC 2006)

(a) *Definitions.*

Acceptable estimating system means an estimating system that—

(1) Is maintained, reliable, and consistently applied;

(2) Produces verifiable, supportable, and documented cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;

(3) Is consistent with and integrated with the Contractor's related management systems; and

(4) Is subject to applicable financial control systems.

Estimating system means the Contractor's policies, procedures, and practices for generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards. Estimating system includes the Contractor's—

(1) Organizational structure;

(2) Established lines of authority, duties, and responsibilities;

(3) Internal controls and managerial reviews;

(4) Flow of work, coordination, and communication; and

(5) Estimating methods, techniques, accumulation of historical costs, and other analyses used to generate cost estimates.

(b) *General.* The Contractor shall establish, maintain, and comply with an acceptable estimating system.

(c) *Applicability.* Paragraphs (d) and (e) of this clause apply if the Contractor is a large business and either—

(1) In its fiscal year preceding award of this contract, received Department of Defense (DoD) prime contracts or subcontracts, totaling $50 million or more for which cost or pricing data were required; or

(2) In its fiscal year preceding award of this contract—

(i) Received DoD prime contracts or subcontracts totaling $10 million or more (but less than $50 million) for which cost or pricing data were required; and

(ii) Was notified in writing by the Contracting Officer that paragraphs (d) and (e) of this clause apply.

(d) *System requirements.* (1) The Contractor shall disclose its estimating system to the Administrative Contracting Officer (ACO) in writing. If the Contractor wishes the Government to protect the information as privileged or confidential, the Contractor must mark the documents with the appropriate legends before submission.

(2) An estimating system disclosure is acceptable when the Contractor has provided the ACO with documentation that—

(i) Accurately describes those policies, procedures, and practices that the Contractor currently uses in preparing cost proposals; and

(ii) Provides sufficient detail for the Government to reasonably make an informed judgment regarding the acceptability of the Contractor's estimating practices.

(3) The Contractor shall—

(i) Comply with its disclosed estimating system; and

(ii) Disclose significant changes to the cost estimating system to the ACO on a timely basis.

(e) *Estimating system deficiencies.* (1) The Contractor shall respond to a written report from the Government that identifies deficiencies in the Contractor's estimating system as follows:

(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall—

(A) Within 30 days, state its agreement in writing; and

(B) Within 60 days, correct the deficiencies or submit a corrective action plan showing proposed milestones and actions leading to elimination of the deficiencies.

(ii) If the Contractor disagrees with the report, the Contractor shall, within 30 days, state its rationale for disagreeing.

(2) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies and/or the adequacy of any proposed or completed corrective action.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 40473, July 29, 1997; 63 FR 55052, Oct. 14, 1998; 71 FR 69495, Dec. 1, 2006]

252.215–7003 Excessive pass-through charges—identification of subcontract effort.

As prescribed in 215.408(3), use the following provision:

EXCESSIVE PASS-THROUGH CHARGES—IDENTIFICATION OF SUBCONTRACT EFFORT (MAY 2008)

(a) *Definitions. Added value, excessive pass-through charge, subcontract,* and *subcontractor,* as used in this provision, are defined in the clause of this solicitation entitled ''Excessive Pass-Through Charges'' (DFARS 252.215–7004).

(b) *General.* The offeror's proposal shall exclude excessive pass-through charges.

(c) *Performance of work by the Contractor or a subcontractor.*

(1) The offeror shall identify in its proposal the total cost of the work to be performed by the offeror, and the total cost of the work to be performed by each subcontractor, under the contract, task order, or delivery order.

(2) If the offeror intends to subcontract more than 70 percent of the total cost of work to be performed under the contract, task order, or delivery order, the offeror shall identify in its proposal—

(i) The amount of the offeror's indirect costs and profit applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal—

(i) The amount of the subcontractor's indirect costs and profit applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

[73 FR 27472, May 13, 2008]

252.215–7004 Excessive pass-through charges.

As prescribed in 215.408(4), use the following clause:

EXCESSIVE PASS-THROUGH CHARGES (MAY 2008)

(a) *Definitions.* As used in this clause—

Added value means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

Excessive pass-through charge, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit on work performed by a subcontractor (other than charges for the costs of managing subcontracts and applicable indirect costs and profit based on such costs).

No or negligible value means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

Subcontract means any contract, as defined in section 2.101 of the Federal Acquisition Regulation, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor or another subcontractor.

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Required reporting of performance of work by the Contractor or a subcontractor.* The Contractor shall notify the Contracting Officer in writing if—

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist—

(1) For fixed-price contracts, the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price; and

(2) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in Subpart 31.2 of the Federal Acquisition Regulation (FAR) and Subpart 231.2 of the Defense FAR Supplement.

(e) *Access to records.* (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Flowdown.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts under this contract, except for—

(1) Firm-fixed-price subcontracts awarded on the basis of adequate price competition;

(2) Fixed-price subcontracts with economic price adjustment, awarded on the basis of adequate price competition;

(3) Firm-fixed-price subcontracts for the acquisition of a commercial item; or

(4) Fixed-price subcontracts with economic price adjustment, for the acquisition of a commercial item.

(End of clause)

Alternate I (MAY 2008). As prescribed in 215.408(4)(ii), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

[73 FR 27472, May 13, 2008]

252.216–7000 Economic price adjustment—basic steel, aluminum, brass, bronze, or copper mill products.

As prescribed in 216.203–4–70(a), use the following clause:

ECONOMIC PRICE ADJUSTMENT—BASIC STEEL, ALUMINUM, BRASS, BRONZE, OR COPPER MILL PRODUCTS (JUL 1997)

(a) *Definitions.* As used in this clause—

Established price means a price which is an established catalog or market price for a commercial item sold in substantial quantities to the general public.

Unit price excludes any part of the price which reflects requirements for preservation, packaging, and packing beyond standard commercial practice.

(b) The Contractor warrants that the unit price stated for (*Identify the item*) is not in excess of the Contractor's established price in effect on the date set for opening of bids (or the contract date if this is a negotiated contract) for like quantities of the same item. This price is the net price after applying any applicable standard trade discounts offered by the Contractor from its catalog, list, or schedule price.

(c) The Contractor shall promptly notify the Contracting Officer of the amount and effective date of each decrease in any established price.

(1) Each corresponding contract unit price shall be decreased by the same percentage that the established price is decreased.

(2) This decrease shall apply to items delivered on or after the effective date of the decrease in the Contractor's established price.

(3) This contract shall be modified accordingly.

(d) If the Contractor's established price is increased after the date set for opening of bids (or the contract date if this is a negotiated contract), upon the Contractor's written request to the Contracting Officer, the corresponding contract unit price shall be increased by the same percentage that the established price is increased, and this contract shall be modified accordingly, provided—

(1) The aggregate of the increases in any contract unit price under this contract shall not exceed 10 percent of the original contract unit price;

(2) The increased contract unit price shall be effective on the effective date of the increase in the applicable established price if the Contractor's written request is received by the Contracting Officer within ten days of the change. If it is not, the effective date of the increased unit price shall be the date of receipt of the request by the Contracting Officer; and

(3) The increased contract unit price shall not apply to quantities scheduled for delivery before the effective date of the increased contract unit price unless the Contractor's failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause of this contract.

(4) The Contracting Officer shall not execute a modification incorporating an increase in a contract unit price under this clause until the increase is verified.

(e) Within 30 days after receipt of the Contractor's written request, the Contracting Officer may cancel, without liability to either party, any portion of the contract affected by the requested increase and not delivered at the time of such cancellation, except as follows—

(1) The Contractor may, after that time, deliver any items that were completed or in the process of manufacture at the time of receipt of the cancellation notice, provided the Contractor notifies the Contracting Officer of such items within 10 days after the Contractor receives the cancellation notice.

(2) The Government shall pay for those items at the contract unit price increased to the extent provided by paragraph (d) of this clause.

(3) Any standard steel supply item shall be deemed to be in the process of manufacture when the steel for that item is in the state of processing after the beginning of the furnace melt.

(f) Pending any cancellation of this contract under paragraph (e) of this clause, or if there is no cancellation, the Contractor shall continue deliveries according to the delivery schedule of the contract. The Contractor shall be paid for those deliveries at the contract unit price increased to the extent provided by paragraph (d) of this clause.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2614, Jan. 17, 1997; 62 FR 40473, July 29, 1997]

252.216–7001 Economic price adjustment—nonstandard steel items.

As prescribed in 216.203–4–70(b), use the following clause:

ECONOMIC PRICE ADJUSTMENT—NONSTANDARD STEEL ITEMS (JUL 1997)

(a) *Definitions.* As used in this clause—

Base labor index means the average of the labor indices for the three months which consist of the month of bid opening (or offer submission) and the months immediately preceding and following that month.

Base steel index means the Contractor's established price (see note 6) including all applicable extras of $_____ per _____ (see note 1) for _____ (see note 2) on the date set for bid opening (or the date of submission of the offer).

Current labor index means the average of the labor indices for the month in which delivery of supplies is required to be made and the month preceding.

Current steel index means the Contractor's established price (see note 6) for that item, including all applicable extras in effect _____ days (see note 3) prior to the first day of the month in which delivery is required.

Established price is—

(1) A price which is an established catalog or market price of a commercial item sold in substantial quantities to the general public; and

(2) The net price after applying any applicable standard trade discounts offered by the Contractor from its catalog, list, or schedule price. (But see Note 6.)

Labor index means the average straight time hourly earnings of the Contractor's employees in the _____ shop of the Contractor's _____ plant (see note 4) for any particular month.

Month means calendar month. However, if the Contractor's accounting period does not coincide with the calendar month, then that accounting period shall be used in lieu of *month*.

(b) Each contract unit price shall be subject to revision, under the terms of this clause, to reflect changes in the cost of labor and steel. For purpose of this price revision, the proportion of the contract unit price attributable to costs of labor not otherwise included in the price of the steel item identified under the *base steel index* definition in paragraph (a) shall be _____ percent, and the proportion of the contract unit price attributable to the cost of steel shall be _____ percent. (See note 5.)

(c)(1) Unless otherwise specified in this contract, the labor index shall be computed by dividing the total straight time earnings of the Contractor's employees in the shop identified in paragraph (a) for any given month by the total number of straight time hours worked by those employees in that month.

(2) Any revision in a contract unit price to reflect changes in the cost of labor shall be computed solely by reference to the ''*base labor index*'' and the ''*current labor index*.''

(d) Any revision in a contract unit price to reflect changes in the cost of steel shall be computed solely by reference to the ''*base steel index*'' and the ''*current steel index*.''

(e)(1) Each contract unit price shall be revised for each month in which delivery of supplies is required to be made.

(2) The revised contract unit price shall apply to the deliveries of those quantities required to be made in that month regardless of when actual delivery is made.

(3) Each revised contract unit price shall be computed by adding—

(i) The adjusted cost of labor (obtained by multiplying _____ percent of the contract unit price by a fraction, of which the numerator shall be the current labor index and the denominator shall be the base labor index);

(ii) The adjusted cost of steel (obtained by multiplying _____ percent of the contract unit price by a fraction, of which the numerator shall be the current steel index and the denominator shall be the base steel index); and

(iii) The amount equal to _____ percent of the original contract unit price (representing that portion of the unit price which relates neither to the cost of labor nor the cost of steel, and which is therefore not subject to revision (see note 5)).

(4) The aggregate of the increases in any contract unit price under this contract shall not exceed ten percent of the original contract unit price.

(5) Computations shall be made to the nearest one-hundredth of one cent.

(f)(1) Pending any revisions of the contract unit prices, the Contractor shall be paid the contract unit price for deliveries made.

(2) Within 30 days after final delivery (or such other period as may be authorized by the Contracting Officer), the Contractor shall furnish a statement identifying the correctness of—

(i) The average straight time hourly earnings of the Contractor's employees in the shop identified in paragraph (a) that are relevant to the computations of the *base labor index* and the *current labor index;* and

(ii) The Contractor's established prices (see note 6), including all applicable extras for like quantities of the item that are relevant to the computation of the *base steel index* and the *current steel index*.

(3) Upon request of the Contracting Officer, the Contractor shall make available all records used in the computation of the labor indices.

(4) Upon receipt of the statement, the Contracting Officer will compute the revised contract unit prices and modify the contract accordingly. No modification to this contract will be made pursuant to this clause until the Contracting Officer has verified the revised established price (see note 6).

(g)(1) In the event any item of this contract is subject to a total or partial termination for convenience, the month in which the Contractor receives notice of the termination, if prior to the month in which delivery is required, shall be considered the month in which delivery of the terminated item is required for the purposes of determining the current labor and steel indices under paragraphs (c) and (d).

(2) For any item which is not terminated for convenience, the month in which delivery is required under the contract shall continue to apply for determining those indices with respect to the quantity of the non-terminated item.

(3) If this contract is terminated for default, any price revision shall be limited to the quantity of the item which has been delivered by the Contractor and accepted by the Government prior to receipt by the Contractor of the notice of termination.

(h) If the Contractor's failure to make delivery of any required quantity arises out of causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the clause of this contract entitled ''*Default*,'' the quantity not delivered shall be delivered as promptly as possible after the cessation of the cause of the failure, and the delivery schedule set forth in this contract shall be amended accordingly.

Notes:

1 Offeror insert the unit price and unit measure of the standard steel mill item to be used in the manufacture of the contract item.

2 Offeror identify the standard steel mill item to be used in the manufacture of the contract item.

3 Offeror insert best estimate of the number of days required for processing the standard steel mill item in the shop identified under the *labor index* definition.

4 Offeror identify the shop and plant in which the standard steel mill item identified under the *base steel index* definition will be finally fabricated or processed into the contract item.

5 Offeror insert the same percentage figures for the corresponding blanks in paragraphs (b), (e)(3)(i), and (e)(3)(ii). In paragraph (e)(3)(iii), insert the percentage representing the difference between the sum of the percentages inserted in paragraph (b) and 100 percent.

6 In negotiated acquisitions of nonstandard steel items, when there is no *established price* or when it is not desirable to use this price, this paragraph may refer to another appropriate price basis, e.g., an established interplant price.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2614, Jan. 17, 1997; 62 FR 40473, July 29, 1997]

252.216–7002 Alternate A, Time-and-Materials/Labor-Hour Proposal Requirements—Non-Commercial Item Acquisition With Adequate Price Competition.

As prescribed in 216.601(e), substitute the following paragraph (c) for paragraph (c) of the provision at FAR 52.216–29:

ALTERNATE A, TIME-AND-MATERIALS/LABOR-HOUR PROPOSAL REQUIREMENTS—NON-COMMERCIAL ITEM ACQUISITION WITH ADEQUATE PRICE COMPETITION (FEB. 2007)

(c) The offeror must establish fixed hourly rates using separate rates for each category of labor to be performed by each subcontractor and for each category of labor to be performed by the offeror, and for each category of labor to be transferred between divisions, subsidiaries, or affiliates of the offeror under a common control.

[71 FR 74471, Dec. 12, 2006]

252.216–7003 Economic price adjustment—wage rates or material prices controlled by a foreign government.

As prescribed in 216.203–4–70(c), use the following clause:

ECONOMIC PRICE ADJUSTMENT—WAGE RATES OR MATERIAL PRICES CONTROLLED BY A FOREIGN GOVERNMENT (JUN 1997)

(a) The Contractor represents that the prices set forth in this contract—

(1) Are based on the wage rate(s) or material price(s) established and controlled by the Government of_____(*Offeror insert name of host country*); and

(2) Do not include contingency allowances to pay for possible increases in wage rates or material prices.

(b) If wage rates or material prices are revised by the government named in paragraph (a) of this clause, the Contracting Officer shall make an equitable adjustment in the contract price and shall modify the contract to the extent that the Contractor's actual costs of performing this contract are increased or decreased, as a direct result of the revision, subject to the following:

(1) For increases in established wage rates or material prices, the increase in contract unit price(s) shall be effective on the same date that the government named in paragraph (a) of this clause increased the applicable wage rate(s) or material price(s), but only if the Contracting Officer receives the Contractor's written request for contract adjustment within 10 days of the change. If the Contractor's request is received later, the effective date shall be the date that the Contracting Officer received the Contractor's request.

(2) For decreases in established wage rates or material prices, the decrease in contract unit price(s) shall be effective on the same date that the government named in paragraph (a) of this clause decreased the applicable wage rate(s) or material price(s). The decrease in contract unit price(s) shall apply to all items delivered on and after the effective date of the government's rate or price decrease.

(c) No modification changing the contract unit price(s) shall be executed until the Contracting Officer has verified the applicable change in the rates or prices set by the government named in paragraph (a) of this clause. The Contractor shall make available its books and records that support a requested change in contract price.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause of this contract.

(End of clause)

[62 FR 34128, June 24, 1997]

252.217–7000 Exercise of option to fulfill foreign military sales commitments.

As prescribed in 217.208–70(a), use the following clause:

EXERCISE OF OPTION TO FULFILL FOREIGN MILITARY SALES COMMITMENTS (DEC 1991)

(a) The Government may exercise the option(s) of this contract to fulfill foreign military sales commitments.

(b) The foreign military sales commitments are for:

_____

(Insert name of country, or To Be Determined)

_____

(Insert applicable CLIN)

(End of clause)

Alternate I (DEC 1991). As prescribed in 217.208–70(a)(1), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) On the date the option is exercised, the Government shall identify the foreign country for the purpose of negotiating any equitable adjustment attributable to foreign military sales. Failure to agree on an equitable adjustment shall be treated as a dispute under the Disputes clause of this contract.

252.217–7001 Surge option.

As prescribed in 217.208–70(b), use the following clause:

SURGE OPTION (AUG 1992)

(a) *General.* The Government has the option to—

(1) Increase the quantity of supplies or services called for under this contract by no more than _____ percent; and/or

(2) Accelerate the rate of delivery called for under this contract, at a price or cost established before contract award or to be established by negotiation as provided in this clause.

(b) *Schedule.* (1) When the Production Surge Plan (DI-MGMT-80969) is included in the contract, the option delivery schedule shall be the production rate provided with the Plan. If the Plan was negotiated before contract award, then the negotiated schedule shall be used.

(2) If there is no Production Surge Plan in the contract, the Contractor shall, within 30 days from the date of award, furnish the Contracting Officer a delivery schedule showing the maximum sustainable rate of delivery for items in this contract. This delivery schedule shall provide acceleration by month up to the maximum sustainable rate of delivery achievable within the Contractor's existing facilities, equipment, and subcontracting structure.

(3) The Contractor shall not revise the option delivery schedule without approval from the Contracting Officer.

(c) *Exercise of option.* (1) The Contracting Officer may exercise this option at any time before acceptance by the Government of the final scheduled delivery.

(2) The Contracting Officer will provide a preliminary oral or written notice to the Contractor stating the quantities to be added or accelerated under the terms of this clause, followed by a contract modification incorporating the transmitted information and instructions. The notice and modification will establish a not-to-exceed price equal to the highest contract unit price or cost of the added or accelerated items as of the date of the notice.

(3) The Contractor will not be required to deliver at a rate greater than the maximum sustainable delivery rate under paragraph (b)(2) of this clause, nor will the exercise of this option extend delivery more than 24 months beyond the scheduled final delivery.

(d) *Price negotiation.* (1) Unless the option cost or price was previously agreed upon, the Contractor shall, within 30 days from the date of option exercise, submit to the Contracting Officer a cost or price proposal (including a cost breakdown) for the added or accelerated items.

(2) Failure to agree on a cost or price in negotiations resulting from the exercise of this option shall constitute a dispute concerning a question of fact within the meaning of the Disputes clause of this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the performance of the contract, as modified, while any resulting claim is being settled.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 57 FR 42633, Sept. 15, 1992]

252.217–7002 Offering property for exchange.

As prescribed in 217.7005, use the following provision:

OFFERING PROPERTY FOR EXCHANGE (DEC 1991)

(a) The property described in item number _____, is being offered in accordance with the exchange provisions of section 201(c) of the Federal Property and Administrative Services Act of 1949, 63 Stat. 384 (40 U.S.C. 481(c)).

(b) The property is located at (insert address). Offerors may inspect the property during the period (insert beginning and ending dates and insert hours during day).

(End of provision)

252.217–7003 Changes.

As prescribed in 217.7104(a), use the following clause:

CHANGES (DEC 1991)

(a) The Contracting Officer may, at any time and without notice to the sureties, by written change order, make changes within the general scope of any job order issued under the Master Agreement in—

(1) Drawings, designs, plans, and specifications;

(2) Work itemized;

(3) Place of performance of the work;

(4) Time of commencement or completion of the work; and

(5) Any other requirement of the job order.

(b) If a change causes an increase or decrease in the cost of, or time required for, performance of the job order, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in

the price or date of completion, or both, and shall modify the job order in writing.

(1) Within ten days after the Contractor receives notification of the change, the Contractor shall submit to the Contracting Officer a request for price adjustment, together with a written estimate of the increased cost.

(2) The Contracting Officer may grant an extension of this period if the Contractor requests it within the ten day period.

(3) If the circumstances justify it, the Contracting Officer may accept and grant a request for equitable adjustment at any later time prior to final payment under the job order, except that the Contractor may not receive profit on a payment under a late request.

(c) If the Contractor includes in its claim the cost of property made obsolete or excess as a result of a change, the Contracting Officer shall have the right to prescribe the manner of disposition of that property.

(d) Failure to agree to any adjustment shall be a dispute within the meaning of the Disputes clause.

(e) Nothing in this clause shall excuse the Contractor from proceeding with the job order as changed.

(End of clause)

252.217–7004 Job orders and compensation.

As prescribed in 217.7104(a), use the following clause:

JOB ORDERS AND COMPENSATION (MAY 2006)

(a) The Contracting Officer shall solicit bids or proposals and make award of job orders. The issuance of a job order signed by the Contracting Officer constitutes award. The job order shall incorporate the terms and conditions of the Master Agreement.

(b) Whenever the Contracting Officer determines that a vessel, its cargo or stores, would be endangered by delay, or whenever the Contracting Officer determines that military necessity requires that immediate work on a vessel is necessary, the Contracting Officer may issue a written order to perform that work and the Contractor hereby agrees to comply with that order and to perform work on such vessel within its capabilities.

(1) As soon as practicable after the issuance of the order, the Contracting Officer and the Contractor shall negotiate a price for the work and the Contracting Officer shall issue a job order covering the work.

(2) The Contractor shall, upon request, furnish the Contracting Officer with a breakdown of costs incurred by the Contractor and an estimate of costs expected to be incurred in the performance of the work. The Contractor shall maintain, and make available for inspection by the Contracting Officer or the Contracting Officer's representative, records supporting the cost of performing the work.

(3) Failure of the parties to agree upon the price of the work shall constitute a dispute within the meaning of the Disputes clause of the Master Agreement. In the meantime, the Contractor shall diligently proceed to perform the work ordered.

(c)(1) If the nature of any repairs is such that their extent and probable cost cannot be ascertained readily, the Contracting Officer may issue a job order (on a sealed bid or negotiated basis) to determine the nature and extent of required repairs.

(2) 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 that work. The prices agreed upon shall be set forth in a modification of the job order.

(3) Failure of the parties to agree upon the price shall constitute a dispute under the Disputes clause. In the meantime, the Contractor shall diligently proceed to perform the work ordered.

(End of clause)

[56 FR 36479, July 13, 1991, as amended at 71 FR 27643, May 12, 2006]

252.217–7005 Inspection and manner of doing work.

As prescribed in 217.7104(a), use the following clause:

INSPECTION AND MANNER OF DOING WORK (JAN 1997)

(a) The Contractor shall perform work in accordance with the job order, any drawings and specifications made a part of the job order, and any change or modification issued under the Changes clause of the Master Agreement.

(b)(1) Except as provided in paragraph (b)(2) of this clause, and unless otherwise specifically provided in the job order, all operational practices of the Contractor and all workmanship, material, equipment, and articles used in the performance of work under the Master Agreement shall be in accordance with the best commercial marine practices and the rules and requirements of the American Bureau of Shipping, the U.S. Coast Guard, and the Institute of Electrical and Electronic Engineers, in effect at the time of Contractor's submission of bid (or acceptance of the job order, if negotiated).

(2) When Navy specifications are specified in the job order, the Contractor shall follow Navy standards of material and workmanship. The solicitation shall prescribe the Navy standard whenever applicable.

(c) The Government may inspect and test all material and workmanship at any time during the Contractor's performance of the work.

(1) If, prior to delivery, the Government finds any material or workmanship is defective or not in accordance with the job order, in addition to its rights under the Guarantees clause of the Master Agreement, the Government may reject the defective or nonconforming material or workmanship and require the Contractor to correct or replace it at the Contractor's expense.

(2) If the Contractor fails to proceed promptly with the replacement or correction of the material or workmanship, the Government may replace or correct the defective or nonconforming material or workmanship and charge the Contractor the excess costs incurred.

(3) As specified in the job order, the Contractor shall provide and maintain an inspection system acceptable to the Government.

(4) The Contractor shall maintain complete records of all inspection work and shall make them available to the Government during performance of the job order and for 90 days after the completion of all work required.

(d) The Contractor shall not permit any welder to work on a vessel unless the welder is, at the time of the work, qualified to the standards established by the U.S. Coast Guard, American Bureau of Shipping, or Department of the Navy for the type of welding being performed. Qualifications of a welder shall be as specified in the job order.

(e) The Contractor shall—

(1) Exercise reasonable care to protect the vessel from fire;

(2) Maintain a reasonable system of inspection over activities taking place in the vicinity of the vessel's magazines, fuel oil tanks, or storerooms containing flammable materials;

(3) Maintain a reasonable number of hose lines ready for immediate use on the vessel at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on a marine railway;

(4) Unless otherwise provided in a job order, provide sufficient security patrols to reasonably maintain a fire watch for protection of the vessel when it is in the Contractor's custody;

(5) To the extent necessary, clean, wash, and steam out or otherwise make safe, all tanks under alteration or repair;

(6) Furnish the Contracting Officer or designated representative with a copy of the ''gas-free'' or ''safe-for-hotwork'' certificate, provided by a Marine Chemist or Coast Guard authorized person in accordance with Occupational Safety and Health Administration regulations (29 CFR 1915.14) before any hot work is done on a tank;

(7) Treat the contents of any tank as Government property in accordance with the Government Property (Fixed-Price Contracts) clause; and

(8) Dispose of the contents of any tank only at the direction, or with the concurrence, of the Contracting Officer.

(f) Except as otherwise provided in the job order, when the vessel is in the custody of the Contractor or in dry dock or on a marine railway and the temperature is expected to go as low as 35 °F, the Contractor shall take all necessary steps to—

(1) Keep all hose pipe lines, fixtures, traps, tanks, and other receptacles on the vessel from freezing; and

(2) Protect the stern tube and propeller hubs from frost damage.

(g) The Contractor shall, whenever practicable—

(1) Perform the required work in a manner that will not interfere with the berthing and messing of Government personnel attached to the vessel; and

(2) Provide Government personnel attached to the vessel access to the vessel at all times.

(h) Government personnel attached to the vessel shall not interfere with the Contractor's work or workers.

(i)(1) The Government does not guarantee the correctness of the dimensions, sizes, and shapes set forth in any job order, sketches, drawings, plans, or specifications prepared or furnished by the Government, unless the job order requires that the Contractor perform the work prior to any opportunity to inspect.

(2) Except as stated in paragraph (i)(1) of this clause, and other than those parts furnished by the Government, the Contractor shall be responsible for the correctness of the dimensions, sizes, and shapes of parts furnished under this agreement.

(j) The Contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by its employees or the work. At the completion of the work, unless the job order specifies otherwise, the Contractor shall remove all rubbish from the site of the work and leave the immediate vicinity of the work area ''broom clean.''

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2614, Jan. 17, 1997]

252.217–7006 Title.

As prescribed in 217.7104(a), use the following clause:

TITLE (DEC 1991)

(a) Unless otherwise provided, title to all materials and equipment to be incorporated in a vessel in the performance of a job order

shall vest in the Government upon delivery at the location specified for the performance of the work.

(b) Upon completion of the job order, or with the approval of the Contracting Officer during performance of the job order, all Contractor-furnished materials and equipment not incorporated in, or placed on, any vessel, shall become the property of the Contractor, unless the Government has reimbursed the Contractor for the cost of the materials and equipment.

(c) The vessel, its equipment, movable stores, cargo, or other ship's materials shall not be considered Government-furnished property.

(End of clause)

252.217–7007 Payments.

As prescribed in 217.7104(a), use the following clause:

PAYMENTS (DEC 1991)

(a) *Progress payments,* as used in this clause, means payments made before completion of work in progress under a job order.

(b) Upon submission by the Contractor of invoices in the form and number of copies directed by the Contracting Officer, and as approved by the Contracting Officer, the Government will make progress payments as work progresses under the job order.

(1) Generally, the Contractor may submit invoices on a semi-monthly basis, unless expenditures justify a more frequent submission.

(2) The Government need not make progress payments for invoices aggregating less than $5,000.

(3) The Contracting Officer shall approve progress payments based on the value, computed on the price of the job order, of labor and materials incorporated in the work, materials suitably stored at the site of the work, and preparatory work completed, less the aggregate of any previous payments.

(4) Upon request, the Contractor will furnish the Contracting Officer any reports concerning expenditures on the work to date that the Contracting Officer may require.

(c) The Government will retain until final completion and acceptance of all work covered by the job order, an amount estimated or approved by the Contracting Officer under paragraph (b) of this clause. The amount retained will be in accordance with the rate authorized by Congress for Naval vessel repair contracts at the time of job order award.

(d) The Contracting Officer may direct that progress payments be based on the price of the job order as adjusted as a result of change orders under the Changes clause of the Master Agreement. If the Contracting Officer does not so direct—

(1) Payments of any increases shall be made from time to time after the amount of the increase is determined under the Changes clause of the Master Agreement; and

(2) Reductions resulting from decreases shall be made for the purposes of subsequent progress payments as soon as the amounts are determined under the Changes clause of the Master Agreement.

(e) Upon completion of the work under a job order and final inspection and acceptance, and upon submission of invoices in such form and with such copies as the Contracting Officer may prescribe, the Contractor shall be paid for the price of the job order, as adjusted pursuant to the Changes clause of the Master Agreement, less any performance reserves deemed necessary by the Contracting Officer, and less the amount of any previous payments.

(f) All materials, equipment, or any other property or work in process covered by the progress payments made by the Government, upon the making of those progress payments, shall become the sole property of the Government, and are subject to the provisions of the Title clause of the Master Agreement.

(End of clause)

252.217–7008 Bonds.

As prescribed in 217.7104(a), use the following clause:

BONDS (DEC 1991)

(a) If the solicitation requires an offeror to submit a bid bond, the Offeror may furnish, instead, an annual bid bond (or evidence thereof) or an annual performance and payment bond (or evidence thereof).

(b) If the solicitation does not require a bid bond, the Offeror shall not include in the price any contingency to cover the premium of such a bond.

(c) Even if the solicitation does not require bonds, the Contracting Officer may nevertheless require a performance and payment bond, in form, amount, and with a surety acceptable to the Contracting Officer. Where performance and payment bond is required, the offer price shall be increased upon the award of the job order in an amount not to exceed the premium of a corporate surety bond.

(d) If any surety upon any bond furnished in connection with a job order under this agreement fails to submit requested reports as to its financial condition or otherwise becomes unacceptable to the Government, the

Contracting Officer may require the Contractor to furnish whatever additional security the Contracting Officer determines necessary to protect the interests of the Government and of persons supplying labor or materials in the performance of the work contemplated under the Master Agreement.

(End of clause)

252.217–7009 Default.

As prescribed in 217.7104(a), use the following clause:

DEFAULT (DEC 1991)

(a) The Government may, subject to the provisions of paragraph (b) of this clause, by written notice of default to the Contractor, terminate the whole or any part of a job order if the Contractor fails to—

(1) Make delivery of the supplies or to perform the services within the time specified in a job order or any extension;

(2) Make progress, so as to endanger performance of the job order; or

(3) Perform any of the other provisions of this agreement or a job order.

(b) Except for defaults of subcontractors, the Contractor shall not be liable for any excess costs if failure to perform the job order arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather.

(c) If the Contractor's failure to perform is caused by the default of a subcontractor, and if such default arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to perform the job order within the time specified.

(d) If the Government terminates the job order in whole or in part as provided in paragraph (a) of this clause—

(1) The Government may, upon such terms and in such manner as the Contracting Officer may deem appropriate, arrange for the completion of the work so terminated, at such plant or plants, including that of the Contractor, as may be designated by the Contracting Officer.

(i) The Contractor shall continue the performance of the job order to the extent not terminated under the provisions of this clause.

(ii) If the work is to be completed at the plant, the Government may use all tools, machinery, facilities, and equipment of the Contractor determined by the Contracting Office to be necessary for that purpose.

(iii) If the cost to the Government of the work procured or completed (after adjusting such cost to exclude the effect of changes in the plans and specifications made subsequent to the date of termination) exceeds the price fixed for work under the job order (after adjusting such price on account of changes in the plans and specifications made before the date of termination), the Contractor, or the Contractor's surety, if any, shall be liable for such excess.

(2) The Government, in addition to any other rights provided in this clause, may require the Contractor to transfer title and delivery to the Government, in the manner and to the extent directed by the Contracting Officer, any completed supplies and such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called ''manufacturing materials'') as the Contractor has specifically produced or specifically acquired for the performance of the terminated part of the job order.

(i) The Contractor shall, upon direction of the Contracting Officer, protect and preserve property in possession of the Contractor in which the Government has an interest.

(ii) The Government shall pay to the Contractor the job order price for completed items of work delivered to and accepted by the Government, and the amount agreed upon by the Contractor and the Contracting Officer for manufacturing materials delivered to and accepted by the Government, and for the protection and preservation of property. Failure to agree shall be a dispute concerning a question of fact within the meaning of the Disputes clause.

(e) If, after notice of termination of the job order, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the notice of termination had been issued for the convenience of the Government.

(f) If the Contractor fails to complete the performance of a job order within the time specified, or any extension, the actual damage to the Government for the delay will be difficult or impossible to determine.

(1) In lieu of actual damage, the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay the amount, if any, set forth in the job order (prorated to the nearest hour for fractional days).

(2) If the Government terminates the job order, the Contractor shall be liable, in addition to the excess costs provided in paragraph (d) of this clause, for liquidated damages accruing until such time as the Government may reasonably obtain completion of the work.

(3) The Contractor shall not be charged with liquidated damages when the delay arises out of causes beyond the control and without the fault or negligence of the Contractor. Subject to the provisions of the Disputes clause of the Master Agreement, the Contracting Officer shall ascertain the facts and the extent of the delay and shall extend the time for performance when in the judgment of the Contracting Officer, the findings of fact justify an extension.

(g) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law under this agreement.

(End of clause)

252.217–7010 Performance.

As prescribed in 217.7104(a), use the following clause:

PERFORMANCE (DEC 1991)

(a) Upon the award of a job order, the Contractor shall promptly start the work specified and shall diligently prosecute the work to completion. The Contractor shall not start work until the job order has been awarded except in the case of emergency work ordered by the Contracting Officer under the Job Orders and Compensation clause of the Master Agreement.

(b) The Government shall deliver the vessel described in the job order at the time and location specified in the job order. Upon completion of the work, the Government shall accept delivery of the vessel at the time and location specified in the job order.

(c) The Contractor shall, without charge and without specific requirement in a job order,—

(1) Make available at the plant to personnel of the vessel while in dry dock or on a marine railway, sanitary lavatory and similar facilities acceptable to the Contracting Officer;

(2) Supply and maintain suitable brows and gangways from the pier, dry dock, or marine railway to the vessel;

(3) Treat salvage, scrap or other ship's material of the Government resulting from performance of the work as items of Government-furnished property, in accordance with the Government Property (Fixed Price Contracts) clause;

(4) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, rigging, or pipe lines; and

(5) Furnish suitable offices, office equipment and telephones at or near the site of the work for the Government's use.

(d) The job order will state whether dock and sea trials are required to determine whether or not the Contractor has satisfactorily performed the work.

(1) If dock and sea trials are required, the vessel shall be under the control of the vessel's commander and crew.

(2) The Contractor shall not conduct dock and sea trials not specified in the job order without advance approval of the Contracting Officer. Dock and sea trials not specified in the job order shall be at the Contractor's expense and risk.

(3) The Contractor shall provide and install all fittings and appliances necessary for dock and sea trials. The Contractor shall be responsible for care, installation, and removal of instruments and apparatus furnished by the Government for use in the trials.

(End of clause)

252.217–7011 Access to vessel.

As prescribed at 217.7104(a), use the following clause:

ACCESS TO VESSEL (DEC 1991)

(a) Upon the request of the Contracting Officer, the Contractor shall grant admission to the Contractor's facilities and access to vessel, on a non-interference basis, as necessary to perform their respective responsibilities, to a reasonable number of:

(1) Government and other Government contractor employees (in addition to those Government employees attached to the vessel); and

(2) Representatives of offerors on other contemplated Government work.

(b) All personnel granted access shall comply with Contractor rules governing personnel at its shipyard.

(End of clause)

252.217–7012 Liability and insurance.

As prescribed in 217.7104(a), use the following clause:

LIABILITY AND INSURANCE (AUG 2003)

(a) The Contractor shall exercise its best efforts to prevent accidents, injury, or damage to all employees, persons, and property, in and about the work, and to the vessel or part of the vessel upon which work is done.

(b) *Loss or damage to the vessel, materials, or equipment.* (1) Unless otherwise directed or

approved in writing by the Contracting Officer, the Contractor shall not carry insurance against any form of loss or damage to the vessel(s) or to the materials or equipment to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to that property.

(2) The Government does not assume any risk with respect to loss or damage compensated for by insurance or otherwise or resulting from risks with respect to which the Contractor has failed to maintain insurance, if available, as required or approved by the Contracting Officer.

(3) The Government does not assume risk of and will not pay for any costs of the following:

(i) Inspection, repair, replacement, or renewal of any defects in the vessel(s) or material and equipment due to—

(A) Defective workmanship performed by the Contractor or its subcontractors;

(B) Defective materials or equipment furnished by the Contractor or its subcontracts; or

(C) Workmanship, materials, or equipment which do not conform to the requirements of the contract, whether or not the defect is latent or whether or not the nonconformance is the result of negligence.

(ii) Loss, damage, liability, or expense caused by, resulting from, or incurred as a consequence of any delay or disruption, willful misconduct or lack of good faith by the Contractor or any of its representatives that have supervision or direction of—

(A) All or substantially all of the Contractor's business; or

(B) All or substantially all of the Contractor's operation at any one plant.

(4) As to any risk that is assumed by the Government, the Government shall be subrogated to any claim, demand or cause of action against third parties that exists in favor of the Contractor. If required by the Contracting Officer, the Contractor shall execute a formal assignment or transfer of the claim, demand, or cause of action.

(5) No party other than the Contractor shall have any right to proceed directly against the Government or join the Government as a co-defendant in any action.

(6) Notwithstanding the foregoing, the Contractor shall bear the first $50,000 of loss or damage from each occurrence or incident, the risk of which the Government would have assumed under the provisions of this paragraph (b).

(c) *Indemnification*. The Contractor indemnifies the Government and the vessel and its owners against all claims, demands, or causes of action to which the Government, the vessel or its owner(s) might be subject as a result of damage or injury (including death) to the property or person of anyone other than the Government or its employees, or the vessel or its owner, arising in whole or in part from the negligence or other wrongful act of the Contractor or its agents or employees, or any subcontractor, or its agents or employees.

(1) The Contractor's obligation to indemnify under this paragraph shall not exceed the sum of $300,000 as a consequence of any single occurrence with respect to any one vessel.

(2) The indemnity includes, without limitation, suits, actions, claims, costs, or demands of any kind, resulting from death, personal injury, or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. For any claim, etc., made after 90 days, the rights of the parties shall be as determined by other provisions of this agreement and by law. The indemnity does apply to death occurring after 90 days where the injury was received during the period covered by the indemnity.

(d) *Insurance*. (1) The Contractor shall, at its own expense, obtain and maintain the following insurance—

(i) Casualty, accident, and liability insurance, as approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause.

(ii) Workers Compensation Insurance (or its equivalent) covering the employees engaged on the work.

(2) The Contractor shall ensure that all subcontractors engaged on the work obtain and maintain the insurance required in paragraph (d)(1) of this clause.

(3) Upon request of the Contracting Officer, the Contractor shall provide evidence of the insurance required by paragraph (d) of this clause.

(e) The Contractor shall not make any allowance in the job order price for the inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) The Contractor shall give the Contracting Officer written notice as soon as practicable after the occurrence of a loss or damage for which the Government has assumed the risk.

(1) The notice shall contain full details of the loss or damage.

(2) If a claim or suit is later filed against the Contractor as a result of the event, the Contractor shall immediately deliver to the Government every demand, notice, summons, or other process received by the Contractor or its employees or representatives.

(3) The Contractor shall cooperate with the Government and, upon request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The Government shall reimburse the Contractor for

expenses incurred in this effort, other than the cost of maintaining the Contractor's usual organization.

(4) The Contractor shall not, except at its own expense, voluntarily make any payment, assume any obligation, or incur any expense other than what would be imperative for the protection of the vessel(s) at the time of the event.

(g) In the event or loss of or damage to any vessel(s), material, or equipment which may result in a claim against the Government under the insurance provisions of this contract, the Contractor shall promptly notify the Contracting Officer of the loss or damage. The Contracting Officer may, without prejudice to any other right of the Government, either—

(1) Order the Contractor to proceed with replacement or repair, in which event the Contractor shall effect the replacement or repair;

(i) The Contractor shall submit to the Contracting Officer a request for reimbursement of the cost of the replacement or repair together with whatever supporting documentation the Contracting Officer may reasonably require, and shall identify the request as being submitted under the Insurance clause of the agreement.

(ii) If the Government determines that the risk of the loss or damage is within the scope of the risks assumed by the Government under this clause, the Government will reimburse the Contractor for the reasonable, allowable cost of the replacement or repair, plus a reasonable profit (if the work or replacement or repair was performed by the Contractor) less the deductible amount specified in paragraph (b) of this clause.

(iii) Payments by the Government to the Contractor under this clause are outside the scope of and shall not affect the pricing structure of the contract, and are additional to the compensation otherwise payable to the Contractor under this contract; or

(2) In the event the Contracting Officer decides that the loss or damage shall not be replaced or repaired, the Contracting Officer shall—

(i) Modify the contract appropriately, consistent with the reduced requirements reflected by the unreplaced or unrepaired loss or damage; or

(ii) Terminate the repair of any part or all of the vessel(s) under the Termination for Convenience of the Government clause of this agreement.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 68 FR 50478, Aug. 21, 2003]

252.217–7013 Guarantees.

As prescribed in 217.7104(a), use the following clause:

GUARANTEES (DEC 1991)

(a) In the event any work performed or materials furnished by the contractor under the Master Agreement prove defective or deficient within 90 days from the date of redelivery of the vessel(s), the Contractor, as directed by the Contracting Officer and at its own expense, shall correct and repair the deficiency to the satisfaction of the Contracting Officer.

(b) If the Contractor or any subcontractor has a guarantee for work performed or materials furnished that exceeds the 90 day period, the Government shall be entitled to rely upon the longer guarantee until its expiration.

(c) With respect to any individual work item identified as incomplete at the time of redelivery of the vessel(s), the guarantee period shall run from the date the item is completed.

(d) If practicable, the Government shall give the Contractor an opportunity to correct the deficiency.

(1) If the Contracting Officer determines it is not practicable or is otherwise not advisable to return the vessel(s) to the Contractor, or the Contractor fails to proceed with the repairs promptly, the Contracting Officer may direct that the repairs be performed elsewhere, at the Contractor's expense.

(2) If correction and repairs are performed by other than the Contractor, the Contracting Officer may discharge the Contractor's liability by making an equitable deduction in the price of the job order.

(e) The Contractor's liability shall extend for an additional 90 day guarantee period on those defects or deficiencies that the Contractor corrected.

(f) At the option of the Contracting Officer, defects and deficiencies may be left uncorrected. In that event, the Contractor and Contracting Officer shall negotiate an equitable reduction in the job price. Failure to agree upon an equitable reduction shall constitute a dispute under the Disputes clause of this agreement.

(End of clause)

252.217–7014 Discharge of liens.

As prescribed in 217.7104(a), use the following clause:

DISCHARGE OF LIENS (DEC 1991)

(a) The Contractor shall immediately discharge, or cause to be discharged, any lien or right *in rem* of any kind, other than in favor of the Government, that exists or arises in

connection with work done or material furnished under any job order under this agreement.

(b) If any lien or right *in rem* is not immediately discharged, the Government, at the expense of the Contractor, may discharge, or cause to be discharged, the lien or right.

(End of clause)

252.217–7015 Safety and health.

As prescribed in 217.7104(a), use the following clause:

SAFETY AND HEALTH (DEC 1991)

Nothing contained in the Master Agreement or any job order shall relieve the Contractor of any obligations it may have to comply with—

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*);

(b) The Safety and Health Regulations for Ship Repairing (29 CFR part 1915); or

(c) Any other applicable Federal, State, and local laws, codes, ordinances, and regulations.

(End of clause)

252.217–7016 Plant protection.

As prescribed in 217.7104(a), use the following clause:

PLANT PROTECTION (DEC 1991)

(a) The Contractor shall provide, for the plant and work in process, reasonable safeguards against all hazards, including unauthorized entry, malicious mischief, theft, vandalism, and fire.

(b) The Contractor shall also provide whatever additional safeguards are necessary to protect the plant and work in process from espionage, sabotage, and enemy action.

(1) The Government shall reimburse the Contractor for that portion of the costs of the additional safeguards that is allocable to the contract in the same manner as if the Contracting Officer had issued a change order for the additional safeguards.

(2) The costs reimbursed shall not include any overhead allowance, unless the overhead is incident to the construction or installation of necessary security devices or equipment.

(c) Upon payment by the Government of the cost of any device or equipment required or approved under paragraph (b) of this clause, title shall vest in the Government.

(1) The Contractor shall comply with the instructions of the Contracting Officer concerning its identification and disposition.

(2) No such device or equipment shall become a fixture as a result of its being affixed to realty not owned by the Government.

(End of clause)

252.217–7017—252.217–7025 [Reserved]

252.217–7026 Identification of sources of supply.

As prescribed in 217.7303, use the following provision:

IDENTIFICATION OF SOURCES OF SUPPLY (NOV 1995)

(a) The Government is required under 10 U.S.C. 2384 to obtain certain information on the actual manufacturer or sources of supplies it acquires.

(b) The apparently successful Offeror agrees to complete and submit the following table before award:

TABLE

Line items	National stock No.	Commercial item (Y or N)	Source of supply			Actual mfg?
			Company	Address	Part No.	
(1)	(2)	(3)	(4)	(4)	(5)	(6)
_____	_____	_____	_____	_____	_____	_____

(1) List each deliverable item of supply and item of technical data.
(2) If there is no national stock number, list ''none.''
(3) Use ''Y'' if the item is a commercial item; otherwise use ''N.'' If ''Y'' is listed, the Offeror need not complete the remaining columns in the table.
(4) For items of supply, list all sources. For technical data, list the source.
(5) For items of supply, list each source's part number for the item.
(6) Use ''Y'' if the source of supply is the actual manufacturer; ''N'' if it is not; and ''U'' if unknown.

(End of provision)

[56 FR 36479, July 31, 1991, as amended at 59 FR 27675, May 27, 1994; 60 FR 61601, Nov. 30, 1995]

252.217–7027 Contract definitization.

As prescribed in 217.7405(b), use the following clause:

CONTRACT DEFINITIZATION (OCT 1998)

(a) A _____(*insert specific type of contract action*) is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the underfinitized contract action, (2) all clauses required by law on the date of execution of the definitive contract action, and (3) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a _____(*insert type of proposal; e.g., fixed-price or cost-and-fee*) proposal and cost or pricing data supporting its proposal.

(b) The schedule for definitizing this contract is as follows (*insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy and subcontracting plans and cost or pricing data).*

_____

_____

_____

_____

(c) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (b) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee in accordance with subpart 15.4 and part 31 of the FAR, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the Limitation of Government Liability clause.

(1) After the Contracting Officer's determination of price or fee, the contract shall be governed by—

(i) All clauses required by the FAR on the date of execution of this underfinitized contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (c)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(d) The definitive contract resulting from this undefinitized contract action will include a negotiated _____ (*insert ''cost/price ceiling'' or ''firm-fixed price''*) in no event to exceed _____ (*insert the not-to-exceed amount).*

(End of clause)

[61 FR 7750, Feb. 29, 1996; 61 FR 18195, Apr. 24, 1996, as amended at 63 FR 55052, Oct. 14, 1998; 71 FR 27643, May 12, 2006]

252.217–7028 Over and above work.

As prescribed in 217.7702, use a clause substantially as follows:

OVER AND ABOVE WORK (DEC 1991)

(a) *Definitions.* As used in this clause—

(1) *Over and above work* means work discovered during the course of performing overhaul, maintenance, and repair efforts that is—

(i) Within the general scope of the contract;

(ii) Not covered by the line item(s) for the basic work under the contract; and

(iii) Necessary in order to satisfactorily complete the contract.

(2) *Work request* means a document prepared by the Contractor which describes over and above work being proposed.

(b) The Contractor and Administrative Contracting Officer shall mutually agree to procedures for Government administration and Contractor performance of over and above work requests. If the parties cannot agree upon the procedures, the Administrative Contracting Officer has the unilateral right to direct the over and above work procedures to be followed. These procedures shall, as a minimum, cover—

(1) The format, content, and submission of work requests by the Contractor. Work requests shall contain data on the type of discrepancy disclosed, the specific location of the discrepancy, and the estimated labor hours and material required to correct the discrepancy. Data shall be sufficient to satisfy contract requirements and obtain the authorization of the Contracting Officer to perform the proposed work;

(2) Government review, verification, and authorization of the work; and

(3) Proposal pricing, submission, negotiation, and definitization.

(c) Upon discovery of the need for over and above work, the Contractor shall prepare and furnish to the Government a work request in accordance with the agreed-to procedures.

(d) The Government shall—

(1) Promptly review the work request;

(2) Verify that the proposed work is required and not covered under the basic contract line item(s);

(3) Verify that the proposed corrective action is appropriate; and

(4) Authorize over and above work as necessary.

(e) The Contractor shall promptly submit to the Contracting Officer, a proposal for the over and above work. The Government and Contractor will then negotiate a settlement for the over and above work. Contract modifications will be executed to definitize all over and above work.

(f) Failure to agree on the price of over and above work shall be a dispute within the meaning of the Disputes clause of this contract.

(End of clause)

252.219–7000—252.219–7002 [Reserved]

252.219–7003 Small business subcontracting plan (DoD contracts).

As prescribed in 219.708(b)(1)(A), use the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (DOD CONTRACTS) (APR 2007)

This clause supplements the Federal Acquisition Regulation 52.219–9, Small Business Subcontracting Plan, clause of this contract.

(a) *Definitions. Historically black colleges and universities,* as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this clause, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c (b)(1)).

(b) Except for company or division-wide commercial items subcontracting plans, the term *small disadvantaged business,* when used in the FAR 52.219–9 clause, includes historically black colleges and universities and minority institutions, in addition to small disadvantaged business concerns.

(c) Work under the contract or its subcontracts shall be credited toward meeting the small disadvantaged business concern goal required by paragraph (d) of the FAR 52.219–9 clause when:

(1) It is performed on Indian lands or in joint venture with an Indian tribe or a tribally-owned corporation, and

(2) It meets the requirements of 10 U.S.C. 2323a.

(d) Subcontracts awarded to workshops approved by the Committee for Purchase from People Who Are Blind or Severely Disabled (41 U.S.C. 46–48), may be counted toward the Contractor's small business subcontracting goal.

(e) A mentor firm, under the Pilot Mentor-Protege Program established under Section 831 of Pub. L. 101–510, as amended, may count toward its small disadvantaged business goal, subcontracts awarded—

(1) Protege firms which are qualified organizations employing the severely handicapped; and

(2) Former protege firms that meet the criteria in Section 831(g)(4) of Pub. L. 101–510.

(f) The master plan approval referred to in paragraph (f) of the FAR 52.219–9 clause is approval by the Contractor's cognizant contract administration activity.

(g) In those subcontracting plans which specifically identify small businesses, the Contractor shall notify the Administrative Contracting Officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified 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.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 59 FR 22131, Apr. 29, 1994; 59 FR 27675, May 27, 1994; 60 FR 61601, Nov. 30, 1995; 61 FR 18688, Apr. 29, 1996; 72 FR 20763, Apr. 26, 2007]

252.219–7004 Small business subcontracting plan (test program).

As prescribed in 219.708(b)(1)(B), use the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (TEST PROGRAM) (AUG 2008)

(a) *Definition. Subcontract,* as used in this clause, means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(b) The Offeror's comprehensive small business subcontracting plan and its successors, which are authorized by and approved under the test program of Section 834 of Pub. L. 101–189, as amended, shall be included in and made a part of the resultant contract. Upon expulsion from the test program or expiration of the test program, the Contractor shall negotiate an individual subcontracting plan for all future contracts that meet the requirements of Section 211 of Pub. L. 95–507.

(c) The Contractor shall submit Standard Form (SF) 295, Summary Subcontract Report, in accordance with the instructions on the form, except—

(1) One copy of the SF 295 and attachments shall be submitted to Director, Small Business Programs, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), 201 12th Street South, Suite 406, Arlington, VA 22202; and

(2) Item 14, Remarks, shall be completed to include semi-annual cumulative—

(i) Small business, small disadvantaged business, and women-owned small business goals; and

(ii) Small business and small disadvantaged business goals, actual accomplishments, and percentages for each of the two designated industry categories.

(d) The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled ''Utilization of Small Business Concerns,'' or (2) an approved plan required by this clause, shall be a material breach of the contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 35668, July 10, 1995; 61 FR 39901, July 31, 1996; 62 FR 34129, June 24, 1997; 72 FR 20763, Apr. 26, 2007; 73 FR 46814, Aug. 12, 2008]

252.219–7005—252.219–7008 [Reserved]

252.219–7009 Section 8(a) direct award.

As prescribed in 219.811–3(1), use the following clause:

SECTION 8(A) DIRECT AWARD (SEP 2007)

(a) This contract is issued as a direct award between the contracting office and the 8(a) Contractor pursuant to the Partnership Agreement dated between the Small Business Administration (SBA) and the Department of Defense. Accordingly, the SBA, even if not identified in Section A of this contract, is the prime contractor and retains responsibility for 8(a) certification, for 8(a) eligibility determinations and related issues, and for providing counseling and assistance to the 8(a) Contractor under the 8(a) Program. The cognizant SBA district office is:

_____

_____

_____

_____

[*To be completed by the Contracting Officer at the time of award*]

(b) The contracting office is responsible for administering the contract and for taking any action on behalf of the Government under the terms and conditions of the contract; provided that the contracting office shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting office also shall coordinate with the SBA prior to processing any novation agreement. The contracting office may assign contract administration functions to a contract administration office.

(c) The 8(a) Contractor agrees that—

(1) It will notify the Contracting Officer, simultaneous with its notification to the SBA (as required by SBA's 8(a) regulations at 13 CFR 124.308), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern. Consistent with Section 407 of Pub. L. 100–656, transfer of ownership or control shall result in termination of the contract for convenience, unless the SBA waives the requirement for termination prior to the actual relinquishing of ownership and control; and

(2) It will not subcontract the performance of any of the requirements of this contract without the prior written approval of the SBA and the Contracting Officer.

(End of clause)

[63 FR 33588, June 19, 1998, as amended at 67 FR 11437, Mar. 14, 2002; 72 FR 51188, Sept. 6, 2007]

252.219–7010 Alternate A.

ALTERNATE A (JUN 1998)

As prescribed in 219.811–3(2), substitute the following paragraph (c) for paragraph (c) of the clause at FAR 52.219–18:

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

[63 FR 33588, June 19, 1998]

252.219–7011 Notification to delay performance.

As prescribed in 219.811-3 (3), use the following clause:

NOTIFICATION TO DELAY PERFORMANCE (JUN 1998)

The Contractor shall not begin performance under this purchase order until 2 working days have passed from the date of its receipt. Unless the Contractor receives notification from the Small Business Administration that it is ineligible for this 8(a) award, or otherwise receives instructions from the Contracting Officer, performance under this purchase order may begin on the third working day following receipt of the purchase order. If a determination of ineligibility is issued within the 2-day period, the purchase order shall be considered canceled.

(End of clause)

[63 FR 33588, June 19, 1998]

252.222–7000 Restrictions on employment of personnel.

As prescribed in 222.7004, use the following clause:

RESTRICTIONS ON EMPLOYMENT OF PERSONNEL (MAR 2000)

(a) The Contractor shall employ, for the purpose of performing that portion of the contract work in _____, individuals who are residents thereof 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.

(b) The Contractor shall insert the substance of this clause, including this paragraph (b), in each subcontract awarded under this contract.

(End of clause)

[65 FR 14403, Mar. 16, 2000]

252.222–7001 Right of first refusal of employment—Closure of military installations.

As prescribed in 222.7102, use the following clause:

RIGHT OF FIRST REFUSAL OF EMPLOYMENT—CLOSURE OF MILITARY INSTALLATIONS (APR 1992)

(a) The Contractor shall give Government employees, who have been or will be adversely affected by the closure of the military installation where this contract will be performed, the right of first refusal for employment openings under the contract. This right applies to positions for which the employee is qualified, if consistent with post-Government employment conflict of interest standards.

(b) Government personnel seeking preference under this clause shall provide the Contractor with evidence from the Government personnel office.

(End of clause)

[57 FR 52594, Nov. 4, 1992, as amended at 58 FR 28472, May 13, 1993]

252.222–7002 Compliance with local labor laws (overseas).

As prescribed in 222.7201(a), use the following clause:

COMPLIANCE WITH LOCAL LABOR LAWS (OVERSEAS) (JUNE 1997)

(a) The Contractor shall comply with all—

(1) Local laws, regulations, and labor union agreements governing work hours; and

(2) Labor regulations including collective bargaining agreements, workers' compensation, working conditions, fringe benefits, and labor standards or labor contract matters.

(b) The Contractor indemnifies and holds harmless the United States Government from all claims arising out of the requirements of this clause. This indemnity includes the Contractor's obligation to handle and settle, without cost to the United States Government, any claims or litigation concerning allegations that the Contractor or the United States Government, or both, have not fully complied with local labor laws or regulations relating to the performance of work required by this contract.

(c) Notwithstanding paragraph (b) of this clause, consistent with paragraphs 31.205–15(a) and 31.205–47(d) of the Federal Acquisition Regulation, the Contractor will be reimbursed for the costs of all fines, penalties, and reasonable litigation expenses incurred as a result of compliance with specific contract terms and conditions or written instructions from the Contracting officer.

(End of clause)

[62 FR 34129, June 24, 1997]

252.222–7003 Permit from Italian Inspectorate of Labor.

As prescribed in 222.7201(b), use the following clause:

PERMIT FROM ITALIAN INSPECTORATE OF LABOR (JUN 1997)

Prior to the date set for commencement of work and services under this contract, the Contractor shall obtain the prescribed permit from the Inspectorate of Labor having jurisdiction over the work site, in accordance with Article 5g of Italian Law Number 1369, dated October 23, 1960. The Contractor shall ensure that a copy of the permit is available at all reasonable times for inspection by the Contracting Officer or an authorized representative. Failure to obtain such permit may result in termination of the contract for the convenience of the United States Government, at no cost to the United States Government.

(End of clause)

[62 FR 34129, June 24, 1997]

252.222–7004 Compliance with Spanish social security laws and regulations.

As prescribed in 222.7201(c), use the following clause:

COMPLIANCE WITH SPANISH SOCIAL SECURITY LAWS AND REGULATIONS (JUN 1997)

(a) The Contractor shall comply with all Spanish Government social security laws and regulations. Within 30 calendar days after the start of contract performance, the Contractor shall ensure that copies of the documents identified in paragraph (a)(1) through (a)(5) of this clause are available at all reasonable times for inspection by the Contracting Officer or an authorized representative. The Contractor shall retain the records in accordance with the Audit and Records clause of this contract.

(1) TC1—Certificate of Social Security Payments;

(2) TC2—List of Employees;

(3) TC2/1—Certificate of Social Security Payments for Trainees;

(4) Nominal (pay statements) signed by both the employee and the Contractor; and

(5) Informa de Situacion de Empressa (Report of the Condition of the Enterprise) from the Ministerio de Trabajo y S.S., Tesoreria General de la Seguridad Social (annotated with the pertinent contract number(s) next to the employee's name).

(b) All TC1's, TC2's, and TC2/1's shall contain a representation that they have been paid by either the Social Security Administration office or the Contractor's bank or savings institution. Failure by the Contractor to comply with the requirements of this clause may result in termination of the contract under the clause of the contract entitled ''Default.''

(End of clause)

[62 FR 34129, June 24, 1997]

252.222–7005 Prohibition on use of nonimmigrant aliens—Guam.

As prescribed in 222.7302, use the following clause:

PROHIBITION ON USE OF NONIMMIGRANT ALIENS—GUAM (SEP 1999)

The work required by this contract shall not be performed by any alien who is issued a visa or otherwise provided nonimmigrant status under Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)(ii)). This prohibition does not apply to the performance of work by lawfully admitted citizens of the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, or the Republic of Palau.

(End of clause)

[64 FR 52673, Sept. 30, 1999, as amended at 72 FR 20764, Apr. 26, 2007]

252.223–7000 [Reserved]

252.223–7001 Hazard warning labels.

As prescribed in 223.303, use the following clause:

HAZARD WARNING LABELS (DEC 1991)

(a) ''Hazardous material,'' as used in this clause, is defined in the Hazardous Material Identification and Material Safety Data clause of this contract.

(b) The Contractor shall label the item package (unit container) of any hazardous material to be delivered under this contract in accordance with the Hazard Communication Standard (29 CFR 1910.1200 *et seq*). The Standard requires that the hazard warning label conform to the requirements of the standard unless the material is otherwise subject to the labelling requirements of one of the following statutes:

(1) Federal Insecticide, Fungicide and Rodenticide Act;

(2) Federal Food, Drug and Cosmetics Act;

(3) Consumer Product Safety Act;

(4) Federal Hazardous Substances Act; or

(5) Federal Alcohol Administration Act.

(c) The Offeror shall list which hazardous material listed in the Hazardous Material Identification and Material Safety Data clause of this contract will be labelled in accordance with one of the Acts in paragraphs (b) (1) through (5) of this clause instead of the Hazard Communication Standard. Any hazardous material not listed will be interpreted to mean that a label is required in accordance with the Hazard Communication Standard.

Material (if none, insert ''none.'')	Act
_____	_____
_____	_____

(d) The apparently successful Offeror agrees to submit, before award, a copy of the hazard warning label for all hazardous materials not listed in paragraph (c) of this clause. The Offeror shall submit the label with the Material Safety Data Sheet being furnished under the Hazardous Material Identification and Material Safety Data clause of this contract.

(e) The Contractor shall also comply with MIL-STD-129, Marking for Shipment and Storage (including revisions adopted during the term of this contract).

(End of clause)

252.223–7002 Safety precautions for ammunition and explosives.

As prescribed in 223.370–5, use the following clause:

SAFETY PRECAUTIONS FOR AMMUNITION AND EXPLOSIVES (MAY 1994)

(a) *Definition. Ammunition and explosives,* as used in this clause—

(1) Means liquid and solid propellants and explosives, pyrotechnics, incendiaries and smokes in the following forms:

(i) Bulk,

(ii) Ammunition;

(iii) Rockets;

(iv) Missiles;

(v) Warheads;

(vi) Devices; and

(vii) Components of (i) through (vi), except for wholly inert items.

(2) This definition does not include the following, unless the Contractor is using or incorporating these materials for initiation, propulsion, or detonation as an integral or component part of an explosive, an ammunition or explosive end item, or of a weapon system—

(i) Inert components containing no explosives, propellants, or pyrotechnics;

(ii) Flammable liquids;

(iii) Acids;

(iv) Oxidizers;

(v) Powdered metals; or

(vi) Other materials having fire or explosive characteristics.

(b) *Safety requirements.* (1) The Contractor shall comply with the requirements of the DoD Contractors' Safety Manual for Ammunition and Explosives, DoD 4145.26–M, hereafter referred to as ''the manual,'' in effect on the date of the solicitation for this contract. The Contractor shall also comply with any other additional requirements included in the schedule of this contract.

(2) The Contractor shall allow the Government access to the Contractor's facilities, personnel, and safety program documentation. The Contractor shall allow authorized Government representatives to evaluate safety programs, implementation, and facilities.

(c) *Noncompliance with the manual.* (1) If the Contracting Officer notifies the Contractor of any noncompliance with the manual or schedule provisions, the Contractor shall take immediate steps to correct the noncompliance. The Contractor is not entitled to reimbursement of costs incurred to correct noncompliances unless such reimbursement is specified elsewhere in the contract.

(2) The Contractor has 30 days from the date of notification by the Contracting Officer to correct the noncompliance and inform the Contracting Officer of the actions taken. The Contracting Officer may direct a different time period for the correction of noncompliances.

(3) If the Contractor refuses or fails to correct noncompliances within the time period specified by the Contracting Officer, the Government has the right to direct the Contractor to cease performance on all or part of this contract. The Contractor shall not resume performance until the Contracting Officer is satisfied that the corrective action was effective and the Contracting Officer so informs the Contractor.

(4) The Contracting Officer may remove Government personnel at any time the Contractor is in noncompliance with any safety requirement of this clause.

(5) If the direction to cease work or the removal of Government personnel results in increased costs to the Contractor, the Contractor shall not be entitled to an adjustment in the contract price or a change in the delivery or performance schedule unless the Contracting Officer later determines that the Contractor had in fact complied with the manual or schedule provisions. If the Contractor is entitled to an equitable adjustment, it shall be made in accordance with the Changes clause of this contract.

(d) *Mishaps.* If a mishap involving ammunition or explosives occurs, the Contractor shall—

(1) Notify the Contracting Officer immediately;

(2) Conduct an investigation in accordance with other provisions of this contract or as required by the Contracting Officer; and

(3) Submit a written report to the Contracting Officer.

(e) *Contractor responsibility for safety.* (1) Nothing in this clause, nor any Government action or failure to act in surveillance of this contract, shall relieve the Contractor of its responsibility for the safety of—

(i) The Contractor's personnel and property;

(ii) The Government's personnel and property; or

(iii) The general public.

(2) Nothing in this clause shall relieve the Contractor of its responsibility for complying with applicable Federal, State, and local laws, ordinances, codes, and regulations (including those requiring the obtaining of licenses and permits) in connection with the performance of this contract.

(f) *Contractor responsibility for contract performance.* (1) Neither the number or frequency of inspections performed by the Government, nor the degree of surveillance exercised by the Government, relieve the Contractor of its responsibility for contract performance.

(2) If the Government acts or fails to act in surveillance or enforcement of the safety requirements of this contract, this does not impose or add to any liability of the Government.

(g) *Subcontractors.* (1) The Contractor shall insert this clause, including this paragraph (g), in every subcontract that involves ammunition or explosives.

(i) The clause shall include a provision allowing authorized Government safety representatives to evaluate subcontractor safety programs, implementation, and facilities as the Government determines necessary.

(ii) NOTE: The Government Contracting Officer or authorized representative shall notify the prime Contractor of all findings concerning subcontractor safety and compliance with the manual. The Contracting Officer or authorized representative may furnish copies to the subcontractor. The Contractor in turn shall communicate directly with the subcontractor, substituting its name for references to ''the Government''. The Contractor and higher tier subcontractors shall also include provisions to allow direction to cease performance of the subcontract if a serious uncorrected or recurring safety deficiency potentially causes an imminent hazard to DoD personnel, property, or contract performance.

(2) The Contractor agrees to ensure that the subcontractor complies with all contract safety requirements. The Contractor will determine the best method for verifying the adequacy of the subcontractor's compliance.

(3) The Contractor shall ensure that the subcontractor understands and agrees to the Government's right to access to the subcontractor's facilities, personnel, and safety program documentation to perform safety surveys. The Government performs these safety surveys of subcontractor facilities solely to prevent the occurrence of any mishap which would endanger the safety of DoD personnel or otherwise adversely impact upon the Government's contractual interests.

(4) The Contractor shall notify the Contracting Officer or authorized representative before issuing any subcontract when it involves ammunition or explosives. If the proposed subcontract represents a change in the place of performance, the Contractor shall request approval for such change in accordance with the clause of this contract entitled ''Change in Place of Performance—Ammunition and Explosives''.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 59 FR 27675, May 27, 1994]

252.223–7003 Change in place of performance—ammunition and explosives.

As prescribed in 223.370–5, use the following clause:

CHANGE IN PLACE OF PERFORMANCE—AMMUNITION AND EXPLOSIVES (DEC 1991)

(a) The Offeror shall identify, in the ''Place of Performance'' provision of this solicitation, the place of performance of all ammunition and explosives work covered by the Safety Precautions for Ammunition and Explosives clause of this solicitation. Failure to furnish this information with the offer may result in rejection of the offer.

(b) The Offeror agrees not to change the place of performance of any portion of the offer covered by the Safety Precautions for Ammunition and Explosives clause contained in this solicitation after the date set for receipt of offers without the written approval of the Contracting Officer. The Contracting Officer shall grant approval only if there is enough time for the Government to perform the necessary safety reviews on the new proposed place of performance.

(c) If a contract results from this offer, the Contractor agrees not to change any place of performance previously cited without the advance written approval of the Contracting Officer.

(End of clause)

252.223–7004 Drug-free work force.

As prescribed in 223.570–2, use the following clause:

DRUG-FREE WORK FORCE (SEP 1988)

(a) *Definitions.* (1) *Employee in a sensitive position,* as used in this clause, means an employee who has been granted access to classified information; or employees in other positions that the Contractor determines involve national security, health or safety, or functions other than the foregoing requiring a high degree of trust and confidence.

(2) *Illegal drugs,* as used in this clause, means controlled substances included in Schedules I and II, as defined by section 802(6) of title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that title. The term ''illegal drugs'' does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(b) The Contractor agrees to institute and maintain a program for achieving the objective of a drug-free work force. While this clause defines criteria for such a program, contractors are encouraged to implement alternative approaches comparable to the criteria in paragraph (c) that are designed to achieve the objectives of this clause.

(c) Contractor programs shall include the following, or appropriate alternatives:

(1) Employee assistance programs emphasizing high level direction, education, counseling, rehabilitation, and coordination with available community resources;

(2) Supervisory training to assist in identifying and addressing illegal drug use by Contractor employees;

(3) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues;

(4) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis. Employee drug testing programs shall be established taking account of the following:

(i) The Contractor shall establish a program that provides for testing for the use of illegal drugs by employees in sensitive positions. The extent of and criteria for such testing shall be determined by the Contractor based on considerations that include the nature of the work being performed under the contract, the employee's duties, the efficient use of Contractor resources, and the risks to health, safety, or national security that could result from the failure of an employee adequately to discharge his or her position.

(ii) In addition, the Contractor may establish a program for employee drug testing—

(A) When there is a reasonable suspicion that an employee uses illegal drugs; or

(B) When an employee has been involved in an accident or unsafe practice;

(C) As part of or as a follow-up to counseling or rehabilitation for illegal drug use;

(D) As part of a voluntary employee drug testing program.

(iii) The Contractor may establish a program to test applicants for employment for illegal drug use.

(iv) For the purpose of administering this clause, testing for illegal drugs may be limited to those substances for which testing is prescribed by section 2.1 of subpart B of the ''Mandatory Guidelines for Federal Workplace Drug Testing Programs'' (53 FR 11980 (April 11 1988)), issued by the Department of Health and Human Services.

(d) Contractors shall adopt appropriate personnel procedures to deal with employees who are found to be using drugs illegally. Contractors shall not allow any employee to remain on duty or perform in a sensitive position who is found to use illegal drugs until such times as the Contractor, in accordance with procedures established by the Contractor, determines that the employee may perform in such a position.

(e) The provisions of this clause pertaining to drug testing program shall not apply to the extent they are inconsistent with state or local law, or with an existing collective bargaining agreement; provided that with respect to the latter, the Contractor agrees that those issues that are in conflict will be a subject of negotiation at the next collective bargaining session.

(End of clause)

[57 FR 32737, July 23, 1992, as amended at 70 FR 73151, Dec. 9, 2005]

252.223–7005 [Reserved]

252.223–7006 Prohibition on storage and disposal of toxic and hazardous materials.

As prescribed in 223.7103(a), use the following clause:

PROHIBITION ON STORAGE AND DISPOSAL OF TOXIC AND HAZARDOUS MATERIALS (APR 1993)

(a) *Definitions.*

As used in this clause—

(1) *Storage* means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.

(2) *Toxic or hazardous materials* means:

(i) Materials referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601(14)) and materials designated under section 102 of CERCLA (42 U.S.C. 9602) (40 CFR part 302);

(ii) Materials that are of an explosive, flammable, or pyrotechnic nature; or

(iii) Materials otherwise identified by the Secretary of Defense as specified in DoD regulations.

(b) In accordance with 10 U.S.C. 2692, the Contractor is prohibited from storing or disposing of non-DoD-owned toxic or hazardous materials on a DoD installation, except to the extent authorized by a statutory exception to 10 U.S.C. 2692 or as authorized by the Secretary of Defense or his designee.

Alternate I (NOV 1995). As prescribed in 223.7103(b), add the following paragraphs (c) and (d) to the basic clause:

(c) With respect to treatment or disposal authorized pursuant to 10 U.S.C. 2692(b)(9), and notwithstanding any other provision of the contract, the Contractor assumes all financial and environmental responsibility and liability resulting from any treatment or disposal of non-DoD-owned toxic or hazardous materials on a military installation. The Contractor shall indemnify, defend, and hold the Government harmless for all costs, liability, or penalties resulting from the Contractor's treatment or disposal of non-DoD-owned toxic or hazardous materials on a military installation.

(d) The Contractor shall include this clause, including this paragraph (d), in each subcontract which requires, may require, or permits a subcontractor to treat or dispose

of non-DoD-owned toxic or hazardous materials as defined in this clause.

[58 FR 28472, May 13, 1993, as amended at 60 FR 13076, Mar. 10, 1995; 60 FR 61601, Nov. 30, 1995]

252.223–7007 Safeguarding sensitive conventional arms, ammunition, and explosives.

As prescribed in 223.7203, use the following clause:

SAFEGUARDING SENSITIVE CONVENTIONAL ARMS, AMMUNITION, AND EXPLOSIVES (SEP 1999)

(a) Definition. ''Arms, ammunition, and explosives (AA&E),'' as used in this clause, means those items within the scope (chapter 1, paragraph B) of DoD 5100.76–M, Physical Security of Sensitive Conventional Arms, Ammunition, and Explosives.

(b) The requirements of DoD 5100.76–M apply to the following items of AA&E being developed, produced, manufactured, or purchased for the Government, or provided to the Contractor as Government-furnished property under this contract:

Nomenclature	National stock number	Sensitivity category

(c) The Contractor shall comply with the requirements of DoD 5100.76–M, as specified in the statement of work. The edition of DoD 5100.76–M in effect on the date of issuance of the solicitation for this contract shall apply.

(d) The Contractor shall allow representatives of the Defense Security Service (DSS), and representatives of other appropriate offices of the Government, access at all reasonable times into its facilities and those of its subcontractors, for the purpose of performing surveys, inspections, and investigations necessary to review compliance with the physical security standards applicable to this contract.

(e) The Contractor shall notify the cognizant DSS field office of any subcontract involving AA&E within 10 days after award of the subcontract.

(f) The Contractor shall ensure that the requirements of this clause are included in all subcontracts, at every tier—

(1) For the development, production, manufacture, or purchase of AA&E; or

(2) When AA&E will be provided to the subcontractor as Government-furnished property.

(g) Nothing in this clause shall relieve the Contractor of its responsibility for complying with applicable Federal, state, and local laws, ordinances, codes, and regulations (including requirements for obtaining licenses and permits) in connection with the performance of this contract.

(End of clause)

[61 FR 7750, Feb. 29, 1996, as amended at 64 FR 51077, Sept. 21, 1999]

252.225–7000 Buy American Act—Balance of Payments Program Certificate.

As prescribed in 225.1101(1), use the following provision:

BUY AMERICAN ACT—BALANCE OF PAYMENTS PROGRAM CERTIFICATE (JUN 2005)

(a) *Definitions. Domestic end product, foreign end product, qualifying country, qualifying country end product,* and *United States* have the meanings given in the Buy American Act and Balance of Payments Program clause of this solicitation.

(b) *Evaluation.* The Government—

(1) Will evaluate offers in accordance with the policies and procedures of Part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) Will evaluate offers of qualifying country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program.

(c) *Certifications and identification of country of origin.* (1) For all line items subject to the Buy American Act and Balance of Payments Program clause of this solicitation, the offeror certifies that—

(i) Each end product, except those listed in paragraph (c)(2) or (3) of this provision, is a domestic end product; and

(ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror certifies that the following end products are qualifying country end products:

_____

(Line Item Number)

_____

(Country of Origin)

(3) The following end products are other foreign end products:

_____

(Line Item Number)

_____

(Country of Origin) (If known)

(End of provision)

[68 FR 15634, Mar. 31, 2003; 68 FR 25088, May 9, 2003, as amended at 70 FR 35546, June 21, 2005]

252.225–7001 Buy American Act and Balance of Payments Program.

As prescribed in 225.1101(2), use the following clause:

BUY AMERICAN ACT AND BALANCE OF PAYMENTS PROGRAM (JUN 2005)

(a) *Definitions.* As used in this clause—

(1) *Component* means an article, material, or supply incorporated directly into an end product.

(2) *Domestic end product means*—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if the cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(A) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) It is inconsistent with the public interest to apply the restrictions of the Buy American Act.

(3) *End product* means those articles, materials, and supplies to be acquired under this contract for public use.

(4) *Foreign end product* means an end product other than a domestic end product.

(5) *Qualifying country* means any country set forth in subsection 225.872–1 of the Defense Federal Acquisition Regulation Supplement.

(6) *Qualifying country component* means a component mined, produced, or manufactured in a qualifying country.

(7) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if the cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States.

(8) *United States* means the 50 States, the District of Columbia, and outlying areas.

(b) This clause implements the Buy American Act (41 U.S.C. Section 10a–d). Unless otherwise specified, this clause applies to all line items in the contract.

(c) The Contractor shall deliver only domestic end products unless, in its offer, it specified delivery of other end products in the Buy American Act—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, the Contractor shall deliver a qualifying country end product or, at the Contractor's option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)

[68 FR 15634, Mar. 31, 2003, as amended at 70 FR 35546, June 21, 2005]

252.225–7002 Qualifying country sources as subcontractors.

As prescribed in 225.1101(3), use the following clause:

QUALIFYING COUNTRY SOURCES AS SUBCONTRACTORS (APR 2003)

(a) *Definition. Qualifying country,* as used in this clause, means any country set forth in subsection 225.872–1 of the Defense Federal Acquisition Regulation (FAR) Supplement.

(b) Subject to the restrictions in section 225.872 of the Defense FAR Supplement, the Contractor shall not preclude qualifying country sources or U.S. sources from competing for subcontracts under this contract.

(End of clause)

[68 FR 15634, Mar. 31, 2003]

252.225–7003 Report of intended performance outside the United States and Canada—Submission with offer.

As prescribed in 225.7204(a), use the following provision:

REPORT OF INTENDED PERFORMANCE OUTSIDE THE UNITED STATES AND CANADA—SUBMISSION WITH OFFER (DEC 2006)

(a) *Definition. United States,* as used in this provision, means the 50 States, the District of Columbia, and outlying areas.

(b) The offeror shall submit, with its offer, a report of intended performance outside the United States and Canada if—

(1) The offer exceeds $11.5 million in value; and

(2) The offeror is aware that the offeror or a first-tier subcontractor intends to perform any part of the contract outside the United States and Canada that—

(i) Exceeds $550,000 in value; and

(ii) Could be performed inside the United States or Canada.

(c) Information to be reported includes that for—

(1) Subcontracts;

(2) Purchases; and

(3) Intracompany transfers when transfers originate in a foreign location.

(d) The offeror shall submit the report using—

(1) DD Form 2139, Report of Contract Performance Outside the United States; or

(2) A computer-generated report that contains all information required by DD Form 2139.

(e) The offeror may obtain a copy of DD Form 2139 from the Contracting Officer or via the Internet at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*.

(End of provision)

[70 FR 20839, Apr. 22, 2005, as amended at 70 FR 35546, June 21, 2005; 71 FR 75893, Dec. 19, 2006]

252.225–7004 Report of Intended Performance Outside the United States and Canada—Submission after Award.

As prescribed in 225.7204(b), use the following clause:

REPORT OF INTENDED PERFORMANCE OUTSIDE THE UNITED STATES AND CANADA—SUBMISSION AFTER AWARD (MAY 2007)

(a) *Definition. United States,* as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) *Reporting requirement.* The Contractor shall submit a report in accordance with this clause, if the Contractor or a first-tier subcontractor will perform any part of this contract outside the United States and Canada that—

(1) Exceeds $550,000 in value; and

(2) Could be performed inside the United States or Canada.

(c) *Submission of reports.* The Contractor—

(1) Shall submit a report as soon as practical after the information is known;

(2) To the maximum extent practicable, shall submit a report regarding a first-tier subcontractor at least 30 days before award of the subcontract;

(3) Need not resubmit information submitted with its offer, unless the information changes;

(4) Shall submit all reports to the Contracting Officer; and

(5) Shall submit a copy of each report to: Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), OUSD(AT&L)DPAP(CPIC), Washington, DC 20301–3060.

(d) *Report format.* The Contractor—

(1) Shall submit reports using—

(i) DD Form 2139, Report of Contract Performance Outside the United States; or

(ii) A computer-generated report that contains all information required by DD Form 2139; and

(2) May obtain copies of DD Form 2139 from the Contracting Officer or via the Internet at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*.

(End of clause)

[70 FR 20839, Apr. 22, 2005, as amended at 70 FR 35546, June 21, 2005; 71 FR 75893, Dec. 19, 2006; 72 FR 30278, May 31, 2007]

252.225–7005 Identification of expenditures in the United States.

As prescribed in 225.1103(1), use the following clause:

IDENTIFICATION OF EXPENDITURES IN THE UNITED STATES (JUN 2005)

(a) *Definition. United States,* as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) This clause applies only if the Contractor is—

(1) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is not incorporated in the United States); or

(2) An unincorporated concern having its principal place of business in the United States.

(c) On each invoice, voucher, or other request for payment under this contract, the Contractor shall identify that part of the requested payment that represents estimated expenditures in the United States. The identification—

(1) May be expressed either as dollar amounts or as percentages of the total amount of the request for payment;

(2) Should be based on reasonable estimates; and

(3) Shall state the full amount of the payment requested, subdivided into the following categories:

(i) U.S. products—expenditures for material and equipment manufactured or produced in the United States, including end

products, components, or construction material, but excluding transportation;

(ii) U.S. services—expenditures for services performed in the United States, including all charges for overhead, other indirect costs, and profit under construction or service contracts;

(iii) Transportation on U.S. carriers—expenditures for transportation furnished by U.S. flag, ocean, surface, and air carriers; and

(iv) Expenditures not identified under paragraphs (c)(3)(i) through (iii) of this clause.

(d) Nothing in this clause requires the establishment or maintenance of detailed accounting records or gives the U.S. Government any right to audit the Contractor's books or records.

(End of clause)

[67 FR 20695, Apr. 26, 2002, as amended at 70 FR 35546, June 21, 2005]

252.225–7006 Quarterly reporting of actual contract performance outside the United States.

As prescribed in 225.7204(c), use the following clause:

QUARTERLY REPORTING OF ACTUAL CONTRACT PERFORMANCE OUTSIDE THE UNITED STATES (MAY 2007)

(a) *Definition. United States,* as used in this clause, means the 50 States, the District of Columbia, and outlying areas.

(b) *Reporting requirement.* Except as provided in paragraph (c) of this clause, within 10 days after the end of each quarter of the Government's fiscal year, the Contractor shall report any subcontract, purchase, or intracompany transfer that—

(1) Will be or has been performed outside the United States;

(2) Exceeds the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation; and

(3) Has not been identified in a report for a previous quarter.

(c) *Exception.* Reporting under this clause is not required if—

(1) A foreign place of performance is the principal place of performance of the contract; and

(2) The Contractor specified the foreign place of performance in its offer.

(d) *Submission of reports.* The Contractor shall submit the reports required by this clause to: Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), OUSD(AT&L)DPAP(CPIC), Washington, DC 20301–3060.

(e) *Report format.* The Contractor—

(1) Shall submit reports using—

(i) DD Form 2139, Report of Contract Performance Outside the United States; or

(ii) A computer-generated report that contains all information required by DD Form 2139; and

(2) May obtain copies of DD Form 2139 from the Contracting Officer or via the Internet at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm.*

(f) *Subcontracts.* The Contractor—

(1) Shall include the substance of this clause in all first-tier subcontracts exceeding $550,000, except those for commercial items, construction, ores, natural gases, utilities, petroleum products and crudes, timber (logs), or subsistence;

(2) Shall provide the number of this contract to its subcontractors required to submit reports under this clause; and

(3) Shall require the subcontractor, with respect to performance of its subcontract, to comply with the requirements directed to the Contractor in paragraphs (b) through (e) of this clause.

(End of clause)

[70 FR 20840, Apr. 22, 2005, as amended at 70 FR 35546, June 21, 2005; 71 FR 75893, Dec. 19, 2004; 72 FR 30278, May 31, 2007]

252.225–7007 Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies.

As prescribed in 225.1103(4), use the following clause:

PROHIBITION ON ACQUISITION OF UNITED STATES MUNITIONS LIST ITEMS FROM COMMUNIST CHINESE MILITARY COMPANIES (SEP 2006)

(a) *Definitions.* As used in this clause—

Communist Chinese military company means any entity that is—

(1) A part of the commercial or defense industrial base of the People's Republic of China; or

(2) Owned or controlled by, or affiliated with, an element of the Government or armed forces of the People's Republic of China.

United States Munitions List means the munitions list of the International Traffic in Arms Regulation in 22 CFR Part 121.

(b) Any supplies or services covered by the United States Munitions List that are delivered under this contract may not be acquired, directly or indirectly, from a Communist Chinese military company.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts for items covered by the United States Munitions List.

(End of clause)

[71 FR 53046, Sept. 8, 2006]

252.225–7008—252.225–7010 [Reserved]

252.225–7011 Restriction on acquisition of supercomputers.

As prescribed in 225.7012–3, use the following clause:

RESTRICTION ON ACQUISITION OF SUPERCOMPUTERS (JUN 2005)

Supercomputers delivered under this contract shall be manufactured in the United States or its outlying areas.

(End of clause)

[70 FR 35547, June 21, 2005]

252.225–7012 Preference for certain domestic commodities.

As prescribed in 225.7002–3(a), use the following clause:

PREFERENCE FOR CERTAIN DOMESTIC COMMODITIES (MAR 2008)

(a) *Definitions.* As used in this clause—

(1) *Component* means any item supplied to the Government as part of an end product or of another component.

(2) *End product* means supplies delivered under a line item of this contract.

(3) *United States* means the 50 States, the District of Columbia, and outlying areas.

(4) *U.S.-flag vessel* means a vessel of the United States or belonging to the United States, including any vessel registered or having national status under the laws of the United States.

(b) The Contractor shall deliver under this contract only such of the following items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

(1) Food.

(2) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof. Clothing includes items such as outerwear, headwear, underwear, nightwear, footwear, hosiery, handwear, belts, badges, and insignia.

(3) Tents, tarpaulins, or covers.

(4) Cotton and other natural fiber products.

(5) Woven silk or woven silk blends.

(6) Spun silk yarn for cartridge cloth.

(7) Synthetic fabric, and coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics.

(8) Canvas products.

(9) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).

(10) Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing fibers, yarns, fabrics, or materials listed in this paragraph (b).

(c) This clause does not apply—

(1) To items listed in section 25.104(a) of the Federal Acquisition Regulation (FAR), or other items for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at U.S. market prices;

(2) To incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool—

(i) Is not more than 10 percent of the total price of the end product; and

(ii) Does not exceed the simplified acquisition threshold in FAR part 2;

(3) To waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives;

(4) To foods, other than fish, shellfish, or seafood, that have been manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced. Fish, shellfish, or seafood manufactured or processed in the United States and fish, shellfish, or seafood contained in foods manufactured or processed in the United States shall be provided in accordance with paragraph (d) of this clause;

(5) To chemical warfare protective clothing produced in the countries listed in subsection 225.872–1 of the Defense FAR Supplement; or

(6) To fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but does apply to the synthetic or coated synthetic fabric itself), if—

(i) The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include—

(A) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);

(B) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/ tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;

(C) Upholstered seats (whether for household, office, or other use); and

(D) Parachutes (Federal Supply Class 1670); or

(ii) The fibers and yarns are para-aramid fibers and yarns manufactured in the Netherlands.

(d)(1) Fish, shellfish, and seafood delivered under this contract, or contained in foods delivered under this contract—

(i) Shall be taken from the sea by U.S.-flag vessels; or

(ii) If not taken from the sea, shall be obtained from fishing within the United States; and

(2) Any processing or manufacturing of the fish, shellfish, or seafood shall be performed on a U.S.-flag vessel or in the United States.

(End of clause)

[67 FR 20698, Apr. 26, 2002, as amended at 68 FR 7442, Feb. 14, 2003; 69 FR 26509, May 13, 2004; 69 FR 31910, June 8, 2004; 72 FR 2638, Jan. 22, 2007; 73 FR 11356, Mar. 3, 2008]

252.225–7013 Duty-free entry.

As prescribed in 225.1101(4), use the following clause:

DUTY-FREE ENTRY (OCT 2006)

(a) *Definitions.* As used in this clause—

(1) *Customs territory of the United States* means the 50 States, the District of Columbia, and Puerto Rico.

(2) *Eligible product* means—

(i) *Designated country end product* as defined in the Trade Agreements clause of this contract;

(ii) *Free Trade Agreement country end product,* other than a *Bahrainian end product* or a *Moroccan end product,* as defined in the Buy American Act-Free Trade Agreements-Balance of Payments Program clause of this contract; or

(iii) *Canadian end product* as defined in Alternate I of the Buy American Act-Free Trade Agreements-Balance of Payments Program clause of this contract.

(3) *Qualifying country* and *qualifying country end product* have the meanings given in the Trade Agreements clause, the Buy American Act and Balance of Payments Program clause, or the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this contract.

(b) Except as provided in paragraph (i) of this clause, or unless supplies were imported into the customs territory of the United States before the date of this contract or the applicable subcontract, the price of this contract shall not include any amount for duty on—

(1) End items that are eligible products or qualifying country end products;

(2) Components (including, without limitation, raw materials and intermediate assemblies) produced or made in qualifying countries, that are to be incorporated in U.S.-made end products to be delivered under this contract; or

(3) Other supplies for which the Contractor estimates that duty will exceed $200 per shipment into the customs territory of the United States.

(c) The Contractor shall—

(1) Claim duty-free entry only for supplies that the Contractor intends to deliver to the Government under this contract, either as end items or components of end items; and

(2) Pay duty on supplies, or any portion thereof, that are diverted to nongovernmental use, other than—

(i) Scrap or salvage; or

(ii) Competitive sale made, directed, or authorized by the Contracting Officer.

(d) Except as the Contractor may otherwise agree, the Government will execute duty-free entry certificates and will afford such assistance as appropriate to obtain the duty-free entry of supplies—

(1) For which no duty is included in the contract price in accordance with paragraph (b) of this clause; and

(2) For which shipping documents bear the notation specified in paragraph (e) of this clause.

(e) For foreign supplies for which the Government will issue duty-free entry certificates in accordance with this clause, shipping documents submitted to Customs shall—

(1) Consign the shipments to the appropriate—

(i) Military department in care of the Contractor, including the Contractor's delivery address; or

(ii) Military installation; and

(2) Include the following information:

(i) Prime contract number and, if applicable, delivery order number.

(ii) Number of the subcontract for foreign supplies, if applicable.

(iii) Identification of the carrier.

(iv) (A) For direct shipments to a U.S. military installation, the notation: ''UNITED STATES GOVERNMENT, DEPARTMENT OF DEFENSE Duty-Free Entry to be claimed pursuant to Section XXII, Chapter 98, Subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States. Upon arrival of shipment at the appropriate port of entry, District Director of Customs, please release shipment under 19 CFR part 142 and notify Commander, Defense Contract Management Agency (DCMA) New York, ATTN: Customs Team, DCMAE-GNTF, 207 New York Avenue, Staten Island, New York, 10305–5013, for execution of Customs Form 7501, 7501A, or 7506 and any required duty-free entry certificates.''

(B) If the shipment will be consigned to other than a military installation, *e.g.,* a domestic contractor's plant, the shipping document notation shall be altered to include the name and address of the contractor, agent, or broker who will notify Commander, DCMA New York, for execution of the duty-free entry certificate. (If the shipment will be consigned to a contractor's plant and no duty-free entry certificate is required due to a trade agreement, the Contractor shall

claim duty-free entry under the applicable trade agreement and shall comply with the U.S. Customs Service requirements. No notification to Commander, DCMA New York, is required.)

(v) Gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight).

(vi) Estimated value in U.S. dollars.

(vii) Activity address number of the contract administration office administering the prime contract, *e.g.,* for DCMA Dayton, S3605A.

(f) *Preparation of customs forms.* (1)(i) Except for shipments consigned to a military installation, the Contractor shall—

(A) Prepare any customs forms required for the entry of foreign supplies into the customs territory of the United States in connection with this contract; and

(B) Submit the completed customs forms to the District Director of Customs, with a copy to DCMA NY for execution of any required duty-free entry certificates.

(ii) Shipments consigned directly to a military installation will be released in accordance with sections 10.101 and 10.102 of the U.S. Customs regulations.

(2) For shipments containing both supplies that are to be accorded duty-free entry and supplies that are not, the Contractor shall identify on the customs forms those items that are eligible for duty-free entry.

(g) The Contractor shall—

(1) Prepare (if the Contractor is a foreign supplier), or shall instruct the foreign supplier to prepare, a sufficient number of copies of the bill of lading (or other shipping document) so that at least two of the copies accompanying the shipment will be available for use by the District Director of Customs at the port of entry;

(2) Consign the shipment as specified in paragraph (e) of this clause; and

(3) Mark on the exterior of all packages—

(i) ''UNITED STATES GOVERNMENT, DEPARTMENT OF DEFENSE''; and

(ii) The activity address number of the contract administration office administering the prime contract.

(h) The Contractor shall notify the Administrative Contracting Officer (ACO) in writing of any purchase of eligible products or qualifying country supplies to be accorded duty-free entry, that are to be imported into the customs territory of the United States for delivery to the Government or for incorporation in end items to be delivered to the Government. The Contractor shall furnish the notice to the ACO immediately upon award to the supplier and shall include in the notice—

(1) The Contractor's name, address, and Commercial and Government Entity (CAGE) code;

(2) Prime contract number and, if applicable, delivery order number;

(3) Total dollar value of the prime contract or delivery order;

(4) Date of the last scheduled delivery under the prime contract or delivery order;

(5) Foreign supplier's name and address;

(6) Number of the subcontract for foreign supplies;

(7) Total dollar value of the subcontract for foreign supplies;

(8) Date of the last scheduled delivery under the subcontract for foreign supplies;

(9) List of items purchased;

(10) An agreement that the Contractor will pay duty on supplies, or any portion thereof, that are diverted to nongovernmental use other than—

(i) Scrap or salvage; or

(ii) Competitive sale made, directed, or authorized by the Contracting Officer;

(11) Country of origin; and

(12) Scheduled delivery date(s).

(i) This clause does not apply to purchases of eligible products or qualifying country supplies in connection with this contract if—

(1) The supplies are identical in nature to supplies purchased by the Contractor or any subcontractor in connection with its commercial business; and

(2) It is not economical or feasible to account for such supplies so as to ensure that the amount of the supplies for which duty-free entry is claimed does not exceed the amount purchased in connection with this contract.

(j) The Contractor shall—

(1) Insert the substance of this clause, including this paragraph (j), in all subcontracts for—

(i) Qualifying country components; or

(ii) Nonqualifying country components for which the Contractor estimates that duty will exceed $200 per unit;

(2) Require subcontractors to include the number of this contract on all shipping documents submitted to Customs for supplies for which duty-free entry is claimed pursuant to this clause; and

(3) Include in applicable subcontracts—

(i) The name and address of the ACO for this contract;

(ii) The name, address, and activity address number of the contract administration office specified in this contract; and

(iii) The information required by paragraphs (h)(1), (2), and (3) of this clause.

(End of clause)

[68 FR 15635, Mar. 31, 2003, as amended at 69 FR 1928, Jan. 13, 2004; 70 FR 2363, Jan. 13, 2005; 70 FR 35547, June 21, 2005; 71 FR 34835, June 16, 2006; 71 FR 58542, Oct. 4, 2006]

252.225–7014 Preference for domestic specialty metals.

As prescribed in 225.7002–3(b)(1), use the following clause:

PREFERENCE FOR DOMESTIC SPECIALTY METALS (JUN 2005)

(a) *Definitions.* As used in this clause—

(1) *Qualifying country* means any country listed in subsection 225.872–1 of the Defense Federal Acquisition Regulation Supplement.

(2) *Specialty metals* means—

(i) Steel—

(A) With a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or

(B) Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;

(ii) Metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent;

(iii) Titanium and titanium alloys; or

(iv) Zirconium and zirconium base alloys.

(b) Any specialty metals incorporated in articles delivered under this contract shall be melted in the United States or its outlying areas.

(c) This clause does not apply to specialty metals—

(1) Melted in a qualifying country or incorporated in an article manufactured in a qualifying country; or

(2) Purchased by a subcontractor at any tier.

(End of clause)

Alternate I (APR 2003)

As prescribed in 225.7002–3(b)(2), substitute the following paragraph (c) for paragraph (c) of the basic clause, and add the following paragraph (d) to the basic clause:

(c) This clause does not apply to specialty metals melted in a qualifying country or incorporated in an article manufactured in a qualifying country.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts for items containing specialty metals.

[68 FR 15636, Mar. 31, 2003, as amended at 70 FR 35547, June 21, 2005]

252.225–7015 Restriction on acquisition of hand or measuring tools.

As prescribed in 225.7002–3(c), use the following clause:

RESTRICTION ON ACQUISITION OF HAND OR MEASURING TOOLS (JUN 2005)

Hand or measuring tools delivered under this contract shall be produced in the United States or its outlying areas.

(End of clause)

[70 FR 35547, June 21, 2005]

252.225–7016 Restriction on Acquisition of Ball and Roller Bearings.

As prescribed in 225.7009–5, use the following clause:

RESTRICTION ON ACQUISITION OF BALL AND ROLLER BEARINGS (MAR 2006)

(a) *Definitions.* As used in this clause'

(1) *Bearing components* means the bearing element, retainer, inner race, or outer race.

(2) *Component,* other than bearing components, means any item supplied to the Government as part of an end product or of another component.

(3) *End product* means supplies delivered under a line item of this contract.

(b) Except as provided in paragraph (c) of this clause, all ball and roller bearings and ball and roller bearing components delivered under this contract, either as end items or components of end items, shall be wholly manufactured in the United States, its outlying areas, or Canada. Unless otherwise specified in this contract, raw materials, such as preformed bar, tube, or rod stock and lubricants, need not be mined or produced in the United States, its outlying areas, or Canada.

(c) The restriction in paragraph (b) of this clause does not apply to ball or roller bearings that are acquired as—

(1) Commercial components of a noncommercial end product; or

(2) Commercial or noncommercial components of a commercial component of a noncommercial end product.

(d) The restriction in paragraph (b) of this clause may be waived upon request from the Contractor in accordance with subsection 225.7009–4 of the Defense Federal Acquisition Regulation Supplement.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts, except those for—

(1) Commercial items; or

(2) Items that do not contain ball or roller bearings.

(End of clause)

[71 FR 14112, Mar. 21, 2006]

252.225–7017 [Reserved]

252.225–7018 Notice of prohibition of certain contracts with foreign entities for the conduct of ballistic missile defense research, development, test, and evaluation.

As prescribed in 225.7017–4, use the following provision:

NOTICE OF PROHIBITION OF CERTAIN CONTRACTS WITH FOREIGN ENTITIES FOR THE CONDUCT OF BALLISTIC MISSILE DEFENSE RESEARCH, DEVELOPMENT, TEST, AND EVALUATION (JUN 2005)

(a) *Definitions.* (1) *Competent* means the ability of an offeror to satisfy the requirements of the solicitation. This determination is based on a comprehensive assessment of each offeror's proposal including consideration of the specific areas of evaluation criteria in the relative order of importance described in the solicitation.

(2) *Foreign firm* means a business entity owned or controlled by one or more foreign nationals or a business entity in which more than 50 percent of the stock is owned or controlled by one or more foreign nationals.

(3) *U.S. firm* means a business entity other than a foreign firm.

(b) Except as provided in paragraph (c) of this provision, the Department of Defense will not 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 research, development, test, or evaluation in connection with the Ballistic Missile Defense Program. However, foreign governments and firms are encouraged to submit offers, since this provision is not intended to restrict access to unique foreign expertise if the contract will require a level of competency unavailable in the United States or its outlying areas.

(c) This prohibition does not apply to a foreign government or firm if—

(1) The contract will be performed within the United States or its outlying areas;

(2) The contract is exclusively for research, development, test, or evaluation in connection with antitactical ballistic missile systems;

(3) The foreign government or firm agrees to share a substantial portion of the total contract cost. The foreign share is considered substantial if it is equitable with respect to the relative benefits that the United States and the foreign parties will derive from the contract. For example, if the contract is more beneficial to the foreign party, its share of the costs should be correspondingly higher; or

(4) The U.S. Government determines that a U.S. firm cannot competently perform the contract at a price equal to or less than the price at which a foreign government or firm can perform the contract.

(d) The offeror (____) is (____) is not a U.S. firm.

(End of provision)

[68 FR 15637, Mar. 31, 2003, as amended at 70 FR 35547, June 21, 2005]

252.225–7019 Restriction on acquisition of anchor and mooring chain.

As prescribed in 225.7007–3, use the following clause:

RESTRICTION ON ACQUISITION OF ANCHOR AND MOORING CHAIN (JUN 2005)

(a) Welded shipboard anchor and mooring chain, four inches or less in diameter, delivered under this contract—

(1) Shall be manufactured in the United States or its outlying areas, 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 or its outlying areas shall exceed 50 percent of the total cost of components.

(b) The Contractor may request a waiver of this restriction if adequate domestic supplies meeting the requirements in paragraph (a) of this clause are not available to meet the contract delivery schedule.

(c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts for items containing welded shipboard anchor and mooring chain, four inches or less in diameter.

(End of clause)

[68 FR 15637, Mar. 31, 2003, as amended at 70 FR 35547, June 21, 2005]

252.225–7020 Trade Agreements Certificate.

As prescribed in 225.1101(5), use the following provision:

TRADE AGREEMENTS CERTIFICATE (JAN 2005)

(a) *Definitions. Designated country end product, nondesignated country end product, qualifying country end product,* and *U.S.-made end product* have the meanings given in the Trade Agreements clause of this solicitation.

(b) *Evaluation.* The Government—

(1) Will evaluate offers in accordance with the policies and procedures of part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) Will consider only offers of end products that are U.S.-made, qualifying country, or designated country end products unless—

(i) There are no offers of such end products;

(ii) The offers of such end products are insufficient to fulfill the Government's requirements; or

(iii) A national interest waiver has been granted.

(c) *Certification and identification of country of origin.* (1) For all line items subject to the Trade Agreements clause of this solicitation, the offeror certifies that each end product to be delivered under this contract, except those listed in paragraph (c)(2) of this provision, is a U.S.-made, qualifying country, or designated country end product.

(2) The following supplies are other nondesignated country end products:

(*Line Item Number*) (*Country of Origin*)

(End of provision)

[70 FR 2363, Jan. 13, 2005]

252.225–7021 Trade agreements.

As prescribed in 225.1101(6), use the following clause:

TRADE AGREEMENTS (MAR 2007)

(a) *Definitions.* As used in this clause—

(1) *Caribbean Basin country end product*—

(i) Means an article that—

(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself; and

(ii) Excludes products, other than petroleum and any product derived from petroleum, that are not granted duty-free treatment under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2703(b)). These exclusions presently consist of—

(A) Textiles, apparel articles, footwear, handbags, luggage, flat goods, work gloves, leather wearing apparel, and handloomed, handmade, or folklore articles that are not granted duty-free status in the Harmonized Tariff Schedule of the United States (HTSUS);

(B) Tuna, prepared or preserved in any manner in airtight containers; and

(C) Watches and watch parts (including cases, bracelets, and straps) of whatever type, including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the HTSUS column 2 rates of duty (HTSUS General Note 3(b)) apply.

(2) *Component* means an article, material, or supply incorporated directly into an end product.

(3) *Designated country* means—

(i) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom);

(ii) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, or Singapore);

(iii) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(iv) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

(4) *Designated country end product* means a WTO GPA country end product, a Free Trade Agreement country end product, a least developed country end product, or a Caribbean Basin country end product.

(5) *End product* means those articles, materials, and supplies to be acquired under this contract for public use.

(6) *Free Trade Agreement country end product* means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract,

but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(7) *Least developed country end product* means an article that—

(i) Is wholly the growth, product, or manufacture of a least developed country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(8) *Nondesignated country end product* means any end product that is not a U.S.-made end product or a designated country end product.

(9) *Qualifying country* means any country set forth in subsection 225.872–1 of the Defense Federal Acquisition Regulation Supplement.

(10) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if the cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States.

(11) *United States* means the 50 States, the District of Columbia, and outlying areas.

(12) *U.S.-made end product* means an article that—

(i) Is mined, produced, or manufactured in the United States; or

(ii) Is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

(13) *WTO GPA country end product* means an article that—

(i) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, or designated country end products unless—

(1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)(i) Offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

(ii) A national interest waiver has been granted.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(e) The HTSUS is available on the Internet at *http://www.usitc.gov/tata/hts/bychapter/index.htm*. The following sections of the HTSUS provide information regarding duty-free status of articles specified in paragraph (a)(2)(ii)(A) of this clause:

(1) General Note 3(c), Products Eligible for Special Tariff Treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries Under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits Under the United States-Caribbean Basin Trade Partnership Act.

(End of clause)

ALTERNATE I (SEP 2008)

As prescribed in 225.1101(6)(ii), add the following paragraph (a)(14) to the basic clause and substitute the following paragraph (c) for paragraph (c) of the basic clause:

(a)(14) *Iraqi end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Iraq; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed

in Iraq into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(c) The Contractor shall deliver under this contract only U.S.-made, qualifying country, Iraqi, or designated country end products unless—

(1) In its offer, the Contractor specified delivery of other nondesignated country end products in the Trade Agreements Certificate provision of the solicitation; and

(2)(i) Offers of U.S.-made, qualifying country, Iraqi, or designated country end products from responsive, responsible offerors are either not received or are insufficient to fill the Government's requirements; or

(ii) A national interest waiver has been granted.

[68 FR 15637, Mar. 31, 2003, as amended at 68 FR 50477, Aug. 21, 2003; 69 FR 1928, Jan. 13, 2004; 69 FR 35535, June 25, 2004; 69 FR 74992, Dec. 15, 2004; 70 FR 2364, Jan. 13, 2005; 70 FR 35547, June 21, 2005; 70 FR 73153, Dec. 9, 2005; 71 FR 9271, Feb. 23, 2006; 71 FR 34835, June 16, 2006; 71 FR 58542, Oct. 4, 2006; 71 FR 65752, Nov. 9, 2006; 72 FR 14243, Mar. 27, 2007; 73 FR 53155, Sept. 15, 2008]

252.225–7022 Trade agreements certificate—inclusion of Iraqi end products.

As prescribed in 225.1101(7), use the following provision:

TRADE AGREEMENTS CERTIFICATE—INCLUSION OF IRAQI END PRODUCTS (SEP 2008)

(a) *Definitions. Designated country end product, Iraqi end product, nondesignated country end product, qualifying country end product,* and *U.S.-made end product* have the meanings given in the Trade Agreements clause of this solicitation.

(b) *Evaluation.* The Government—

(1) Will evaluate offers in accordance with the policies and procedures of Part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) Will consider only offers of end products that are U.S.-made, qualifying country, Iraqi, or designated country end products unless—

(i) There are no offers of such end products;

(ii) The offers of such end products are insufficient to fulfill the Government's requirements; or

(iii) A national interest waiver has been granted.

(c) *Certification and identification of country of origin.*

(1) For all line items subject to the Trade Agreements clause of this solicitation, the offeror certifies that each end product to be delivered under a contract resulting from this solicitation, except those listed in paragraph (c)(2) of this provision, is a U.S.-made, qualifying country, Iraqi, or designated country end product.

(2) The following supplies are other nondesignated country end products:

(*Country of Origin*)

(*Line Item Number*)

(End of provision)

[73 FR 53155, Sept. 15, 2008]

252.225–7023 Preference for products or services from Iraq or Afghanistan.

As prescribed in 225.7703–5(a), use the following provision:

PREFERENCE FOR PRODUCTS OR SERVICES FROM IRAQ OR AFGHANISTAN (SEP 2008)

(a) *Definitions. Product from Iraq or Afghanistan* and service *from Iraq or Afghanistan,* as used in this provision, are defined in the clause of this solicitation entitled ''Requirement for Products or Services from Iraq or Afghanistan'' (DFARS 252.225–7024).

(b) *Representation.* The offeror represents that all products or services to be delivered under a contract resulting from this solicitation are products from Iraq or Afghanistan or services from Iraq or Afghanistan, except those listed in—

(1) Paragraph (c) of this provision; or

(2) Paragraph (c)(2) of the provision entitled ''Trade Agreements Certificate—Inclusion of Iraqi End Products,'' if included in this solicitation.

(c) *Other products or services.* The following offered products or services are not products from Iraq or Afghanistan or services from Iraq or Afghanistan:

(*Country of Origin*)

(*Line Item Number*)

(d) *Evaluation.* For the purpose of evaluating competitive offers, the Contracting Officer will increase by 50 percent the prices of offers of products or services that are not products or services from Iraq or Afghanistan.

(End of provision)

[73 FR 53155, Sept. 15, 2008]

252.225–7024 Requirement for products or services from Iraq or Afghanistan.

As prescribed in 225.7703–5(b), use the following clause:

REQUIREMENT FOR PRODUCTS OR SERVICES FROM IRAQ OR AFGHANISTAN (SEP 2008)

(a) *Definitions.* As used in this clause—

(1) *Product from Iraq or Afghanistan* means a product that is mined, produced, or manufactured in Iraq or Afghanistan.

(2) *Service from Iraq or Afghanistan* means a service that is performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan.

(b) The Contractor shall provide only products from Iraq or Afghanistan or services from Iraq or Afghanistan under this contract, unless, in its offer, it specified that it would provide products or services other than products from Iraq or Afghanistan or services from Iraq or Afghanistan.

(End of clause)

[73 FR 53155, Sept. 15, 2008]

252.225–7025 Restriction on acquisition of forgings.

As prescribed in 225.7102–4, use the following clause:

RESTRICTION ON ACQUISITION OF FORGINGS (JUL 2006)

(a) *Definitions.* As used in this clause—

(1) *Domestic manufacture* means—

(i) Manufactured in the United States or its outlying areas; or

(ii) Manufactured in Canada, if the Canadian firm normally produces similar items or is currently producing the item in support of DoD contracts (as a contractor or a subcontractor).

(2) *Forging items* means—

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears	All greater than 120 inches in diameter.

(b) End items and their components delivered under this contract shall contain forging items that are of domestic manufacture only.

(c) The restriction in paragraph (b) of this clause may be waived upon request from the Contractor in accordance with subsection 225.7102–3 of the Defense Federal Acquisition Regulation Supplement.

(d) The Contractor shall retain records showing compliance with the restriction in paragraph (b) of this clause until 3 years after final payment and shall make the records available upon request of the Contracting Officer.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in subcontracts for forging items or for other items that contain forging items.

(End of clause)

[68 FR 15639, Mar. 31, 2003, as amended at 70 FR 35548, June 21, 2005; 71 FR 39005, July 11, 2006]

252.225–7026 Acquisition Restricted to Products or Services from Iraq or Afghanistan.

As prescribed in 225.7703–5(c), use the following clause:

ACQUISITION RESTRICTED TO PRODUCTS OR SERVICES FROM IRAQ OR AFGHANISTAN (SEP 2008)

(a) *Definitions.* As used in this clause—

(1) *Product from Iraq or Afghanistan* means a product that is mined, produced, or manufactured in Iraq or Afghanistan.

(2) *Service from Iraq or Afghanistan* means a service that is performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan.

(b) The Contractor shall provide only products from Iraq or Afghanistan or services from Iraq or Afghanistan under this contract.

(End of clause)

[73 FR 53155, Sept. 15, 2008]

252.225–7027 Restriction on contingent fees for foreign military sales.

As prescribed in 225.7307(a), use the following clause.

RESTRICTION ON CONTINGENT FEES FOR FOREIGN MILITARY SALES (APR 2003)

(a) Except as provided in paragraph (b) of this clause, contingent fees, as defined in the Covenant Against Contingent Fees clause of this contract, are generally an allowable cost, provided the fees are paid to—

(1) A bona fide employee of the Contractor; or

(2) A bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business.

(b) For foreign military sales, unless the contingent fees have been identified and payment approved in writing by the foreign customer before contract award, the following

contingent fees are unallowable under this contract:

(1) For sales to the Government(s) of _____, contingent fees in any amount.

(2) For sales to Governments not listed in paragraph (b)(1) of this clause, contingent fees exceeding $50,000 per foreign military sale case.

(End of clause)

[68 FR 15639, Mar. 31, 2003, as amended at 70 FR 73156, Dec. 9, 2005]

252.225–7028 Exclusionary policies and practices of foreign governments.

As prescribed in 225.7307(b), use the following clause:

EXCLUSIONARY POLICIES AND PRACTICES OF FOREIGN GOVERNMENTS (APR 2003)

The Contractor and its subcontractors shall not take into account the exclusionary policies or practices of any foreign government in employing or assigning personnel, if—

(a) The personnel will perform functions required by this contract, either in the United States or abroad; and

(b) The exclusionary policies or practices of the foreign government are based on race, religion, national origin, or sex.

(End of clause)

[68 FR 15639, Mar. 31, 2003, as amended at 70 FR 73156, Dec. 9, 2005]

252.225–7029 [Reserved]

252.225–7030 Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate.

As prescribed in 225.7011–3, use the following clause:

RESTRICTION ON ACQUISITION OF CARBON, ALLOY, AND ARMOR STEEL PLATE (DEC 2006)

(a) Carbon, alloy, and armor steel plate shall be melted and rolled in the United States or Canada if the carbon, alloy, or armor steel plate—

(1) Is in Federal Supply Class 9515 or is described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute; and

(2)(i) Will be delivered to the Government for use in a Government-owned facility or a facility under the control of the Department of Defense; or

(ii) Will be purchased by the Contractor for use in a Government-owned facility or a facility under the control of the Department of Defense.

(b) This restriction—

(1) Applies to the acquisition of carbon, alloy, or armor steel plate as a finished steel mill product that may be used ''as is'' or may be used as an intermediate material for the fabrication of an end product; and

(2) Does not apply to the acquisition of an end product (*e.g.*, a machine tool), to be used in the facility, that contains carbon, alloy, or armor steel plate as a component.

(End of clause)

[71 FR 75894, Dec. 19, 2006]

252.225–7031 Secondary Arab boycott of Israel.

As prescribed in 225.7605, use the following provision:

SECONDARY ARAB BOYCOTT OF ISRAEL (JUN 2005)

(a) *Definitions.* As used in this provision—

(1) *Foreign person* means any person (including any individual, partnership, corporation, or other form of association) other than a United States person.

(2) *United States* means the 50 States, the District of Columbia, outlying areas, and the outer Continental Shelf as defined in 43 U.S.C. 1331.

(3) *United States person* is defined in 50 U.S.C. App. 2415(2) and means—

(i) Any United States resident or national (other than an individual resident outside the United States who is employed by other than a United States person);

(ii) Any domestic concern (including any permanent domestic establishment of any foreign concern); and

(iii) Any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern that is controlled in fact by such domestic concern.

(b) *Certification.* If the offeror is a foreign person, the offeror certifies, by submission of an offer, that it—

(1) Does not comply with the Secondary Arab Boycott of Israel; and

(2) Is not taking or knowingly agreeing to take any action, with respect to the Secondary Boycott of Israel by Arab countries, which 50 U.S.C. App. 2407(a) prohibits a United States person from taking.

(End of provision)

[68 FR 15639, Mar. 31, 2003, as amended at 70 FR 35548, June 21, 2005; 71 FR 39006, July 11, 2006]

252.225–7032 Waiver of United Kingdom Levies—Evaluation of offers.

As prescribed in 225.1101(8), use the following provision:

WAIVER OF UNITED KINGDOM LEVIES—EVALUATION OF OFFERS (APR 2003)

(a) Offered prices for contracts or subcontracts with United Kingdom (U.K.) firms may contain commercial exploitation levies assessed by the Government of the U.K. The offeror shall identify to the Contracting Officer all levies included in the offered price by describing—

(1) The name of the U.K. firm;

(2) The item to which the levy applies and the item quantity; and

(3) The amount of levy plus any associated indirect costs and profit or fee.

(b) In the event of difficulty in identifying levies included in a price from a prospective subcontractor, the offeror may seek advice through the Director of Procurement, United Kingdom Defence Procurement Office, British Embassy, 3100 Massachusetts Avenue NW., Washington, DC 20006.

(c) The U.S. Government may attempt to obtain a waiver of levies pursuant to the U.S./U.K. reciprocal waiver agreement of July 1987.

(1) If the U.K. waives levies before award of a contract, the Contracting Officer will evaluate the offer without the levy.

(2) If levies are identified but not waived before award of a contract, the Contracting Officer will evaluate the offer inclusive of the levies.

(3) If the U.K. grants a waiver of levies after award of a contract, the U.S. Government reserves the right to reduce the contract price by the amount of the levy waived plus associated indirect costs and profit or fee.

(End of provision)

[68 FR 15639, Mar. 31, 2003, as amended at 73 FR 53155, Sept. 15, 2008]

252.225–7033 Waiver of United Kingdom levies.

As prescribed in 225.1101(9), use the following clause:

WAIVER OF UNITED KINGDOM LEVIES (APR 2003)

(a) The U.S. Government may attempt to obtain a waiver of any commercial exploitation levies included in the price of this contract, pursuant to the U.S./United Kingdom (U.K.) reciprocal waiver agreement of July 1987. If the U.K. grants a waiver of levies included in the price of this contract, the U.S. Government reserves the right to reduce the contract price by the amount of the levy waived plus associated indirect costs and profit or fee.

(b) If the Contractor contemplates award of a subcontract exceeding $1 million to a U.K. firm, the Contractor shall provide the following information to the Contracting Officer before award of the subcontract:

(1) Name of the U.K. firm.

(2) Prime contract number.

(3) Description of item to which the levy applies.

(4) Quantity being acquired.

(5) Amount of levy plus any associated indirect costs and profit or fee.

(c) In the event of difficulty in identifying levies included in a price from a prospective subcontractor, the Contractor may seek advice through the Director of Procurement, United Kingdom Defence Procurement Office, British Embassy, 3100 Massachusetts Avenue NW., Washington, DC 20006.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in any subcontract for supplies where a lower-tier subcontract exceeding $1 million with a U.K. firm is anticipated.

(End of clause)

[68 FR 15639, Mar. 31, 2003, as amended at 73 FR 53155, Sept. 15, 2008]

252.225–7034 [Reserved]

252.225–7035 Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

As prescribed in 225.1101(10), use the following provision:

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE (OCT 2006)

(a) *Definitions. Bahrainian end product, domestic end product, Free Trade Agreement country, Free Trade Agreement country end product, foreign end product, Moroccan end product, qualifying country end product,* and *United States* have the meanings given in the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation.

(b) *Evaluation.* The Government—

(1) Will evaluate offers in accordance with the policies and procedures of part 225 of the Defense Federal Acquisition Regulation Supplement; and

(2) For line items subject to Free Trade Agreements, will evaluate offers of qualifying country end products or Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program.

(c) *Certifications and identification of country of origin.* (1) For all line items subject to the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation, the offeror certifies that—

(i) Each end product, except the end products listed in paragraph (c)(2) of this provision, is a domestic end product; and

(ii) Components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror shall identify all end products that are not domestic end products.

(i) The offeror certifies that the following supplies are qualifying country (except Australian or Canadian) end products:

(*Line Item Number*) (*Country of Origin*)

(ii) The offeror certifies that the following supplies are Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products:

(*Line Item Number*) (*Country of Origin*)

(iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products.

(*Line Item Number*) (*Country of Origin (If known)*)

(End of provision)

ALTERNATE I (OCT 2006)

As prescribed in 225.1101(10), substitute the phrase *Canadian end product* for the phrases *Bahrainian end product, Free Trade Agreement country, Free Trade Agreement country end product, and Moroccan end product* in paragraph (a) of the basic provision; and substitute the phrase *Canadian end products* for the phrase *Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products* in paragraphs (b) and (c)(2)(ii) of the basic provision.

[70 FR 2364, Jan. 13, 2005, as amended at 71 FR 34835, June 16, 2006; 71 FR 58543, Oct. 4, 2006; 73 FR 53156, Sept. 15, 2008]

252.225–7036 Buy American Act—Free Trade Agreements—Balance of Payments Program.

As prescribed in 225.1101(11)(i), use the following clause:

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM (MAR 2007)

(a) *Definitions.* As used in this clause—

(1) *Bahrainian end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Bahrain; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(2) *Component* means an article, material, or supply incorporated directly into an end product.

(3) *Domestic end product* means—

(i) An unmanufactured end product that has been mined or produced in the United States; or

(ii) An end product manufactured in the United States if the cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(A) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(B) It is inconsistent with the public interest to apply the restrictions of the Buy American Act.

(4) *End product* means those articles, materials, and supplies to be acquired under this contract for public use.

(5) *Foreign end product* means an end product other than a domestic end product.

(6) *Free Trade Agreement country* means Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, or Singapore;

(7) *Free Trade Agreement country end product* means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(8) *Moroccan end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Morocco; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Morocco into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(9) *Qualifying country* means any country set forth in subsection 225.872–1 of the Defense Federal Acquisition Regulation Supplement.

(10) *Qualifying country component* means a component mined, produced, or manufactured in a qualifying country.

(11) *Qualifying country end product* means—

(i) An unmanufactured end product mined or produced in a qualifying country; or

(ii) An end product manufactured in a qualifying country if the cost of the following types of components exceeds 50 percent of the cost of all its components:

(A) Components mined, produced, or manufactured in a qualifying country.

(B) Components mined, produced, or manufactured in the United States.

(C) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States.

(12) *United States* means the 50 States, the District of Columbia, and outlying areas.

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country end products, Free Trade Agreement country end products other than Bahrainian end products or Moroccan end products, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product other than a Bahrainian end product or a Moroccan end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product other than a Bahrainian end product or a Moroccan end product, or, at the Contractor's option, a domestic end product.

(d) The contract price does not include duty for end products or components for which the Contractor will claim duty-free entry.

(End of clause)

Alternate I (OCT 2006) As prescribed in 225.1101(11)(i)(B), substitute the following paragraphs (a)(4) and (c) for paragraphs (a)(4) and (c) of the basic clause:

(a)(4) *Canadian end product* means an article that—

(i) Is wholly the growth, product, or manufacture of Canada; or

(ii) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country, Canadian, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Canadian end product, the Contractor shall deliver a qualifying country end product, a Canadian end product, or, at the Contractor's option, a domestic end product.

[68 FR 15640, Mar. 31, 2003, as amended at 69 FR 1929, Jan. 13, 2004; 69 FR 74992, Dec. 15, 2004; 70 FR 2365, Jan. 13, 2005; 70 FR 35548, June 21, 2005; 71 FR 34835, June 16, 2006; 71 FR 58543, Oct. 4, 2006; 72 FR 14243, Mar. 27, 2007; 73 FR 53156, Sept. 15, 2008]

252.225–7037 Evaluation of Offers for Air Circuit Breakers.

As prescribed in 225.7006–4(a), use the following provision:

EVALUATION OF OFFERS FOR AIR CIRCUIT BREAKERS (JUN 2005)

(a) The offeror shall specify, in its offer, any intent to furnish air circuit breakers that are not manufactured in the United States or its outlying areas, Canada, or the United Kingdom.

(b) The Contracting Officer will evaluate offers by adding a factor of 50 percent to the offered price of air circuit breakers that are not manufactured in the United States or its outlying areas, Canada, or the United Kingdom.

(End of provision)

[70 FR 35548, June 21, 2005]

252.225–7038 Restriction on Acquisition of Air Circuit Breakers.

As prescribed in 225.7006–4(b), use the following clause:

RESTRICTION ON ACQUISITION OF AIR CIRCUIT BREAKERS (JUN 2005)

Unless otherwise specified in its offer, the Contractor shall deliver under this contract air circuit breakers manufactured in the United States or its outlying areas, Canada, or the United Kingdom.

(End of clause)

[70 FR 35548, June 21, 2005]

252.225–7039 [Reserved]

252.225–7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

As prescribed in 225.7402–4(a), use the following clause:

CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY U.S. ARMED FORCES DEPLOYED OUTSIDE THE UNITED STATES (MAR 2008)

(a) *Definitions.* As used in this clause—*Combatant Commander* means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Designated operational area means a geographic area designated by the combatant commander or subordinate joint force commander for the conduct or support of specified military operations.

Subordinate joint force commander means a sub-unified commander or joint task force commander.

(b) *General.*

(1) This clause applies when Contractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the Combatant Commander.

(2) Contract performance in support of U.S. Armed Forces deployed outside the United States may require work in dangerous or austere conditions. Except as otherwise provided in the contract, the Contractor accepts the risks associated with required contract performance in such operations.

(3) Contractor personnel are civilians accompanying the U.S. Armed Forces.

(i) Except as provided in paragraph (b)(3)(ii) of this clause, Contractor personnel are only authorized to use deadly force in self-defense.

(ii) Contractor personnel performing security functions are also authorized to use deadly force when such force reasonably appears necessary to execute their security mission to protect assets/persons, consistent with the terms and conditions contained in their contract or with their job description and terms of employment.

(iii) Unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces can subject such personnel to United States or host nation prosecution and civil liability (see paragraphs (d) and (j)(3) of this clause).

(4) Service performed by Contractor personnel subject to this clause is not active duty or service under 38 U.S.C. 106 note.

(c) *Support.* (1)(i) The Combatant Commander will develop a security plan for protection of Contractor personnel in locations where there is not sufficient or legitimate civil authority, when the Combatant Commander decides it is in the interests of the Government to provide security because—

(A) The Contractor cannot obtain effective security services;

(B) Effective security services are unavailable at a reasonable cost; or

(C) Threat conditions necessitate security through military means.

(ii) The Contracting Officer shall include in the contract the level of protection to be provided to Contractor personnel.

(iii) In appropriate cases, the Combatant Commander may provide security through

military means, commensurate with the level of security provided DoD civilians.

(2)(i) Generally, all Contractor personnel authorized to accompany the U.S. Armed Forces in the designated operational area are authorized to receive resuscitative care, stabilization, hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.

(ii) When the Government provides medical treatment or transportation of Contractor personnel to a selected civilian facility, the Contractor shall ensure that the Government is reimbursed for any costs associated with such treatment or transportation.

(iii) Medical or dental care beyond this standard is not authorized unless specified elsewhere in this contract.

(3) Unless specified elsewhere in this contract, the Contractor is responsible for all other support required for its personnel engaged in the designated operational area under this contract.

(4) Contractor personnel must have a letter of authorization issued by the Contracting Officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The letter of authorization also will identify any additional authorizations, privileges, or Government support that Contractor personnel are entitled to under this contract.

(d) *Compliance with laws and regulations.* The Contractor shall comply with, and shall ensure that its personnel authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause are familiar with and comply with, all applicable—

(1) United States, host country, and third country national laws;

(2) Treaties and international agreements;

(3) United States regulations, directives, instructions, policies, and procedures; and

(4) Orders, directives, and instructions issued by the Combatant Commander, including those relating to force protection, security, health, safety, or relations and interaction with local nationals. However, only the Contracting Officer is authorized to modify the terms and conditions of the contract.

(e) *Pre-deployment requirements.* (1) The Contractor shall ensure that the following requirements are met prior to deploying personnel in support of U.S. Armed Forces. Specific requirements for each category may be specified in the statement of work or elsewhere in the contract.

(i) All required security and background checks are complete and acceptable.

(ii) All deploying personnel meet the minimum medical screening requirements and have received all required immunizations as specified in the contract. The Government will provide, at no cost to the Contractor, any theater-specific immunizations and/or medications not available to the general public.

(iii) Deploying personnel have all necessary passports, visas, and other documents required to enter and exit a designated operational area and have a Geneva Conventions identification card, or other appropriate DoD identity credential, from the deployment center. Any Common Access Card issued to deploying personnel shall contain the access permissions allowed by the letter of authorization issued in accordance with paragraph (c)(4) of this clause.

(iv) Special area, country, and theater clearance is obtained for personnel. Clearance requirements are in DoD Directive 4500.54, Official Temporary Duty Abroad, and DoD 4500.54–G, DoD Foreign Clearance Guide. Contractor personnel are considered non-DoD personnel traveling under DoD sponsorship.

(v) All personnel have received personal security training. At a minimum, the training shall—

(A) Cover safety and security issues facing employees overseas;

(B) Identify safety and security contingency planning activities; and

(C) Identify ways to utilize safety and security personnel and other resources appropriately.

(vi) All personnel have received isolated personnel training, if specified in the contract, in accordance with DoD Instruction 1300.23, Isolated Personnel Training for DoD Civilian and Contractors.

(2) The Contractor shall notify all personnel who are not a host country national, or who are not ordinarily resident in the host country, that—

(i) Such employees, and dependents residing with such employees, who engage in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, may potentially be subject to the criminal jurisdiction of the United States in accordance with the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3621, *et seq.*);

(ii) Pursuant to the War Crimes Act (18 U.S.C. 2441), Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed by a civilian national of the United States;

(iii) Other laws may provide for prosecution of U.S. nationals who commit offenses on the premises of U.S. diplomatic, consular,

military or other U.S. Government missions outside the United States (18 U.S.C. 7(9)); and

(iv) In time of declared war or a contingency operation, Contractor personnel authorized to accompany U.S. Armed Forces in the field are subject to the jurisdiction of the Uniform Code of Military Justice under 10 U.S.C. 802(a)(10).

(f) *Processing and departure points.* Deployed Contractor personnel shall—

(1) Process through the deployment center designated in the contract, or as otherwise directed by the Contracting Officer, prior to deploying. The deployment center will conduct deployment processing to ensure visibility and accountability of Contractor personnel and to ensure that all deployment requirements are met, including the requirements specified in paragraph (e)(1) of this clause;

(2) Use the point of departure and transportation mode directed by the Contracting Officer; and

(3) Process through a Joint Reception Center (JRC) upon arrival at the deployed location. The JRC will validate personnel accountability, ensure that specific designated operational area entrance requirements are met, and brief Contractor personnel on theater-specific policies and procedures.

(g) *Personnel data.* (1) The Contractor shall enter before deployment and maintain data for all Contractor personnel that are authorized to accompany U.S. Armed Forces deployed outside the United States as specified in paragraph (b)(1) of this clause. The Contractor shall use the Synchronized Predeployment and Operational Tracker (SPOT) web-based system, at *http://www.dod.mil/bta/products/spot.html*, to enter and maintain the data.

(2) The Contractor shall ensure that all employees in the database have a current DD Form 93, Record of Emergency Data Card, on file with both the Contractor and the designated Government official. The Contracting Officer will inform the Contractor of the Government official designated to receive this data card.

(h) *Contractor personnel.* (1) The Contracting Officer may direct the Contractor, at its own expense, to remove and replace any Contractor personnel who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

(2) The Contractor shall have a plan on file showing how the Contractor would replace employees who are unavailable for deployment or who need to be replaced during deployment. The Contractor shall keep this plan current and shall provide a copy to the Contracting Officer upon request. The plan shall—

(i) Identify all personnel who are subject to military mobilization;

(ii) Detail how the position would be filled if the individual were mobilized; and

(iii) Identify all personnel who occupy a position that the Contracting Officer has designated as mission essential.

(i) *Military clothing and protective equipment.* (1) Contractor personnel are prohibited from wearing military clothing unless specifically authorized in writing by the Combatant Commander. If authorized to wear military clothing, Contractor personnel must—

(i) Wear distinctive patches, arm bands, nametags, or headgear, in order to be distinguishable from military personnel, consistent with force protection measures; and

(ii) Carry the written authorization with them at all times.

(2) Contractor personnel may wear military-unique organizational clothing and individual equipment (OCIE) required for safety and security, such as ballistic, nuclear, biological, or chemical protective equipment.

(3) The deployment center, or the Combatant Commander, shall issue OCIE and shall provide training, if necessary, to ensure the safety and security of Contractor personnel.

(4) The Contractor shall ensure that all issued OCIE is returned to the point of issue, unless otherwise directed by the Contracting Officer.

(j) *Weapons.* (1) If the Contractor requests that its personnel performing in the designated operational area be authorized to carry weapons, the request shall be made through the Contracting Officer to the Combatant Commander, in accordance with DoD Instruction 3020.41, paragraph 6.3.4.1 or, if the contract is for security services, paragraph 6.3.5.3. The Combatant Commander will determine whether to authorize in-theater Contractor personnel to carry weapons and what weapons and ammunition will be allowed.

(2) If the Contracting Officer, subject to the approval of the Combatant Commander, authorizes the carrying of weapons—

(i) The Contracting Officer may authorize the Contractor to issue Contractor-owned weapons and ammunition to specified employees; or

(ii) The *[Contracting Officer to specify the appropriate individual, e.g., Contracting Officer's Representative, Regional Security Officer]* may issue Government-furnished weapons and ammunition to the Contractor for issuance to specified Contractor employees.

(3) The Contractor shall ensure that its personnel who are authorized to carry weapons—

(i) Are adequately trained to carry and use them—

(A) Safely;

(B) With full understanding of, and adherence to, the rules of the use of force issued by the Combatant Commander; and

(C) In compliance with applicable agency policies, agreements, rules, regulations, and other applicable law;

(ii) Are not barred from possession of a firearm by 18 U.S.C. 922; and

(iii) Adhere to all guidance and orders issued by the Combatant Commander regarding possession, use, safety, and accountability of weapons and ammunition.

(4) Whether or not weapons are Government-furnished, all liability for the use of any weapon by Contractor personnel rests solely with the Contractor and the Contractor employee using such weapon.

(5) Upon redeployment or revocation by the Combatant Commander of the Contractor's authorization to issue firearms, the Contractor shall ensure that all Government-issued weapons and unexpended ammunition are returned as directed by the Contracting Officer.

(k) *Vehicle or equipment licenses.* Contractor personnel shall possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the designated operational area.

(l) *Purchase of scarce goods and services.* If the Combatant Commander has established an organization for the designated operational area whose function is to determine that certain items are scarce goods or services, the Contractor shall coordinate with that organization local purchases of goods and services designated as scarce, in accordance with instructions provided by the Contracting Officer.

(m) *Evacuation.* (1) If the Combatant Commander orders a mandatory evacuation of some or all personnel, the Government will provide assistance, to the extent available, to United States and third country national Contractor personnel.

(2) In the event of a non-mandatory evacuation order, unless authorized in writing by the Contracting Officer, the Contractor shall maintain personnel on location sufficient to meet obligations under this contract.

(n) *Next of kin notification and personnel recovery.* (1) The Contractor shall be responsible for notification of the employee-designated next of kin in the event an employee dies, requires evacuation due to an injury, or is isolated, missing, detained, captured, or abducted.

(2) In the case of isolated, missing, detained, captured, or abducted Contractor personnel, the Government will assist in personnel recovery actions in accordance with DoD Directive 2310.2, Personnel Recovery.

(o) *Mortuary affairs.* Mortuary affairs for Contractor personnel who die while accompanying the U.S. Armed Forces will be handled in accordance with DoD Directive 1300.22, Mortuary Affairs Policy.

(p) *Changes.* In addition to the changes otherwise authorized by the Changes clause of this contract, the Contracting Officer may, at any time, by written order identified as a change order, make changes in the place of performance or Government-furnished facilities, equipment, material, services, or site. Any change order issued in accordance with this paragraph (p) shall be subject to the provisions of the Changes clause of this contract.

(q) *Subcontracts.* The Contractor shall incorporate the substance of this clause, including this paragraph (q), in all subcontracts when subcontractor personnel are authorized to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the Combatant Commander.

(End of clause).

[73 FR 16775, Mar. 31, 2008]

252.225–7041 Correspondence in English.

As prescribed in 225.1103(2), use the following clause:

CORRESPONDENCE IN ENGLISH (JUNE 1997)

The Contractor shall ensure that all contract correspondence that is addressed to the United States Government is submitted in English or with an English translation.

(End of clause)

[62 FR 34132, June 24, 1997, as amended at 65 FR 19858, Apr. 13, 2000; 68 FR 15641, Mar. 31, 2003; 71 FR 39006, July 11, 2006]

252.225–7042 Authorization to perform.

As prescribed in 225.1103(3), use the following provision:

AUTHORIZATION TO PERFORM (APR 2003)

The offeror represents that it has been duly authorized to operate and to do business in the country or countries in which the contract is to be performed.

(End of provision)

[68 FR 15641, Mar. 31, 2003, as amended at 71 FR 39006, July 11, 2006]

252.225–7043 Antiterrorism/force protection policy for defense contractors outside the United States.

As prescribed in 225.7403–2, use the following clause:

ANTITERRORISM/FORCE PROTECTION POLICY FOR DEFENSE CONTRACTORS OUTSIDE THE UNITED STATES (MAR 2006)

(a) *Definition. United States,* as used in this clause, means, the 50 States, the District of Columbia, and outlying areas.

(b) Except as provided in paragraph (c) of this clause, the Contractor and its subcontractors, if performing or traveling outside the United States under this contract, shall—

(1) Affiliate with the Overseas Security Advisory Council, if the Contractor or subcontractor is a U.S. entity;

(2) Ensure that Contractor and subcontractor personnel who are U.S. nationals and are in-country on a non-transitory basis, register with the U.S. Embassy, and that Contractor and subcontractor personnel who are third country nationals comply with any security related requirements of the Embassy of their nationality;

(3) Provide, to Contractor and subcontractor personnel, antiterrorism/force protection awareness information commensurate with that which the Department of Defense (DoD) provides to its military and civilian personnel and their families, to the extent such information can be made available prior to travel outside the United States; and

(4) Obtain and comply with the most current antiterrorism/force protection guidance for Contractor and subcontractor personnel.

(c) The requirements of this clause do not apply to any subcontractor that is—

(1) A foreign government;

(2) A representative of a foreign government; or

(3) A foreign corporation wholly owned by a foreign government.

(d) Information and guidance pertaining to DoD antiterrorism/force protection can be obtained from [*Contracting Officer to insert applicable information cited in PGI 225.7403–1*].

(End of clause)

[63 FR 31937, June 11, 1998, as amended at 70 FR 23803, May 5, 2005; 70 FR 35548, June 21, 2005; 71 FR 14100, Mar. 21, 2006]

252.225–7044 Balance of Payments Program—Construction Material.

As prescribed in 225.7503(a), use the following clause:

BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL (JUN 2005)

(a) *Definitions.* As used in this clause'

Component means any article, material, or supply incorporated directly into construction material.

Construction material means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) *Domestic preference.* This clause implements the Balance of Payments Program by providing a preference for domestic construction material. The Contractor shall use only domestic construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[*Contracting Officer to list applicable excepted materials or indicate ''none''*]

(End of clause)

[67 FR 20695, Apr. 26, 2002, as amended at 70 FR 2365, Jan. 13, 2005; 70 FR 35548, June 21, 2005]

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

As prescribed in 225.7503(b), use the following clause:

BALANCE OF PAYMENTS PROGRAM—CONSTURCTION MATERIAL UNDER TRADE AGREEMENTS (MAR 2007)

(a) *Definitions.* As used in this clause—

Caribbean Basin country construction material means a construction material that—-

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

Component means any article, material, or supply incorporated directly into construction material.

Construction material means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Cost of components means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

Designated country means—

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or the United Kingdom);

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

Designated country construction material means a construction material that is a WTO GPA country construction material, a Free Trade Agreement country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

Domestic construction material means—

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

Free Trade Agreement country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different construction material distinct from the material from which it was transformed.

Least developed country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

United States means the 50 States, the District of Columbia, and outlying areas.

WTO GPA country construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country construction materials.

(c) The Contractor shall use only domestic or designated country construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[*Contracting Officer to list applicable excepted materials or indicate ''none''*]

(End of clause)

Alternate I (OCT 2006). As prescribed in 225.7503(b), add the following definition of *Bahrainian or Mexican construction material* to paragraph (a) of the basic clause, and substitute the following paragraphs (b) and (c) for paragraphs (b) and (c) of the basic clause:

Bahrainian or Mexican construction material means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain or Mexico; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain or Mexico into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the WTO GPA and all Free Trade Agreements except NAFTA apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country construction material other than Bahrainian or Mexican construction material.

(c) The Contractor shall use only domestic or designated country construction material other than Bahrainian or Mexican construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate ''none''].

[70 FR 2365, Jan. 13, 2005, as amended at 70 FR 35548, June 21, 2005; 70 FR 73153, Dec. 9, 2005; 71 FR 9271, Feb. 23, 2006; 71 FR 34836, June 16, 2006; 71 FR 58543, Oct. 4, 2006; 72 FR 14243, Mar. 27, 2007]

252.226–7000 Notice of historically black college or university and minority institution set-aside.

As prescribed in 226.370—9(a), use the following clause:

NOTICE OF HISTORICALLY BLACK COLLEGE OR UNIVERSITY AND MINORITY INSTITUTION SET-ASIDE (APR 1994)

(a) *Definitions. Historically black colleges and universities,* as used in this clause, means institutions determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

Minority institutions, as used in this clause, means institutions meeting the requirements of section 1046(3) of the Higher Education Act of 1965 (20 U.S.C. 1135d–5(3)). The term also includes Hispanic-serving institutions as defined in section 316(b)(1) of such Act (20 U.S.C. 1059c(b)(1)).

(b) *General.* (1) Offers are solicited only from historically black colleges or universities and minority institutions.

(2) Any award resulting from this solicitation will be made only to an offeror which is a historically black college or university or a minority institution at the time of submission of its initial offer including price.

(c) *Agreements.* The offeror will—

(1) Perform at least 50 percent of the cost of contract performance incurred for personnel with its own employees; and

(2) Upon request by the Contracting Officer, provide evidence prior to award that the Secretary of Education has determined the offeror to be a historically black college or university or minority institution.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 59 FR 22131, Apr. 29, 1994; 70 FR 73150, Dec. 9, 2005]

252.226–7001 Utilization of Indian organizations, Indian-owned economic enterprises, and native Hawaiian small business concerns.

As prescribed in 226.104, use the following clause:

UTILIZATION OF INDIAN ORGANIZATIONS, INDIAN-OWNED ECONOMIC ENTERPRISES, AND NATIVE HAWAIIAN SMALL BUSINESS CONCERNS (SEP 2004)

(a) *Definitions.* As used in this clause—

Indian means—

(1) Any person who is a member of any Indian tribe, band, group, pueblo, or community that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs (BIA) in accordance with 25 U.S.C. 1452(c); and

(2) Any ''Native'' as defined in the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

Indian organization means the governing body of any Indian tribe or entity established or recognized by the governing body of an Indian tribe for the purposes of 25 U.S.C. chapter 17.

Indian-owned economic enterprise means any Indian-owned (as determined by the Secretary of the Interior) commercial, industrial, or business activity established or organized for the purpose of profit, provided that Indian ownership constitutes not less than 51 percent of the enterprise.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, that is recognized by the Federal Government as eligible for services from BIA in accordance with 25 U.S.C. 1452(c).

Interested party means a contractor or an actual or prospective offeror whose direct economic interest would be affected by the award of a subcontract or by the failure to award a subcontract.

Native Hawaiian small business concern means an entity that is—

(1) A small business concern as defined in section 3 of the Small Business Act (15 U.S.C. 632) and relevant implementing regulations; and

(2) Owned and controlled by a Native Hawaiian as defined in 25 U.S.C. 4221(9).

(b) The Contractor shall use its best efforts to give Indian organizations, Indian-owned economic enterprises, and Native Hawaiian small business concerns the maximum practicable opportunity to participate in the subcontracts it awards, to the fullest extent consistent with efficient performance of the contract.

(c) The Contracting Officer and the Contractor, acting in good faith, may rely on the representation of an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern as to its eligibility, unless an interested party challenges its status or the Contracting Officer has independent reason to question that status.

(d) In the event of a challenge to the representation of a subcontractor, the Contracting Officer will refer the matter to—

(1) For matters relating to Indian organizations or Indian-owned economic enterprises: U.S. Department of the Interior, Bureau of Indian Affairs, Attn: Chief, Division of Contracting and Grants Administration, 1849 C Street NW, MS–2626–MIB, Washington, DC 20240–4000. The BIA will determine the eligibility and will notify the Contracting Officer.

(2) For matters relating to Native Hawaiian small business concerns: Department of Hawaiian Home Lands, PO Box 1879, Honolulu, HI 96805. The Department of Hawaiian Home Lands will determine the eligibility and will notify the Contracting Officer.

(e) No incentive payment will be made—

(1) While a challenge is pending; or

(2) If a subcontractor is determined to be an ineligible participant.

(f)(1) The Contractor, on its own behalf or on behalf of a subcontractor at any tier, may request an incentive payment in accordance with this clause.

(2) The incentive amount that may be requested is 5 percent of the estimated cost, target cost, or fixed price included in the subcontract at the time of award to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(3) In the case of a subcontract for commercial items, the Contractor may receive

an incentive payment only if the subcontracted items are produced or manufactured in whole or in part by an Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(4) The Contractor has the burden of proving the amount claimed and shall assert its request for an incentive payment prior to completion of contract performance.

(5) The Contracting Officer, subject to the terms and conditions of the contract and the availability of funds, will authorize an incentive payment of 5 percent of the estimated cost, target cost, or fixed price included in the subcontract awarded to the Indian organization, Indian-owned economic enterprise, or Native Hawaiian small business concern.

(6) If the Contractor requests and receives an incentive payment on behalf of a subcontractor, the Contractor is obligated to pay the subcontractor the incentive amount.

(g) The Contractor shall insert the substance of this clause, including this paragraph (g), in all subcontracts exceeding $500,000.

[68 FR 56562, Oct. 1, 2003, as amended at 69 FR 55991, Sept. 17, 2004]

252.227–7000 Non-estoppel.

As prescribed at 227.7009–1, insert the following clause in patent releases, license agreements, and assignments:

NON-ESTOPPEL (OCT 1966)

The Government reserves the right at any time to contest the enforceability, validity, scope of, or the title to any patent or patent application herein licensed without waiving or forfeiting any right under this contract.

(End of clause)

252.227–7001 Release of past infringement.

As prescribed at 227.7009–2(a), insert the following clause in patent releases, license agreements, and assignments:

RELEASE OF PAST INFRINGEMENT (AUG 1984)

The Contractor hereby releases each and every claim and demand which he now has or may hereafter have against the Government for the manufacture or use by or for the Government prior to the effective date of this contract, of any inventions covered by (i) any of the patents and applications for patent identified in this contract, and (ii) any other patent or application for patent owned or hereafter acquired by him, insofar as and only to the extent that such other patent or patent application covers the manufacture, use, or disposition of (description of subject matter).*

(End of clause)

252.227–7002 Readjustment of payments.

As prescribed at 227.7009–2(b), insert the following clause in patent releases, license agreements, and assignments:

READJUSTMENT OF PAYMENTS (OCT 1966)

(a) If any license, under substantially the same patents and authorizing substantially the same acts which are authorized under this contract, has been or shall hereafter be granted within the United States, on royalty terms which are more favorable to the licensee than those contained herein, the Government shall be entitled to the benefit of such more favorable terms with respect to all royalties accruing under this contract after the date such more favorable terms become effective, and the Contractor shall promptly notify the Secretary in writing of the granting of such more favorable terms.

(b) In the event any claim of any patent hereby licensed is construed or held invalid by decision of a court of competent jurisdiction, the requirement to pay royalties under this contract insofar as its arises solely by reason of such claim, and any other claim not materially different therefrom, shall be interpreted in conformity with the court's decision as to the scope of validity of such claims; *Provided*, however, that in the event such decision is modified or reversed on appeal, the requirement to pay royalties under this contract shall be interpreted in conformity with the final decision rendered on such appeal.

(End of clause)

252.227–7003 Termination.

As prescribed at 227.7009–2(c), insert the following clause in patent releases, license agreements, and assignments:

TERMINATION (AUG 1984)

Notwithstanding any other provision of this contract, the Government shall have the right to terminate the within license, in whole or in part, by giving the Contractor not less than thirty (30) days notice in writing of the date such termination is to be effective; provided, however, that such termination shall not affect the obligation of the

*Bracketed portions of the clause may be omitted when not appropriate or not encompassed by the release as negotiated.

Government to pay royalties which have accrued prior to the effective date of such termination.

(End of clause)

252.227–7004 License grant.

As prescribed at 227.7009–3(a), insert the following clause in patent releases, license agreements, and assignments:

LICENSE GRANT (AUG 1984)

(a) The Contractor hereby grants to the Government an irrevocable, nonexclusive, nontransferable, and paid up license under the following patents, applications for patent, and any patents granted on such applications, and under any patents which may issue as the result of any reissue, division or continuation thereof, to practice by or cause to be practiced for the Government throughout the world, any and all of the inventions thereunder, in the manufacture and use of any article or material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____
Date _____
Application Serial No. _____
Filing Date _____

together with corresponding foreign patents and foreign applications for patents, insofar as the Contractor has the right to grant licenses thereunder without incurring an obligation to pay royalties or other compensation to others solely on account of such grant.

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

(End of clause)

252.227–7005 License term.

As prescribed at 227.7009–3(b), insert one of the following clauses in patent releases, license agreements, and assignments:

LICENSE TERM (OCT 2001)

Alternate I (AUG 1984). The license hereby granted shall remain in full force and effect for the full term of each of the patents referred to in the ''License Grant'' clause of this contract and any and all patents hereafter issued on applications for patent referred to in such ''License Grant'' clause.

Alternate II (OCT 2001). The license hereby granted shall terminate on the _____ day of _____ ,_____; *Provided,* however, that said termination shall be without prejudice to the completion of any contract entered into by the Government prior to said date of termination or to the use or disposition thereafter of any articles or materials manufactured by or for the Government under this license.

[56 FR 36479, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

252.227–7006 License grant—running royalty.

As prescribed at 227.7009–4(a), insert the following clause in patent releases, license agreements, and assignments:

LICENSE GRANT—RUNNING ROYALTY (AUG 1984)

(a) The Contractor hereby grants to the Government, as represented by the Secretary of _____, an irrevocable, nonexclusive, nontransferable license under the following patents, applications for patent, and any patents granted on such applications, and under any patents which may issue as the result of any reissue, division, or continuation thereunder to practice by or cause to be practiced for the Department of _____, throughout the world, any and all of the inventions thereunder in the manufacture and use of any article or material, in the use of any method or process, and in the disposition of any article or material in accordance with law:

U.S. Patent No. _____
Date _____
Application Serial No. _____
Filing Date _____

together with corresponding foreign patents and foreign applications for patent, insofar as the Contractor has the right to grant licenses thereunder without incurring an obligation to pay royalties or other compensation to others solely on account of such grant.

(b) No rights are granted or implied by the agreement under any other patents other than as provided above or by operation of law.

(c) Nothing contained herein shall limit any rights which the Government may have obtained by virtue of prior contracts or by operation of law or otherwise.

(End of clause)

252.227–7007 License term—running royalty.

As prescribed at 227.7009–4(b), insert the following clause in patent releases, license agreements, and assignments:

LICENSE TERM—RUNNING ROYALTY (AUG 1984)

The license hereby granted shall remain in full force and effect for the full term of each of the patents referred to in the ''License Grant'' clause of this contract and any and all patents hereafter issued on applications for patent referred to above unless sooner terminated as elsewhere herein provided.

(End of clause)

252.227–7008 Computation of royalties.

As prescribed at 227.7009–4(c), insert the following clause in patent releases, license agreements, and assignments:

COMPUTATION OF ROYALTIES (AUG 1984)

Subject to the conditions hereinafter stated, royalties shall accrue to the Contractor under this agreement on all articles or materials embodying, or manufactured by the use of, any or all inventions claimed under any unexpired United States patent licensed herein, upon acceptance thereof by the Department of _____, at the rate of _____ percent of the net selling price of such articles or materials (amount) per (name of item)* whether manufactured by the Government or procured under a fixed price contract, and at the rate of (amount) per (name of item) acquired or manufactured by a Contractor performing under a cost-reimbursement contract. With respect to such articles or materials made by the Department of _____, ''net selling price,'' as used in this paragraph, means the actual cost of direct labor and materials without allowance for overhead and supervision.

(End of clause)

252.227–7009 Reporting and payment of royalties.

As prescribed at 227.7009–4(d), insert the following clause in patent releases, license agreements, and assignments:

REPORTING AND PAYMENT OF ROYALTIES (AUG 1984)

(a) The (procuring office) shall, on or before the sixtieth (60th) day next following the end of each yearly* period ending _____ during which royalties have accrued under this license, deliver to the Contractor, subject to military security regulations, a report in writing furnishing necessary information relative to royalties which have accrued under this contract.

(b) Royalties which have accrued under this contract during the yearly* period ending _____ shall be paid to the Contractor (if appropriations therefor are available or become available) within sixty (60) days next following the receipt of a voucher from the Contractor submitted in accordance with the report referred to in (a) of this clause; *Provided,* that the Government shall not be obligated to pay, in respect of any such yearly period, on account of the combined royalties accruing under this contract directly and under any separate licenses granted pursuant to the ''License to Other Government Agencies'' clause (if any) of this contract, an amount greater than _____ dollars ($_____), and if such combined royalties exceed the said maximum yearly obligation, each department or agency shall pay a pro rata share of the said maximum yearly obligation as determined by the proportion its accrued royalties bear to the combined total of accrued royalties.

(End of clause)

252.227–7010 License to other Government agencies.

As prescribed at 227.7009–4(e), insert the following clause in patent releases, license agreements, and assignments:

LICENSE TO OTHER GOVERNMENT AGENCIES (AUG 1984)

The Contractor hereby agrees to grant a separate license under the patents, applications for patents, and improvements referred to in the ''License Grant'' clause of this contract, on the same terms and conditions as appear in this license contract, to any other department or agency of the Government at any time on receipt of a written request for such a license from such department or agency; *Provided,* however, that as to royalties which accrue under such separate licenses, reports and payments shall be made directly to the Contractor by each such other department or agency pursuant to the terms of such separate licenses. The Contractor shall notify the Licensee hereunder promptly upon receipt of any request for license hereunder.

(End of clause)

252.227–7011 Assignments.

As prescribed at 227.7010, insert the following clause in assignments.

ASSIGNMENT (AUG 1984)

The Contractor hereby conveys to the Government, as represented by the Secretary of

*Use bracketed matter as appropriate.

*The frequency, date, and length of reporting periods should be selected as appropriate to the particular circumstances of the contract.

_____, the entire right, title, and interest in and to the following patents (and applications for patent), in and to the inventions thereof, and in and to all claims and demands whatsoever for infringement thereof heretofore accrued, the same to be held and enjoyed by the Government through its duly appointed representatives to the full end of the term of said patents (and to the full end of the terms of all patents which may be granted upon said applications for patent, or upon any division, continuation-in-part or continuation thereof):

U.S. Patent No. _____
Date _____
Name of Inventor _____
U.S. Application Serial No. _____
Filing Date _____
Name of Inventor _____

together with corresponding foreign patents and applications for patent insofar as the Contractor has the right to assign the same.

(End of clause)

252.227–7012 Patent license and release contract.

As prescribed at 227.7012, insert the following clause in patent releases, license agreements, and assignments:

_____
(Contract No.)

PATENT LICENSE AND RELEASE CONTRACT
(SEP 1999)

This CONTRACT is effective as of the ____ day of [month, year], between the UNITED STATES OF AMERICA (hereinafter called the Government), and _____ (hereinafter called the Contractor), (a corporation organized and existing under the laws of the State of _____), (a partnership consisting of _____), (an individual trading as _____), of the City of _____, in the State of _____.

Whereas, the Contractor warrants that it has the right to grant the within license and release, and the Government desires to procure the same, and

Whereas, this contract is authorized by law, including 10 U.S.C. 2386.

Now Therefore, in consideration of the grant, release and agreements hereinafter recited, the parties have agreed as follows:

Article 1. License Grant.*

(Insert the clause at 252.227–7004 for a paid up license, or the clause at 252.227–7006 for a license on a running royalty basis.)

Article 2. License Term.*

(Insert the appropriate alternative clause at 252.227–7005 for a paid up license, or the clause at 252.227–7007 for a license on a running royalty basis.)

Article 3. Release of Past Infringement.

(Insert the clause at 252.227–7001.)

Article 4. Non-Estoppel.

(Insert the clause at 252.227–7000.)

Article 5. Payment.

The Contractor shall be paid the sum of _____ Dollars ($_____) in full compensation for the rights herein granted and agreed to be granted. (For a license on a running royalty basis, insert the clause at 252.227–7006 in accordance with the instructions therein, and also the clause as specified at 252.227–7002 and 252.227–7009 and 252.227–7010.)

Article 6. Covenant Against Contingent Fees.

(Insert the clause at FAR 52.203–5.)

Article 7. Assignment of Claims.

(Insert the clause at FAR 52.232–23.)

Article 8. Gratuities.

(Insert the clause at FAR 52.203–3.)

Article 9. Disputes.

(Insert the clause at FAR 52.233–1.)

Article 10. Successors and Assignees.

This Agreement shall be binding upon the Contractor, its successors** and assignees, but nothing contained in this Article shall authorize an assignment of any claim against the Government otherwise than as permitted by law.

In Witness Whereof, the parties hereto have executed this contract.

THE UNITED STATES OF AMERICA
By _____
Date _____
(Signature and Title of
Contractor Representative) _____
By _____
Date _____

*If only a release is procured, delete this article; if an assignment is procured, use the clause at 252.227–7011.

**When the Contractor is an individual, change ''successors'' to ''heirs''; if a partnership, modify appropriately.

(End of clause)

[64 FR 49685, Sept. 14, 1999]

252.227–7013 Rights in technical data—Noncommercial items.

As prescribed in 227.7103–6(a), use the following clause:

RIGHTS IN TECHNICAL DATA—NONCOMMERCIAL ITEMS (NOV 1995)

(a) *Definitions.* As used in this clause:

(1) *Computer data base* means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) *Computer program* means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(6) *Developed* means that an item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered ''developed,'' the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component, or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(7) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(8) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(9) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(10) *Form, fit, and function data* means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(11) *Government purpose* means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations, or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data for commercial purposes or authorize others to do so.

(12) *Government purpose rights* means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and

(ii) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.

(13) *Limited rights* means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or authorize the technical data to be used by another party, except that the Government may reproduce, release or disclose such data or authorize the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes;

(iii) Subject to a prohibition on the further reproduction, release, disclosure, or use of the technical data; and

(iv) The contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(14) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer

software or data incidental to contract administration, such as financial and/or management information.

(15) *Unlimited rights* means rights to use, modify, reproduce, perform, display, release, or disclose technical data in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in technical data.* The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in technical data other than computer software documentation (see the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract for rights in computer software documentation):

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data that are—

(i) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(ii) Studies, analyses, test data, or similar data produced for this contract, when the study, analysis, test, or similar work was specified as an element of performance;

(iii) 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;

(iv) Form, fit, and function data;

(v) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(vi) Corrections or changes to technical data furnished to the Contractor by the Government;

(vii) Otherwise 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 technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(viii) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(ix) Data furnished to the Government, under this or any other Government contract or subcontract thereunder, with—

(A) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such data for commercial purposes has expired.

(2) *Government purpose rights.* (i) The Government shall have government purpose rights for a five-year period, or such other period as may be negotiated, in technical data—

(A) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights in such data as provided in paragraphs (b)(ii) and (b)(iv) through (b)(ix) of this clause; or

(B) 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.

(ii) The five-year period, or such other period as may have been negotiated, shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the items, components, or processes or creation of the data described in paragraph (b)(2)(i)(B) of this clause. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the technical data.

(iii) The Government shall not release or disclose technical data in which it has government purpose rights unless—

(A) Prior to release or disclosure, the intended recipient is subject to the non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS); or

(B) The recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(iv) The Contractor has the exclusive right, including the right to license others, to use technical data in which the Government has obtained government purpose rights under this contract for any commercial purpose during the time period specified in the government purpose rights legend prescribed in paragraph (f)(2) of this clause.

(3) *Limited rights.* (i) Except as provided in paragraphs (b)(1)(ii) and (b)(1)(iv) through (b)(1)(ix) of this clause, the Government shall have limited rights in technical data—

(A) Pertaining to items, components, or processes developed exclusively at private expense and marked with the limited rights legend prescribed in paragraph (f) of this clause; or

(B) 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.

(ii) The Government shall require a recipient of limited rights data for emergency repair or overhaul to destroy the data and all copies in its possession promptly following completion of the emergency repair/overhaul

and to notify the Contractor that the data have been destroyed.

(iii) The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data furnished to the Government with limited rights. However, if the Government desires to obtain additional rights in technical data in which it has limited rights, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the Contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract. The license shall enumerate the additional rights granted the Government in such data.

(4) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in technical data, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights than are enumerated in paragraph (a)(13) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Technical data that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data made in accordance with paragraph (a)(13) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the data and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data marked with restrictive legends.

(c) *Contractor rights in technical data.* All rights not granted to the Government are retained by the Contractor.

(d) *Third party copyrighted data.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted data in the technical data to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data of the appropriate scope set forth in paragraph (b) of this clause, and has affixed a statement of the license or licenses obtained on behalf of the Government and other persons to the data transmittal document.

(e) *Identification and delivery of data to be furnished with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, technical data that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure are identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any data with restrictive markings unless the data are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the data, in the following format, and signed by an official authorized to contractually obligate the Contractor: Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data.

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data should be restricted—

Technical data to be furnished with restrictions [1]	Basis for assertion [2]	Asserted rights category [3]	Name of person asserting restrictions [4]
(LIST)	(LIST)	(LIST)	(LIST)

[1] If the assertion is applicable to items, components or processes developed at private expense, identify both the data and each such item, component, or process.

[2] Generally, the development of an item, component, or process at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data pertaining to such items, components, or processes. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

[3] Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited or government purpose rights under this or a prior contract, or specifically negotiated licenses).

[4] Corporation, individual, or other person, as appropriate.

Date _____

Printed Name and Title _____

_____

Signature _____

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Restrictive Markings on Technical Data clause of this contract.

(f) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data to be delivered under this contract by marking the deliverable data subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract: the government purpose rights legend at paragraph (f)(2) of this clause; the limited rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all technical data that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. Reproductions of technical data or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings.* Data delivered or otherwise furnished to the Government purpose rights shall be marked as follows:

Government Purpose Rights

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Limited rights markings.* Data delivered or otherwise furnished to the Government with limited rights shall be marked with the following legend:

Limited Rights

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(3) of the Rights in Technical Data—Noncommercial Items clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings.* (i) Data in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these data are restricted by Contract No. _____ (Insert contract number) _____, License No. _____ (Insert license identifier) _____. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data deliverable under this contract, and those restrictions are still applicable, the Contractor may mark such data with the appropriate restrictive legend for which the data qualified

under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver technical data with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this contract.

(h) *Removal of unjustified and nonconforming markings*—(1) *Unjustified technical data markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data furnished or to be furnished under this contract are contained in the Validation of Restrictive Markings on Technical Data clause of this contract. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures in the Validation of Restrictive Markings on Technical Data clause of this contract, a restrictive marking is determined to be unjustified.

(2) *Nonconforming technical data markings.* A nonconforming marking is a marking placed on technical data delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking and the Contractor fails to remove or correct such marking within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming marking.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data.* (1) The Contractor shall not charge to this contract any cost, including, but not limited to, license fees, royalties, or similar charges, for rights in technical data to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier technical data, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data will be delivered.

(k) *Applicability to subcontractors or suppliers.* (1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes of paragraph (e) of this clause are recognized and protected.

(2) Whenever any technical data for noncommercial items is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher-tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher-tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such data directly to the Government, rather than through a higher-tier contractor, subcontractor, or supplier.

(4) The Contractor and higher-tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data as an excuse for failing to satisfy its contractual obligations to the Government.

(End of clause)

Alternate I (JUN 1995). As prescribed in 227.7103–6(b), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.* (1) This paragraph only applies to technical data in which the Government has obtained unlimited rights or a license to make an unrestricted release of technical data.

(2) The Government shall not publish a deliverable technical data item or items identified in this contract as being subject to paragraph (l) of this clause or authorize others to publish such data on its behalf if, prior to publication for sale by the Government and within twenty-four (24) months following the date specified in this contract for delivery of such data or the removal of any national security or export control restrictions, whichever is later, the Contractor publishes that item or items for sale and promptly notifies the Contracting Officer of such publication(s). Any such publication shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the data are reasonably available to the public for purchase.

[60 FR 33490, June 28, 1995, as amended at 60 FR 61602, Nov. 30, 1995]

252.227–7014 Rights in noncommercial computer software and noncommercial computer software documentation.

As prescribed in 227.7203–6(a)(1), use the following clause.

RIGHTS IN NONCOMMERCIAL COMPUTER SOFTWARE AND NONCOMMERCIAL COMPUTER SOFTWARE DOCUMENTATION (JUN 1995)

(a) *Definitions.* As used in this clause:

(1) *Commercial computer software* means software developed or regularly used for nongovernmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(iv) Satisfies a criterion expressed in paragraph (a)(1) (i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract.

(2) *Computer database* means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) *Computer program* means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(6) *Developed* means that—

(i) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(ii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(iii) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(7) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(8) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(9) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(10) *Government purpose* means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation for commercial purposes or authorize others to do so.

(11) *Government purpose rights* means the rights to—

(i) Use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation within the Government without restriction; and

(ii) Release or disclose computer software or computer software documentation outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose the software or documentation for United States government purposes.

(12) *Minor modification* means a modification that does not significantly alter the nongovernmental function or purpose of the software or is of the type customarily provided in the commercial marketplace.

(13) *Noncommercial computer software* means software that does not qualify as commercial computer software under paragraph (a)(1) of this clause.

(14) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in paragraphs (a)(14) (i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(14) (ii), (v) and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the use and non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS) or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(14)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(14)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the use and non-disclosure agreement at DFARS 227.7103–7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(14)(iv) of this clause, for any other purpose.

(15) *Unlimited rights* means rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in computer software or computer software documentation*. The Contractor grants or shall obtain for the Government the following royalty free, world-wide, nonexclusive, irrevocable license rights in noncommercial computer software or computer software documentation. All rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights*. The Government shall have unlimited rights in—

(i) Computer software developed exclusively with Government funds;

(ii) Computer software documentation required to be delivered under this contract;

(iii) Corrections or changes to computer software or computer software documentation furnished to the Contractor by the Government;

(iv) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the Contractor or subcontractor without restriction 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;

(v) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or

(vi) Computer software or computer software documentation furnished to the Government, under this or any other Government contract or subcontract thereunder with—

(A) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(B) Government purpose rights and the Contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(2) *Government purpose rights.* (i) Except as provided in paragraph (b)(1) of this clause, the Government shall have government purpose rights in computer software development with mixed funding.

(ii) Government purpose rights shall remain in effect for a period of five years unless a different period has been negotiated. Upon expiration of the five-year or other negotiated period, the Government shall have unlimited rights in the computer software or computer software documentation. The government purpose rights period shall commence upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software.

(iii) The Government shall not release or disclose computer software in which it has government purpose rights to any other person unless—

(A) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at DFARS 227.7103–7; or

(B) The recipient is a Government contractor receiving access to the software or documentation for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends.

(3) *Restricted rights.* (i) The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise provided to the Government under this contract that were developed exclusively at private expense.

(ii) The Contractor, its subcontractors, or suppliers are not required to provide the Government additional rights in noncommercial computer software delivered or otherwise provided to the Government with restricted rights. However, if the Government desires to obtain additional rights in such software, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All noncommercial computer software in which the Contractor has granted the Government additional rights shall be listed or described in a license agreement made part of the contract (see paragraph (b)(4) of this clause). The license shall enumerate the additional rights granted the Government.

(4) *Specifically negotiated license rights.* (i) The standard license rights granted to the Government under paragraphs (b)(1) through (b)(3) of this clause, including the period during which the Government shall have government purpose rights in computer software, may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in computer software than are enumerated in paragraph (a)(14) of this clause or lesser rights in computer software documentation than are enumerated in paragraph (a)(13) of the Rights in Technical Data—Noncommercial Items clause of this contract.

(ii) Any rights so negotiated shall be identified in a license agreement made part of this contract.

(5) *Prior government rights.* Computer software or computer software documentation that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired or no longer apply.

(6) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of computer software made in accordance with paragraph (a)(14) or (b)(2)(iii) of this clause, in accordance with the terms of a license negotiated under paragraph (b)(4) of this clause, or by others to whom the recipient has released or disclosed the software, and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed

Contractor software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative computer software or computer software documentation.

(d) *Third party copyrighted computer software or computer software documentation.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted computer software or computer software documentation in the software or documentation to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable software or documentation of the appropriate scope set forth in paragraph (b) of this clause, and prior to delivery of such—

(1) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer; or

(2) Computer software documentation, has affixed to the transmittal document a statement of the license rights obtained.

(e) *Identification and delivery of computer software and computer software documentation to be furnished with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any software with restrictive markings unless the software is listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled data for delivery of the software, in the following format, and signed by an official authorized to contractually obligate the Contractor: Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Computer Software.

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following computer software should be restricted:

Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)	(LIST)	(LIST)	(LIST)

*Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose computer software.

**Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

***Enter asserted rights category (e.g., restricted or government purpose rights in computer software, government purpose license rights from a prior contract, rights in SBIR software generated under another contract, or specifically negotiated licenses).

****Corporation, individual, or other person, as appropriate.

Date _____

Printed Name and Title _____

_____

Signature _____

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertion, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software clause of this contract.

(f) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software by marking the deliverable software or documentation subject to restriction. Except as provided in paragraph (f)(5) of this clause, only the following legends are authorized under this contract; the government purpose rights legend at paragraph (f)(2) of this clause; the restricted rights legend at paragraph (f)(3) of this clause; or the special license rights legend at paragraph (f)(4) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend on all computer software that qualify for such markings. The authorized legends shall be placed on the transmitted document or software storage container and each page, or portions thereof, of printed material containing computer software for which restrictions are asserted. Computer software transmitted directly from one computer or computer terminal to

another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of computer software or any portions thereof subject to asserted restrictions, shall also reproduce the asserted restrictions.

(2) *Government purpose rights markings.* Computer software delivered or otherwise furnished to the Government with government purpose rights shall be marked as follows:

GOVERNMENT PURPOSE RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

Expiration Date _____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(2) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of the software or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(3) *Restricted rights markings.* Software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

RESTRICTED RIGHTS

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such software must promptly notify the above named Contractor.

(End of legend)

(4) *Special license rights markings.* (i) Computer software or computer documentation in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

SPECIAL LICENSE RIGHTS

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by Contract No. _____(Insert contract number)_____, License No._____(Insert license identifier)_____. Any reproduction of computer software, computer software documentation, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(5) of this clause).

(5) *Pre-existing markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, release, perform, display, or disclose computer software or computer software documentation and those restrictions are still applicable, the Contractor may mark such software or documentation with the appropriate restrictive legend for which the software qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the Contractor and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on computer software or computer software documentation delivered under this contract.

(h) *Removal of unjustified and nonconforming markings*—(1) *Unjustified computer software or computer software documentation markings.* The rights and obligations of the parties regarding the validation of restrictive markings on computer software or computer software documentation furnished or to be furnished under this contract are contained in the Validation of Asserted Restrictions—

Computer Software and the Validation of Restrictive Markings on Technical Data clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming computer software or computer software documentation markings.* A nonconforming marking is a marking placed on computer software or computer software documentation delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Asserted Restrictions—Computer Software or the Validation of Restrictive Markings on Technical Data clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within sixty (60) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in computer software or computer software documentation.* (1) The Contractor shall not charge to this contract any cost, including but not limited to license fees, royalties, or similar charges, for rights in computer software or computer software documentation to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the software or documentation; or

(ii) The software or documentation are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor or supplier computer software or computer software documentation, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the software or documentation will be delivered.

(k) *Applicability to subcontractors or suppliers.* (1) Whenever any noncommercial computer software or computer software documentation is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in its subcontracts or other contractual instruments, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's computer software or computer software documentation.

(2) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in computer software or computer software documentation from their subcontractors or suppliers.

(3) The Contractor shall ensure that subcontractor or supplier rights are recognized and protected in the identification, assertion, and delivery processes required by paragraph (e) of this clause.

(4) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in computer software or computer software documentation as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

Alternate I (JUN 1995). As prescribed in 227.7203–6(a)(2), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.* (1) This paragraph only applies to computer software or computer software documentation in which the Government has obtained unlimited rights or a license to make an unrestricted release of the software or documentation.

(2) The Government shall not publish a deliverable item or items of computer software or computer software documentation identified in this contract as being subject to paragraph (l) of this clause or authorize others to publish such software or documentation on its behalf if, prior to publication for sale by the Government and within twenty-four (24) months following the date specified in this contract for delivery of such software or documentation, or the removal of any national security or export control restrictions, whichever is later, the Contractor publishes that item or items for sale and promptly notifies the Contracting Officer of such publication(s). Any such publication shall include a notice identifying the number of this contract and the Government's rights in the published software or documentation.

(3) This limitation on the Government's rights to publish for sale shall continue as long as the software or documentation are reasonably available to the public for purchase.

[60 FR 33493, June 28, 1995]

252.227–7015 Technical data—Commercial items.

As prescribed in 227.7102–3, use the following clause:

TECHNICAL DATA—COMMERCIAL ITEMS (NOV 1995)

(a) *Definitions.* As used in this clause:

(1) *Commercial item* does not include commercial computer software.

(2) *Form, fit, and function data* means technical data that describes the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(3) The term *item* includes components or processes.

(4) *Technical data* means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(b) *License.* (1) The Government shall have the unrestricted right to use, modify, reproduce, release, perform, display, or disclose technical data, and to permit others to do so, that—

(i) Have been provided to the Government or others without restrictions on use, modification, reproduction, release, or further disclosure 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;

(ii) Are form, fit, and function data;

(iii) Are a correction or change to technical data furnished to the Contractor by the Government;

(iv) Are necessary for operation, maintenance, installation, or training (other than detailed manufacturing or process data); or

(v) Have been provided to the Government under a prior contract or licensing agreement through which the Government has acquired the rights to use, modify, reproduce, release, perform, display, or disclose the data without restrictions.

(2) Except as provided in paragraph (b)(1) of this clause, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only. The Government shall not—

(i) Use the technical data to manufacture additional quantities of the commercial items; or

(ii) Release, perform, display, disclose, or authorize use of the technical data outside the Government without the Contractor's written permission unless a release, disclosure or permitted use is necessary for emergency repair or overhaul of the commercial items furnished under this contract.

(c) *Additional license rights.* The Contractor, its subcontractors, and suppliers are not required to provide the Government additional rights to use, modify, reproduce, release, perform, display, or disclose technical data. However, if the Government desires to obtain additional rights in technical data, the Contractor agrees to promptly enter into negotiations with the Contracting Officer to determine whether there are acceptable terms for transferring such rights. All technical data in which the Contractor has granted the Government additional rights shall be listed or described in a special license agreement made part of this contract. The license shall enumerate the additional rights granted the Government in such data.

(d) *Release from liability.* The Contractor agrees that the Government, and other persons to whom the Government may have released or disclosed technical data delivered or otherwise furnished under this contract, shall have no liability for any release or disclosure of technical data that are not marked to indicate that such data are licensed data subject to use, modification, reproduction, release, performance, display, or disclosure restrictions.

(End of clause)

[60 FR 33497, June 28, 1995, as amended at 60 FR 61602, Nov. 30, 1995]

252.227–7016 Rights in bid or proposal information.

As prescribed in 227.7103–6(e)(1), 227.7104(e)(1), or 227.7203–6(b), use the following clause:

RIGHTS IN BID OR PROPOSAL INFORMATION (JUN 1995)

(a) *Definitions.* (1) For contracts that require the delivery of technical data, the terms ''technical data'' and ''computer software'' are defined in the Rights in Technical Data—Noncommercial Item clause of this contract or, if this is a contract awarded under the Small Business Innovative Research Program, the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause of this contract.

(2) For contracts that do not require the delivery of technical data, the term ''computer software'' is defined in the Rights in Noncommercial Computer and Noncommercial Computer Software Documentation clause of this contract or, if this is a contract awarded under the Small Business Innovative Research Program, the Rights in

Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause of this contract.

(b) *Government rights to contract award.* By submission of its offer, the Offeror agrees that the Government—

(1) May reproduce the bid or proposal, or any portions thereof, to the extent necessary to evaluate the offer.

(2) Except as provided in paragraph (d) of this clause, shall use information contained in the bid or proposal only for evaluational purposes and shall not disclose, directly or indirectly, such information to any person including potential evaluators, unless that person has been authorized by the head of the agency, his or her designee, or the Contracting Officer to receive such information.

(c) *Government rights subsequent to contract award.* The Contractor agrees—

(1) Except as provided in paragraphs (c)((2), (d), and (e) of this clause, the Government shall have the rights to use, modify, reproduce, release, perform, display, or disclose information contained in the Contractor's bid or proposal within the Government. The Government shall not release, perform, display, or disclose such information outside the Government without the Contractor's written permission.

(2) The Government's right to use, modify, reproduce, release, perform, display, or disclose information that is technical data or computer software required to be delivered under this contract are determined by the Rights in Technical Data—Noncommercial Items, Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, or Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause(s) of this contract.

(d) *Government-furnished information.* The Government's rights with respect to technical data or computer software contained in the Contractor's bid or proposal that were provided to the Contractor by the Government are subject only to restrictions on use, modification, reproduction, release, performance, display, or disclosure, if any, imposed by the developer or licensor of such data or software.

(e) *Information available without restrictions.* The Government's rights to use, modify, reproduce, release, perform, display, or, disclose information contained in a bid or proposal, including technical data or computer software, and to permit others to do so, shall not be restricted in any manner if such information has been released or disclosed to the Government or to other persons without restrictions other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the information to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(f) *Flowdown.* Contractor shall include this clause in all subcontracts or similar contractual instruments and require its subcontractors or suppliers to do so without alteration, except to identify the parties.

(End of clause)

[60 FR 33498, June 28, 1995]

252.227–7017 Identification and assertion of use, release, or disclosure restrictions.

As prescribed in 227.7103–3(b), 227.7104(e)(2), or 227.7203–3(a), use the following provision:

IDENTIFICATION AND ASSERTION OF USE, RELEASE, OR DISCLOSURE RESTRICTIONS (JUN 1995)

(a) The terms used in this provision are defined in following clause or clauses contained in this solicitation—

(1) If a successful offeror will be required to deliver technical data, the Rights in Technical Data—Noncommercial Items clause, or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause.

(2) If a successful offeror will not be required to deliver technical data, the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause, or, if this solicitation contemplates a contract under the Small Business Innovative Research Program, the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause.

(b) The identification and assertion requirements in this provision apply only to technical data, including computer software documents, or computer software to be delivered with other than unlimited rights. For contracts to be awarded under the Small Business Innovative Research Program, the notification requirements do not apply to technical data or computer software that will be generated under the resulting contract. Notification and identification is not required for restrictions based solely on copyright.

(c) Offers submitted in response to this solicitation shall identify, to the extent known at the time an offer is submitted to the Government, the technical data or computer software that the Offeror, its subcontractors or suppliers, or potential subcontractors or suppliers, assert should be furnished to the Government with restrictions on use, release, or disclosure.

(d) The Offeror's assertions, including the assertions of its subcontractors or suppliers or potential subcontractors or suppliers shall be submitted as an attachment to its offer in the following format, dated and signed by an official authorized to contractually obligate the Offeror:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)

*For technical data (other than computer software documentation) pertaining to items, components, or processes developed at private expense, identify both the deliverable technical data and each such items, component, or process. For computer software or computer software documentation identify the software or documentation.

**Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions. For technical data, other than computer software documentation, development refers to development of the item, component, or process to which the data pertain. The Government's rights in computer software documentation generally may not be restricted. For computer software, development refers to the software. Indicate whether development was accomplished exclusively or partially at private expense. If development was not accomplished at private expense, or for computer software documentation, enter the specific basis for asserting restrictions.

***Enter asserted rights category (e.g., government purpose license rights from a prior contract, rights in SBIR data generated under another contract, limited, restricted, or government purpose rights under this or a prior contract, or specially negotiated licenses).

****Corporation, individual, or other person, as appropriate.

*****Enter "none" when all data or software will be submitted without restrictions.

Date _____

Printed Name and Title _____

_____

Signature _____

(End of identification and assertion)

(e) An offeror's failure to submit, complete, or sign the notification and identification required by paragraph (d) of this provision with its offer may render the offer ineligible for award.

(f) If the Offeror is awarded a contract, the assertions identified in paragraph (d) of this provision shall be listed in an attachment to that contract. Upon request by the Contracting Officer, the Offeror shall provide sufficient information to enable the Contracting Officer to evaluate any listed assertion.

(End of provision)

[60 FR 33498, June 28, 1994]

252.227–7018 Rights in noncommercial technical data and computer software—Small Business Innovation Research (SBIR) Program.

As prescribed in 227.7104(a), use the following clause:

RIGHTS IN NONCOMMERCIAL TECHNICAL DATA AND COMPUTER SOFTWARE—SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM (JUN 1995)

(a) *Definitions.* As used in this clause:

(1) *Commercial computer software* means software developed or regularly used for nongovernmental purposes which—

(i) Has been sold, leased, or licensed to the public;

(ii) Has been offered for sale, lease, or license to the public;

(iii) Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of this contract; or

(iv) Satisfies a criterion expressed in paragraph (a)(1)(i), (ii), or (iii) of this clause and would require only minor modification to meet the requirements of this contract.

(2) *Computer database* means a collection of recorded data in a form capable of being processed by a computer. The term does not include computer software.

(3) *Computer program* means a set of instructions, rules, or routines, recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(4) *Computer software* means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the software to be reproduced, re-created, or recompiled. Computer software does not include computer databases or computer software documentation.

(5) *Computer software documentation* means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of

the computer software or provide instructions for using the software.

(6) *Detailed manufacturing or process data* means technical data that describe the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(7) *Developed* means—

(i) (Applicable to technical data other than computer software documentation.) An item, component, or process, exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered ''developed,'' the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code;

(ii) A computer program has been successfully operated in a computer and tested to the extent sufficient to demonstrate to reasonable persons skilled in the art that the program can reasonably be expected to perform its intended purpose;

(iii) Computer software, other than computer programs, has been tested or analyzed to the extent sufficient to demonstrate to reasonable persons skilled in the art that the software can reasonably be expected to perform its intended purpose; or

(iv) Computer software documentation required to be delivered under a contract has been written, in any medium, in sufficient detail to comply with requirements under that contract.

(8) *Developed exclusively at private expense* means development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof.

(i) Private expense determinations should be made at the lowest practicable level.

(ii) Under fixed-price contracts, when total costs are greater than the firm-fixed-price or ceiling price of the contract, the additional development costs necessary to complete development shall not be considered when determining whether development was at government, private, or mixed expense.

(9) *Developed exclusively with government funds* means development was not accomplished exclusively or partially at private expense.

(10) *Developed with mixed funding* means development was accomplished partially with costs charged to indirect cost pools and/or costs not allocated to a government contract, and partially with costs charged directly to a government contract.

(11) *Form, fit, and function data* means technical data that describe the required overall physical, functional, and performance characteristics (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(12) *Generated* means technical data or computer software first created in the performance of this contract.

(13) *Government purpose* means any activity in which the United States Government is a party, including cooperative agreements with international or multi-national defense organizations or sales or transfers by the United States Government to foreign governments or international organizations. Government purposes include competitive procurement, but do not include the rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software for commercial purposes or authorize others to do so.

(14) *Limited rights* means the rights to use, modify, reproduce, release, perform, display, or disclose technical data, in whole or in part, within the Government. The Government may not, without the written permission of the party asserting limited rights, release or disclose the technical data outside the Government, use the technical data for manufacture, or permit the technical data to be used by another party, except that the Government may reproduce, release or disclose such data or permit the use or reproduction of the data by persons outside the Government if reproduction, release, disclosure, or use is—

(i) Necessary for emergency repair and overhaul; or

(ii) A release or disclosure of technical data (other than detailed manufacturing or process data) to, or use of such data by, a foreign government that is in the interest of the Government and is required for evaluational or informational purposes;

(iii) Subject to a prohibition on the further reproduction, release disclosure, or use of the technical data; and

(iv) The Contractor or subcontractor asserting the restriction is notified of such reproduction, release, disclosure, or use.

(15) *Minor modification* means a modification that does not significantly alter the nongovernmental function or purpose of computer software or is of the type customarily provided in the commercial marketplace.

(16) *Noncommercial computer software* means software that does not qualify as commercial

computer software under paragraph (a)(1) of this clause.

(17) *Restricted rights* apply only to noncommercial computer software and mean the Government's rights to—

(i) Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Transfer a computer program to another Government agency without the further permission of the Contractor if the transferor destroys all copies of the program and related computer software documentation in its possession and notifies the licensor of the transfer. Transferred programs remain subject to the provisions of this clause;

(iii) Make the minimum number of copies of the computer software required for safekeeping (archive), backup, or modification purposes;

(iv) Modify computer software provided that the Government may—

(A) Use the modified software only as provided in paragraphs (a)(17) (i) and (iii) of this clause; and

(B) Not release or disclose the modified software except as provided in paragraphs (a)(17) (ii), (v) and (vi) of this clause;

(v) Permit contractors or subcontractors performing service contracts (see 37.101 of the Federal Acquisition Regulation) in support of this or a related contract to use computer software to diagnose and correct deficiencies in a computer program, to modify computer software to enable a computer program to be combined with, adapted to, or merged with other computer programs or when necessary to respond to urgent tactical situations, provided that—

(A) The Government notifies the party which has granted restricted rights that a release or disclosure to particular contractors or subcontractors was made;

(B) Such contractors or subcontractors are subject to the non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS or are Government contractors receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(C) The Government shall not permit the recipient to decompile disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(17)(iv) of this clause, for any other purpose; and

(D) Such use is subject to the limitation in paragraph (a)(17)(i) of this clause; and

(vi) Permit contractors or subcontractors performing emergency repairs or overhaul of items or components of items, procured under this or a related contract to use the computer software when necessary to perform the repairs or overhaul, or to modify the computer software to reflect the repairs or overhaul made, provided that—

(A) The intended recipient is subject to the non-disclosure agreement at DFARS 227.7103–7 or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends; and

(B) The Government shall not permit the recipient to decompile, disassemble, or reverse engineer the software, or use software decompiled, disassembled, or reverse engineered by the Government pursuant to paragraph (a)(17)(iv) of this clause, for any other purpose.

(18) *SBIR data rights* means a royalty-free license for the Government, including its support service contractors, to use, modify, reproduce, release, perform, display, or disclose technical data or computer software generated and delivered under this contract for any United States Government purpose.

(19) *Technical data* means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(20) *Unlimited rights* means rights to use, modify, reproduce, release, perform, display, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or authorize others to do so.

(b) *Rights in technical data and computer software.* The Contractor grants or shall obtain for the Government the following royalty-free, world-wide, nonexclusive, irrevocable license rights in technical data or noncommercial computer software. All rights not granted to the Government are retained by the Contractor.

(1) *Unlimited rights.* The Government shall have unlimited rights in technical data, including computer software documentation, or computer software generated under this contract that are—

(i) Form, fit, and function data;

(ii) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(iii) Corrections or changes to Government-furnished technical data or computer software;

(iv) Otherwise publicly available or have been released or disclosed by the Contractor or a 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 technical data or computer software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(v) Data or software in which the Government has acquired previously unlimited rights under another Government contract or through a specific license; and

(vi) SBIR data upon expiration of the SBIR data rights period.

(2) *Limited rights.* The Government shall have limited rights in technical data, that were not generated under this contract, pertain to items, components or processes developed exclusively at private expense, and are marked, in accordance with the marking instructions in paragraph (f)(1) of this clause, with the legend prescribed in paragraph (f)(2) of this clause.

(3) *Restricted rights in computer software.* The Government shall have restricted rights in noncommercial computer software required to be delivered or otherwise furnished to the Government under this contract that were developed exclusively at private expense and were not generated under this contract.

(4) *SBIR data rights.* (i) Except for technical data, including computer software documentation, or computer software in which the Government has unlimited rights under paragraph (b)(1) of this clause, the Government shall have SBIR data rights in all technical data or computer software generated under this contract during the period commencing with contract award and ending upon the date five years after completion of the project from which such data were generated.

(ii) The Government may not release or disclose SBIR data to any person, other than its support services contractors, except—

(A) As expressly permitted by the Contractor;

(B) For evaluation purposes; or

(C) A release, disclosure, or use that is necessary for emergency repair or overhaul of items operated by the Government.

(iii) A release or disclosure of SBIR data to the Government's support services contractors, or a release or disclosure under paragraph (b)(4)(ii)(B) or (C) of this clause, may be made only if, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at DFARS 227.7103–7 or is a Government contractor receiving access to the technical data or software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use of Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) *Specifically negotiated license rights.* The standard license rights granted to the Government under paragraphs (b)(1) through (b)(4) of this clause may be modified by mutual agreement to provide such rights as the parties consider appropriate but shall not provide the Government lesser rights in technical data, including computer software documentation, than are enumerated in paragraph (a)(14) of this clause or lesser rights in computer software than are enumerated in paragraph (a)(17) of this clause. Any rights so negotiated shall be identified in a license agreement made part of this contract.

(6) *Prior government rights.* Technical data, including computer software documentation, or computer software that will be delivered, furnished, or otherwise provided to the Government under this contract, in which the Government has previously obtained rights shall be delivered, furnished, or provided with the pre-existing rights, unless—

(i) The parties have agreed otherwise; or

(ii) Any restrictions on the Government's rights to use, modify, release, perform, display, or disclose the technical data or computer software have expired or no longer apply.

(7) *Release from liability.* The Contractor agrees to release the Government from liability for any release or disclosure of technical data, computer software, or computer software documentation made in accordance with paragraph (a)(14), (a)(17), or (b)(4) of this clause, or in accordance with the terms of a license negotiated under paragraph (b)(5) of this clause, or by others to whom the recipient has released or disclosed the data, software, or documentation and to seek relief solely from the party who has improperly used, modified, reproduced, released, performed, displayed, or disclosed Contractor data or software marked with restrictive legends.

(c) *Rights in derivative computer software or computer software documentation.* The Government shall retain its rights in the unchanged portions of any computer software or computer software documentation delivered under this contract that the Contractor uses to prepare, or includes in, derivative software or documentation.

(d) *Third party copyrighted technical data and computer software.* The Contractor shall not, without the written approval of the Contracting Officer, incorporate any copyrighted technical data, including computer software documentation, or computer software in the data or software to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license or licenses in the deliverable data or software of the appropriate scope set forth in paragraph (b) of this clause and, prior to delivery of such—

(1) Technical data, has affixed to the transmittal document a statement of the license rights obtained; or

(2) Computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer.

(e) *Identification and delivery of technical data or computer software to be furnished with restrictions on use, release, or disclosure.* (1) This paragraph does not apply to technical data or computer software that were or will be generated under this contract or to restrictions based solely on copyright.

(2) Except as provided in paragraph (e)(3) of this clause, technical data or computer software that the Contractor asserts should be furnished to the Government with restrictions on use, release, or disclosure is identified in an attachment to this contract (the Attachment). The Contractor shall not deliver any technical data or computer software with restrictive markings unless the technical data or computer software are listed on the Attachment.

(3) In addition to the assertions made in the Attachment, other assertions may be identified after award when based on new information or inadvertent omissions unless the inadvertent omissions would have materially affected the source selection decision. Such identification and assertion shall be submitted to the Contracting Officer as soon as practicable prior to the scheduled date for delivery of the technical data or computer software, in the following format, and signed by an official authorized to contractually obligate the Contractor:

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software

The Contractor asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical data or computer software to be furnished with restrictions [1]	Basis for assertion [2]	Asserted rights category [3]	Name of person asserting restrictions [4]
(LIST)	(LIST)	(LIST)	(LIST)

[1] If the assertion is applicable to items, components, or processes developed at private expense, identify both the technical data and each such item, component, or process.

[2] Generally, development at private expense, either exclusively or partially, is the only basis for asserting restrictions on the Government's rights to use, release, or disclose technical data or computer software. Indicate whether development was exclusively or partially at private expense. If development was not at private expense, enter the specific reason for asserting that the Government's rights should be restricted.

[3] Enter asserted rights category (e.g., limited rights, restricted rights, government purpose rights, or government purpose license rights from a prior contract, SBIR data rights under another contract, or specifically negotiated licenses).

[4] Corporation, individual, or other person, as appropriate.

Date _____

Printed Name and Title _____

Signature _____

(End of identification and assertion)

(4) When requested by the Contracting Officer, the Contractor shall provide sufficient information to enable the Contracting Officer to evaluate the Contractor's assertions. The Contracting Officer reserves the right to add the Contractor's assertions to the Attachment and validate any listed assertions, at a later date, in accordance with the procedures of the Validation of Asserted Restrictions—Computer Software and/or Validation of Restrictive Markings on Technical Data clauses of this contract.

(f) *Marking requirements.* The Contractor, and its subcontractors or suppliers, may only assert restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software to be delivered under this contract by marking the deliverable data or software subject to restriction. Except as provided in paragraph (f)(6) of this clause, only the following markings are authorized under this contract: the limited rights legend at paragraph (f)(2) of this clause; the restricted rights legend at paragraph (f)(3) of this clause, the SBIR data rights legend at paragraph (f)(4) of this clause, or the special license rights legend at paragraphs (f)(5) of this clause; and/or a notice of copyright as prescribed under 17 U.S.C. 401 or 402.

(1) *General marking instructions.* The Contractor, or its subcontractors or suppliers, shall conspicuously and legibly mark the appropriate legend to all technical data and computer software that qualify for such markings. The authorized legends shall be placed on the transmittal document or storage container and, for printed material, each page of the printed material containing technical data or computer software for which restrictions are asserted. When only portions of a page of printed material are subject to the asserted restrictions, such portions shall be identified by circling, underscoring, with a note, or other appropriate identifier. Technical data or computer software transmitted directly from one computer or computer terminal to another shall contain a notice of asserted restrictions. However, instructions that interfere with or delay the operation of computer software in order to display a restrictive rights legend or other license statement at any time prior to or during use of the computer software, or otherwise cause such interference or delay, shall not be inserted in software that will or might be used in combat or situations that simulate combat conditions, unless the Contracting Officer's written permission to deliver such software has been obtained prior to delivery. Reproductions of technical data, computer software, or any portions thereof subject to asserted restrictions shall also reproduce the asserted restrictions.

(2) *Limited rights markings.* Technical data not generated under this contract that pertain to items, components, or processes developed exclusively at private expense and delivered or otherwise furnished with limited rights shall be marked with the following legend:

Limited Rights

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose these technical data are restricted by paragraph (b)(2) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. Any reproduction of technical data or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(3) *Restricted rights markings.* Computer software delivered or otherwise furnished to the Government with restricted rights shall be marked with the following legend:

Restricted Rights

Contract No. _____

Contractor Name _____

Contractor Address _____

_____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this software are restricted by paragraph (b)(3) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. Any reproduction of computer software or portions thereof marked with this legend must also reproduce the markings. Any person, other than the Government, who has been provided access to such data must promptly notify the above named Contractor.

(End of legend)

(4) *SBIR data rights markings:* Except for technical data or computer software in which the Government has acquired unlimited rights under paragraph (b)(1) of this clause, or negotiated special license rights as provided in paragraph (b)(5) of this clause, technical data or computer software generated under this contract shall be marked with the following legend. The Contractor shall enter the expiration date for the SBIR data rights period on the legend:

SBIR Data Rights

Contract No. _____

Contractor Name _____

Address _____

_____

Expiration of SBIR Data Rights Period ____

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(5) *Special license rights markings.* (i) Technical data or computer software in which the Government's rights stem from a specifically negotiated license shall be marked with the following legend:

Special License Rights

The Government's rights to use, modify, reproduce, release, perform, display, or disclose this technical data or computer software are restricted by Contract No. _____ (Insert contract number) _____, License No. _____ (Insert license identifier) _____. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

(End of legend)

(ii) For purposes of this clause, special licenses do not include government purpose license rights acquired under a prior contract (see paragraph (b)(6) of this clause).

(6) *Pre-existing data markings.* If the terms of a prior contract or license permitted the Contractor to restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software, and those restrictions are still applicable, the Contractor may mark such data or software with the appropriate restrictive legend for which the data or software qualified under the prior contract or license. The marking procedures in paragraph (f)(1) of this clause shall be followed.

(g) *Contractor procedures and records.* Throughout performance of this contract, the Contractor, and its subcontractors or suppliers that will deliver technical data or computer software with other than unlimited rights, shall—

(1) Have, maintain, and follow written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of this clause; and

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data or computer software delivered under this contract.

(h) *Removal of unjustified and nonconforming markings*—(1) *Unjustified markings.* The rights and obligations of the parties regarding the validation of restrictive markings on technical data or computer software furnished or to be furnished under this contract are contained in the Validation of Restrictive Markings on Technical Data and the Validation of Asserted Restrictions—Computer Software clauses of this contract, respectively. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may ignore or, at the Contractor's expense, correct or strike a marking if, in accordance with the applicable procedures of those clauses, a restrictive marking is determined to be unjustified.

(2) *Nonconforming markings.* A nonconforming marking is a marking placed on technical data or computer software delivered or otherwise furnished to the Government under this contract that is not in the format authorized by this contract. Correction of nonconforming markings is not subject to the Validation of Restrictive Markings on Technical Data or the Validation of Asserted Restrictions—Computer Software clause of this contract. If the Contracting Officer notifies the Contractor of a nonconforming marking or markings and the Contractor fails to remove or correct such markings within sixty (6)) days, the Government may ignore or, at the Contractor's expense, remove or correct any nonconforming markings.

(i) *Relation to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(j) *Limitation on charges for rights in technical data or computer software.* (1) The Contractor shall not charge to this contract any cost, including but not limited to, license fees, royalties, or similar charges, for rights in technical data or computer software to be delivered under this contract when—

(i) The Government has acquired, by any means, the same or greater rights in the data or software; or

(ii) The data are available to the public without restrictions.

(2) The limitation in paragraph (j)(1) of this clause—

(i) Includes costs charged by a subcontractor or supplier, at any tier, or costs incurred by the Contractor to acquire rights in subcontractor of supplier technical data or computer software, if the subcontractor or supplier has been paid for such rights under any other Government contract or under a license conveying the rights to the Government; and

(ii) Does not include the reasonable costs of reproducing, handling, or mailing the documents or other media in which the technical data or computer software will be delivered.

(k) *Applicability to subcontractors or suppliers.* (1) the Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and the identification, assertion, and delivery processes required by paragraph (e) of this clause are recognized and protected.

(2) Whenever any noncommercial technical data or computer software is to be obtained from a subcontractor or supplier for delivery to the Government under this contract, the Contractor shall use this same clause in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. The Contractor shall use the Technical Data—Commercial Items clause of this contract to obtain technical data pertaining to commercial items, components, or processes. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

(3) Technical data required to be delivered by a subcontractor or supplier shall normally be delivered to the next higher tier contractor, subcontractor, or supplier. However, when there is a requirement in the prime contract for technical data which may be submitted with other than unlimited rights by a subcontractor or supplier, then said subcontractor or supplier may fulfill its requirement by submitting such technical data directly to the Government, rather than through a higher tier contractor, subcontractor, or supplier.

(4) The Contractor and higher tier subcontractors or suppliers shall not use their power to award contracts as economic leverage to obtain rights in technical data or computer software from their subcontractors or suppliers.

(5) In no event shall the Contractor use its obligation to recognize and protect subcontractor or supplier rights in technical data or computer software as an excuse for failing to satisfy its contractual obligation to the Government.

(End of clause)

Alternate I (JUN 1995). As prescribed in 227.7104(d), add the following paragraph (l) to the basic clause:

(l) *Publication for sale.* (1) This paragraph applies only to technical data or computer software delivered to the Government with SBIR data rights.

(2) Upon expiration of the SBIR data rights period, the Government will not exercise its right to publish or authorize others to publish an item of technical data or computer software identified in this contract as being subject to paragraph (l) of this clause if the Contractor, prior to the expiration of the SBIR data rights period, or within two years following delivery of the data or software item, or within twenty-four months following the removal of any national security or export control restrictions, whichever is later, publishes such data or software item(s) and promptly notifies the Contracting Officer of such publication(s). Any such publication(s) shall include a notice identifying the number of this contract and the Government's rights in the published data.

(3) This limitation on the Government's right to publish for sale shall continue as long as the technical data or computer software are reasonably available to the public for purchase.

[60 FR 33499, June 28, 1995, as amended at 60 FR 61602, Nov. 30, 1995]

252.227–7019 Validation of asserted restrictions—Computer software.

As prescribed in 227.7104(e)(3) or 227.7203–6(c), use the following clause:

VALIDATION OF ASSERTED RESTRICTIONS—COMPUTER SOFTWARE (JUN 1995)

(a) *Definitions.* (1) As used in this clause, unless otherwise specifically indicated, the term ''Contractor'' means the Contractor and its subcontractors or suppliers.

(2) Other terms used in this clause are defined in the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract.

(b) *Justification.* The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a request for information under paragraph (d) or a challenge under paragraph (f) of this clause.

(c) *Direct contact with subcontractors or suppliers.* The Contractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors or suppliers at any tier who assert restrictions on the Government's right to use, modify, reproduce, release, perform, display, or disclose computer software. Neither this clause, nor any action taken by the Government under this clause, creates or implies privity of contract between the Government and the Contractor's subcontractors or suppliers.

(d) *Requests for information.* (1) The Contracting Officer may request the Contractor to provide sufficient information to enable the Contracting Officer to evaluate the Contractor's asserted restrictions. Such information shall be based upon the records required by this clause or other information reasonably available to the Contractor.

(2) Based upon the information provided, if the—

(i) Contractor agrees that an asserted restriction is not valid, the Contracting Officer may—

(A) Strike or correct the unjustified marking at the Contractor's expense; or

(B) Return the computer software to the Contractor for correction at the Contractor's expense. If the Contractor fails to correct or strike the unjustified restrictions and return the corrected software to the Contracting Officer within sixty (60) days following receipt of the software, the Contracting Officer may correct the strike the markings at the Contractor's expense.

(ii) Contracting Officer concludes that the asserted restriction is appropriate for this contract, the Contracting Officer shall so notify the Contractor in writing.

(3) The Contractor's failure to provide a timely response to a Contracting Officer's request for information or failure to provide sufficient information to enable the Contracting Officer to evaluate an asserted restriction shall constitute reasonable grounds for questioning the validity of an asserted restriction.

(e) *Government right to challenge and validate asserted restrictions.* (1) The Government, when there are reasonable grounds to do so, has the right to review and challenge the validity of any restrictions asserted by the Contractor on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software delivered, to be delivered under this contract, or otherwise provided to the Government in the performance of this contract. Except for software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions, the Government may exercise this right only within three

years after the date(s) the software is delivered or otherwise furnished to the Government, or three years following final payment under this contract, whichever is later.

(2) The absence of a challenge to an asserted restriction shall not constitute validation under this clause. 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) *Challenge procedures.* (1) A challenge must be in writing and shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require the Contractor to respond within sixty (60) days;

(iii) Require the Contractor to provide justification for the assertion based upon records kept in accordance with paragraph (b) of this clause and such other documentation that are reasonably available to the Contractor, in sufficient detail to enable the Contracting Officer to determine the validity of the asserted restrictions; and

(iv) State that a Contracting Officer's final decision, during the three-year period preceding this challenge, or action of a court of competent jurisdiction or Board of Contract Appeals that sustained the validity of an identical assertion made by the Contractor (or a licensee) shall serve as justification for the asserted restriction.

(2) The Contracting Officer shall extend the time for response if the Contractor submits a written request showing the need for additional time to prepare a response.

(3) The Contracting Officer may request additional supporting documentation if, in the Contracting Officer's opinion, the Contractor's explanation does not provide sufficient evidence to justify the validity of the asserted restrictions. The Contractor agrees to promptly respond to the Contracting Officer's request for additional supporting documentation.

(4) Notwithstanding challenge by the Contracting Officer, the parties may agree on the disposition of an asserted restriction at any time prior to a Contracting Officer's final decision or, if the Contractor has appealed that decision, filed suit, or provided notice of an intent to file suit, at any time prior to a decision by a court of competent jurisdiction or Board of Contract Appeals.

(5) If the Contractor fails to respond to the Contracting Officer's request for information or additional information under paragraph (f)(1) of this clause, the Contracting Officer shall issue a final decision, in accordance with the Disputes clause of this contract, pertaining to the validity of the asserted restriction.

(6) If the Contracting Officer, after reviewing the written explanation furnished pursuant to paragraph (f)(1) of this clause, or any other available information pertaining to the validity of an asserted restriction, determines that the asserted restriction has—

(i) Not been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this contract, denying the validity of the asserted restriction; or

(ii) Been justified, the Contracting Officer shall issue promptly a final decision, in accordance with the Disputes clause of this contract, validating the asserted restriction.

(7) A Contractor receiving challenges to the same asserted restriction(s) from more than one Contracting Officer shall notify each Contracting Officer of the other challenges. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer who initiated the first in time unanswered challenge, after consultation with the other Contracting Officers who have challenged the restrictions and the Contractor, shall formulate and distribute a schedule that provides the contractor a reasonable opportunity for responding to each challenge.

(g) *Contractor appeal—Government obligation.* (1) The Government agrees that, notwithstanding a Contracting Officer's final decision denying the validity of an asserted restriction and except as provided in paragraph (g)(3) of this clause, it will honor the asserted restriction—

(i) For a period of ninety (90) days from the date of the Contracting Officer's final decision to allow the Contractor to appeal to the appropriate Board of Contract Appeals or to file suit in an appropriate court;

(ii) For a period of one year from the date of the Contracting Officer's final decision if, within the first ninety (90) days following the Contracting Officer's final decision, the Contractor has provided notice of an intent to file suit in an appropriate court; or

(iii) Until final disposition by the appropriate Board of Contract Appeals or court of competent jurisdiction, if the Contractor has: (A) appealed to the Board of Contract Appeals or filed suit an appropriate court within ninety (90) days; or (B) submitted, within ninety (90) days, a notice of intent to file suit in an appropriate court and filed suit within one year.

(2) The Contractor agrees that the Government may strike, correct, or ignore the restrictive markings if the Contractor fails to—

(i) Appeal to a Board of Contract Appeals within ninety (90) days from the date of the Contracting Officer's final decision;

(ii) File suit in an appropriate court within ninety (90) days from such date; or

(iii) File suit within one year after the date of the Contracting Officer's final decision if the Contractor had provided notice of

intent to file suit within ninety (90) days following the date of the Contracting Officer's final decision.

(3) The agency head, on a nondelegable basis, may determine that urgent or compelling circumstances do not permit awaiting the filing of suit in an appropriate court, or the rendering of a decision by a court of competent jurisdiction or Board of Contract Appeals. In that event, the agency head shall notify the Contractor of the urgent or compelling circumstances. Notwithstanding paragraph (g)(1) of this clause, the Contractor agrees that the agency may use, modify, reproduce, release, perform, display, or disclose computer software marked with (i) government purpose legends for any purpose, and authorize others to do so; or (ii) restricted or special license rights for government purposes only. The Government agrees not to release or disclose such software unless, prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS), or is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at DFARS 252.227–7025, Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends. The agency head's determination may be made at any time after the date of the Contracting Officer's final decision and shall not affect the Contractor's right to damages against the United States, or other relief provided by law, if its asserted restrictions are ultimately upheld.

(h) *Final disposition of appeal or suit.* If the Contractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is:

(1) Sustained—

(i) Any restrictive marking on such computer software shall be struck or corrected at the contractor's expense or ignored; and

(ii) If the asserted restriction is found not to be substantially justified, the Contractor shall be liable to the Government for payment of the cost to the Government of reviewing the asserted restriction and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the restriction, unless special circumstances would make such payment unjust.

(2) Not sustained—

(i) The Government shall be bound by the asserted restriction; and

(ii) If the challenge by the Government is found not to have been made in good faith, the Government shall be liable to the Contractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor in defending the restriction.

(i) *Flowdown.* The Contractor shall insert this clause in all contracts, purchase orders, and other similar instruments with its subcontractors or suppliers, at any tier, who will be furnishing computer software to the Government in the performance of this contract. The clause may not be altered other than to identify the appropriate parties.

(End of clause)

[60 FR 33503, June 28, 1995]

252.227–7020 Rights in special works.

As prescribed in 227.7105–3, 227.7106(a) or 227.7205(a), use the following clause:

RIGHTS IN SPECIAL WORKS (JUN 1995)

(a) *Applicability.* This clause applies to works first created, generated, or produced and required to be delivered under this contract.

(b) *Definitions.* As used in this clause:

(1) ''Computer data base'' means a collection of data recorded in a form capable of being processed by a computer. The term does not include computer software.

(2) ''Computer program'' means a set of instructions, rules, or routines recorded in a form that is capable of causing a computer to perform a specific operation or series of operations.

(3) ''Computer software'' means computer programs, source code, source code listings, object code listings, design details, algorithms, processes, flow charts, formulae and related material that would enable the software to be reproduced, recreated, or recompiled. Computer software does not include computer data bases or computer software documentation.

(4) ''Computer software documentation'' means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

(5) ''Unlimited rights'' means the rights to use, modify, reproduce, perform, display, release, or disclose a work in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

(6) The term ''works'' includes computer data bases, computer software, or computer software documentation; literary, musical, choreographic, or dramatic compositions; pantomimes; pictorial, graphic, or sculptural compositions; motion pictures and other audiovisual compositions; sound recordings in any medium; or, items of similar nature.

(c) *License rights.* (1) The Government shall have unlimited rights in works first produced, created, or generated and required to be delivered under this contract.

(2) When a work is first produced, created, or generated under this contract, and such work is required to be delivered under this contract, the Contractor shall assign copyright in those works to the Government. The Contractor, unless directed to the contrary by the Contracting Officer, shall place the following notice on such works: ''© (*Year date of delivery*) United States Government, as represented by the Secretary of (*department*). All rights reserved.''

For phonorecords, the ''©'' markings shall be replaced by a ''P''.

(3) The Contractor grants to the Government a royalty-free, world-wide, nonexclusive, irrevocable license to reproduce, prepare derivative works from, distribute, perform, or display, and to have or authorize others to do so, the Contractor's copyrighted works not first produced, created, or generated under this contract that have been incorporated into the works deliverable under this contract.

(d) *Third party copyrighted data*. The Contractor shall not incorporate, without the written approval of the Contracting Officer, any copyrighted works in the works to be delivered under this contract unless the Contractor is the copyright owner or has obtained for the Government the license rights necessary to perfect a license of the scope identified in paragraph (c)(3) of this clause and, prior to delivery of such works—

(1) Has affixed to the transmittal document a statement of the license rights obtained; or

(2) For computer software, has provided a statement of the license rights obtained in a form acceptable to the Contracting Officer.

(e) *Indemnification*. The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in such works.

(f) *Government-furnished information*. Paragraphs (d) and (e) of this clause are not applicable to information furnished to the Contractor by the Government and incorporated in the works delivered under this contract.

(End of clause)

[60 FR 33504, June 28, 1995]

252.227–7021 Rights in data—existing works.

As prescribed at 227.7105–2(a), use the following clause:

RIGHTS IN DATA—EXISTING WORKS (MAR 1979)

(a) The term *works* as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of a similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to distribute, perform publicly, and display publicly the works called for under this contract and (2) to authorize others to do so for Government purposes.

(c) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity arising out of the creation, delivery, or use, of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in same works.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33504, June 28, 1994]

252.227–7022 Government rights (unlimited).

As prescribed at 227.7107–1(a), use the following clause:

GOVERNMENT RIGHTS (UNLIMITED) (MAR 1979)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33504, June 28, 1994]

252.227–7023 Drawings and other data to become property of Government.

As prescribed at 227.7107–1(b), use the following clause:

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT (MAR 1979)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the ''person for whom the work was prepared'' for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b). With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7024 Notice and approval of restricted designs.

As prescribed at 227.7107–3, use the following clause:

NOTICE AND APPROVAL OF RESTRICTED DESIGNS (APR 1984)

In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment that are readily available through Government or competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Contractor shall not produce a design or specification that requires in this construction work the use of structures, products, materials, construction equipment, or processes that are known by the Contractor to be available only from a sole source. The Contractor shall promptly report any such design or specification to the Contracting Officer and give the reason why it is considered necessary to so restrict the design or specification.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7025 Limitations on the use or disclosure of government-furnished information marked with restrictive legends.

As prescribed in 227.7103–6(c), 227.7104(f)(1), or 227.7203–6(d), use the following clause:

LIMITATIONS ON THE USE OR DISCLOSURE OF GOVERNMENT-FURNISHED INFORMATION MARKED WITH RESTRICTIVE LEGENDS (JUN 1995)

(a)(1) For contracts requiring the delivery of technical data, the terms ''limited rights'' and ''Government purpose rights'' are defined in the Rights in Technical Data—Noncommercial Items clause of this contract.

(2) For contracts that do not require the delivery of technical data, the terms ''government purpose rights'' and ''restricted rights'' are defined in the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause of this contract.

(3) For Small Business Innovative Research program contracts, the terms ''limited rights'' and ''restricted rights'' are defined in the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovative Research (SBIR) Program clause of this contract.

(b) Technical data or computer software provided to the Contractor as Government furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *GFI marked with limited or restricted rights legends.* The Contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The Contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any person.

(2) *GFI marked with government purpose rights legends.* The Contractor shall use technical data or computer software received from the Government with government purpose rights legends for government purposes only. The Contractor shall not, without the express written permission of the party whose name appears in the restrictive legend, use, modify, reproduce, release, perform, or display such data or software for any commercial purpose or disclose such data or software to a person other than its

subcontractors, suppliers, or prospective subcontractors or suppliers, who require the data or software to submit offers for, or perform, contracts under this contract. Prior to disclosing the data or software, the Contractor shall require the persons to whom disclosure will be made to complete and sign the non-disclosure agreement at 227.7103–7 of the Defense Federal Acquisition Regulation Supplement (DFARS).

(3) *GFI marked with specially negotiated license rights legends.* The Contractor shall use, modify, reproduce, release, perform, or display technical data or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the non-disclosure agreement at DFARS 227.7103–7. The Contractor shall modify paragraph (1)(c) of the non-disclosure agreement to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(c) *Indemnification and creation of third party beneficiary rights.* The Contractor agrees—

(1) 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 technical data or computer software received from the Government with restrictive legends by the Contractor or any person to whom the Contractor has released or disclosed such data or software; and

(2) That the party whose name appears on the restrictive legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the Contractor, or any person to whom the Contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of technical data or computer software subject to restrictive legends.

(End of clause)

[60 FR 33505, June 28, 1995]

252.227–7026 Deferred delivery of technical data or computer software.

As prescribed at 227.7103–8(a), use the following clause:

DEFERRED DELIVERY OF TECHNICAL DATA OR COMPUTER SOFTWARE (APR 1988)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified in this contract as ''deferred delivery'' data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7027 Deferred ordering of technical data or computer software.

As prescribed at 227.7103–8(b), use the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (APR 1988)

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software generated in the performance of this contract or any subcontract hereunder. When the technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver the technical data of a subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use said data or computer software shall be pursuant to the ''Rights in Technical Data and Computer Software'' clause of this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7028 Technical data or computer software previously delivered to the government.

As prescribed in 227.7103–6(d), 227.7104(f)(2), or 227.7203–6(e), use the following provision:

TECHNICAL DATA OR COMPUTER SOFTWARE PREVIOUSLY DELIVERED TO THE GOVERNMENT (JUN 1995)

The Offeror shall attach to its offer an identification of all documents or other media incorporating technical data or computer software it intends to deliver under this contract with other than unlimited rights that are identical or substantially similar to documents or other media that the Offeror has produced for, delivered to, or is obligated to deliver to the Government under any contract or subcontract. The attachment shall identify—

(a) The contract number under which the data or software were produced;

(b) The contract number under which, and the name and address of the organization to whom, the data or software were most recently delivered or will be delivered; and

(c) Any limitations on the Government's rights to use or disclose the data or software, including, when applicable, identification of the earliest date the limitations expire.

(End of provision)

[60 FR 33505, June 28, 1995]

252.227–7029 [Reserved]

252.227–7030 Technical data—withholding of payment.

As prescribed at 227.7103–6(e)(2) or 227.7104(e)(4), use the following clause:

TECHNICAL DATA—WITHHOLDING OF PAYMENT (MAR 2000)

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not identified in the list described in the clause at 252.227–7013(e)(2) or 252.227–7018(e)(2) of this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995; 62 FR 34132, June 24, 1997; 65 FR 14398, Mar. 16, 2000]

252.227–7031 [Reserved]

252.227–7032 Rights in technical data and computer software (foreign).

As prescribed in 227.7103–17, use the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (FOREIGN) (JUN 1975)

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other governments, all technical data including reports, drawings and blueprints, and all computer software, specified to be delivered by the Contractor to the United States Government under this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7033 Rights in shop drawings.

As prescribed in 227.7107–(1)(c), use the following clause:

RIGHTS IN SHOP DRAWINGS (APR 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 33505, June 28, 1995]

252.227–7034 [Reserved]

252.227–7035—252.227–7036 [Reserved]

252.227–7037 Validation of restrictive markings on technical data.

As prescribed in 227.7102–3(c), 227.7103–6(e)(3), 227.7104(e)(5), or 227.7203–6(f), use the following clause:

VALIDATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (SEP 1999)

(a) *Definitions.* The terms used in this clause are defined in the Rights in Technical Data—Noncommercial Items clause of this contract.

(b) *Contracts for commercial items—presumption of development at private expense.* Under a contract for a commercial item, component, or process, the Department of Defense shall presume that a Contractor's asserted use or release restrictions are justified on the basis that the item, component, or process was developed exclusively at private expense. The Department shall not challenge such assertions unless information the Department provides demonstrates that the item, component, or process was not developed exclusively at private expense.

(c) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract. Except under contracts for commercial items, the Contractor or subcontractor shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (e) of this clause.

(d) *Prechallenge request for information.* (1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (d)(1) of this clause, or any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in paragraph (e) of this clause.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (d)(1) of this clause, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (e) of this clause.

(e) *Challenge.* (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall—

(i) State the specific grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction;

(iii) State that a DoD Contracting Officer's final decision, issued pursuant to paragraph (g) of this clause, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided; and

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (f) of this clause.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.), and shall be certified in the form prescribed at 33.207 of

the Federal Acquisition Regulation, regardless of dollar amount.

(4) A Contractor or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford the Contractor or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

(f) *Final decision when Contractor or subcontractor fails to respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice, other than a failure to respond under a contract for commercial items, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (e)(1)(ii) or (e)(2) of this clause. Following issuance of the final decision, the Contracting Officer will comply with the procedures in paragraphs (g)(2) (ii) through (iv) of this clause.

(g) *Final decision when Contractor or subcontractor responds.* (1) if the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause of this contract. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking of a period of ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (g)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the Contracting Officer within ninety (90) days from the issuance of the final decision under paragraph (g)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings, if the Contractor or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis,

following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, the Contractor or subcontractor agrees that the agency may authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(h) *Final disposition of appeal or suit.* (1) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained—

(i) The restrictive marking on the technical data shall be cancelled, corrected or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained—

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the Contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(i) *Duration of right to challenge.* The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the Contractor or subcontractor. During the period within three (3) years of final payment on a contract or within three (3) years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data—

(1) Is publicly available;

(2) Has been furnished to the United States without restriction; or

(3) Has been otherwise made available without restriction. Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes ''validation'' as addressed in 10 U.S.C. 2321.

(j) *Decision not to challenge.* A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute ''validation.''

(k) *Privity of contract.* The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates nor implies privity of contract between the Government and subcontractors.

(l) *Flowdown. The Contractor or subcontractor agrees to insert this clause in contractual instruments with its subcontractors or suppliers at any tier requiring the delivery of technical data, except contractual instruments for commercial items or commercial components.*

(End of clause)

[60 FR 33505, June 28, 1995, as amended at 60 FR 61602, Nov. 30, 1995; 64 FR 51077, Sept. 21, 1999; 69 FR 31912, June 8, 2004]

252.227–7038 Patent Rights—Ownership by the Contractor (Large Business).

As prescribed in 227.303(2), use the following clause:

PATENT RIGHTS—OWNERSHIP BY THE CONTRACTOR (LARGE BUSINESS) (DEC 2007)

(a) *Definitions.* As used in this clause—*Invention* means—

(1) Any invention or discovery that is or may be patentable or otherwise protectable under Title 35 of the United States Code; or

(2) Any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Made—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means—

(1) A university or other institution of higher education;

(2) An organization of the type described in the Internal Revenue Code at 26 U.S.C. 501(c)(3) and exempt from taxation under 26 U.S.C. 501(a); or

(3) Any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means—

(1)(i) To manufacture, in the case of a composition or product;

(ii) To practice, in the case of a process or method; or

(iii) To operate, in the case of a machine or system; and

(2) In each case, under such conditions as to establish that—

(i) The invention is being utilized; and

(ii) The benefits of the invention are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights*—(1) *Ownership.* The Contractor may elect to retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license-

(A) Extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part;

(B) Includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at the time of contract award; and

(C) Is transferable only with the approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The agency—

(A) May revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with 37 CFR Part 404 and agency licensing regulations;

(B) Will not revoke the license in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public; and

(C) May revoke or modify the license in any foreign country to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(iii) Before revoking or modifying the license, the agency—

(A) Will furnish the Contractor a written notice of its intention to revoke or modify the license; and

(B) Will allow the Contractor 30 days (or such other time as the funding agency may authorize for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified.

(iv) The Contractor has the right to appeal, in accordance with 37 CFR part 404 and agency regulations, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

(c) *Contractor's obligations.* (1) The Contractor shall—

(i) Disclose, in writing, each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters, or within 6 months after the Contractor first becomes aware that a subject invention has been made, whichever is earlier;

(ii) Include in the disclosure—

(A) The inventor(s) and the contract under which the invention was made;

(B) Sufficient technical detail to convey a clear understanding of the invention; and

(C) Any publication, on sale (i.e., sale or offer for sale), or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication; and

(iii) After submission of the disclosure, promptly notify the Contracting Officer of the acceptance of any manuscript describing the invention for publication and of any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer at the time of disclosure or within 8 months of disclosure, as to those countries (including the United States) in which the Contractor will retain ownership. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the agency may shorten the period of election of title to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall—

(i) File either a provisional or a nonprovisional patent application on an elected subject invention within 1 year after election, provided that in all cases the application is filed prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use;

(ii) File a nonprovisional application within 10 months of the filing of any provisional application; and

(iii) File patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date the Commissioner of Patents grants permission to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (2), and (3) of this clause. The Contracting Officer will normally grant the extension unless there is reason to believe the extension would prejudice the Government's interests.

(d) *Government's rights*— (1) *Ownership.* The Contractor shall assign to the agency, upon written request, title to any subject invention—

(i) If the Contractor elects not to retain title to a subject invention;

(ii) If the Contractor fails to disclose or elect the subject invention within the times specified in paragraph (c) of this clause and the agency requests title within 60 days after learning of the Contractor's failure to report or elect within the specified times;

(iii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause, provided that, if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor shall continue to retain ownership in that country; and

(iv) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.* (1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d)(1) of this clause and enable the Government to obtain patent protection for that subject invention in any country.

(2) The Contractor shall—

(i) Require, by written agreement, its employees, other than clerical and nontechnical employees, to—

(A) Disclose each subject invention promptly in writing to personnel identified as responsible for the administration of patent matters, so that the Contractor can comply with the disclosure provisions in paragraph (c) of this clause; and

(B) Provide the disclosure in the Contractor's format, which should require, as a minimum, the information required by paragraph (c)(1) of this clause;

(ii) Instruct its employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or statutory foreign bars; and

(iii) Execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions.

(3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor shall include, within the specification of any United States nonprovisional patent application and any patent issuing thereon covering a subject invention, the following statement: ''This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in this invention.''

(5) The Contractor shall—

(i) Establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters;

(ii) Include in these procedures the maintenance of—

(A) Laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions; and

(B) Records that show that the procedures for identifying and disclosing the inventions are followed; and

(iii) Upon request, furnish the Contracting Officer a description of these procedures for evaluation and for determination as to their effectiveness.

(6) The Contractor shall, when licensing a subject invention, arrange to—

(i) Avoid royalty charges on acquisitions involving Government funds, including funds derived through the Government's Military

Assistance Program or otherwise derived through the Government;

(ii) Refund any amounts received as royalty charges on the subject inventions in acquisitions for, or on behalf of, the Government; and

(iii) Provide for the refund in any instrument transferring rights in the invention to any party.

(7) The Contractor shall furnish to the Contracting Officer the following:

(i) Interim reports every 12 months (or any longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no subject inventions.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were no subject inventions, and listing all subcontracts at any tier containing a patent rights clause or stating that there were no subcontracts.

(8)(i) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying—

(A) The subcontractor;

(B) The applicable patent rights clause;

(C) The work to be performed under the subcontract; and

(D) The dates of award and estimated completion.

(ii) The Contractor shall furnish, upon request, a copy of the subcontract, and no more frequently than annually, a listing of the subcontracts that have been awarded.

(9) In the event of a refusal by a prospective subcontractor to accept one of the clauses specified in paragraph (l)(1) of this clause, the Contractor—

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for the refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with that subcontract without the written authorization of the Contracting Officer.

(10) The Contractor shall provide to the Contracting Officer, upon request, the following information for any subject invention for which the Contractor has retained ownership:

(i) Filing date.

(ii) Serial number and title.

(iii) A copy of any patent application (including an English-language version if filed in a language other than English).

(iv) Patent number and issue date.

(11) The Contractor shall furnish to the Government, upon request, an irrevocable power to inspect and make copies of any patent application file.

(f) *Reporting on utilization of subject inventions.* (1) The Contractor shall—

(i) Submit upon request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts in obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees;

(ii) Include in the reports information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other information as the agency may reasonably specify; and

(iii) Provide additional reports that the agency may request in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (h) of this clause.

(2) To the extent permitted by law, the agency shall not disclose the information provided under paragraph (f)(1) of this clause to persons outside the Government without the Contractor's permission, if the data or information is considered by the Contractor or its licensee or assignee to be ''privileged and confidential'' (see 5 U.S.C. 552(b)(4)) and is so marked.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the agency may waive the requirement for an exclusive license agreement upon a showing by the Contractor or its assignee that—

(1) Reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States; or

(2) Under the circumstances, domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), 37 CFR 401.6, and any supplemental regulations of the agency in effect on the date of contract award.

(i) *Other inventions.* Nothing contained in this clause shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(j) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract,

have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any inventions are subject inventions;

(ii) The Contractor has established procedures required by paragraph (e)(5) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Contractor invention that the Contracting Officer believes may be a subject invention, the Contractor shall be required to disclose the invention to the agency for a determination of ownership rights.

(3) Any examination of records under this paragraph (j) shall be subject to appropriate conditions to protect the confidentiality of the information involved.

(k) *Withholding of payment (this paragraph does not apply to subcontracts).* (1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of the contract, whichever is less, is set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(5) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (c)(1) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(7)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (e)(8) of this clause.

(2) The reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Government will not make final payment under this contract before the Contractor delivers to the Contracting Officer—

(i) All disclosures of subject inventions required by paragraph (c)(1) of this clause;

(ii) An acceptable final report pursuant to paragraph (e)(7)(ii) of this clause; and

(iii) All past due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized in paragraph (k)(1) of this clause. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government right.

(l) *Subcontracts.* (1) The Contractor—

(i) Shall include the substance of the Patent Rights-Ownership by the Contractor clause set forth at 52.227–11 of the Federal Acquisition Regulation (FAR), in all subcontracts for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization; and

(ii) Shall include the substance of this clause, including this paragraph (l), in all other subcontracts for experimental, developmental, or research work, unless a different patent rights clause is required by FAR 27.303.

(2) For subcontracts at any tier—

(i) The patents rights clause included in the subcontract shall retain all references to the Government and shall provide to the subcontractor all the rights and obligations provided to the Contractor in the clause. The Contractor shall not, as consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions; and

(ii) The Government, the Contractor, and the subcontractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Government with respect to those matters covered by this clause. However, nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (DEC 2007). As prescribed in 227.303(2)(ii), add the following paragraph (b)(2)(v) to the basic clause:

(v) The license shall include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements: _____*.

*[*Contracting Officer to complete with the names of applicable existing treaties or international agreements. This paragraph is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.]*

Alternate II (DEC 2007). As prescribed in 227.303(2)(iii), add the following paragraph (b)(2)(v) to the basic clause:

(v) The agency reserves the right to—

(A) Unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract; and

(B) Exercise those license or other rights that are necessary for the Government to

meet its obligations to foreign governments, their nationals, and international organizations under any treaties or international agreement with respect to subject inventions made after the date of the amendment.

[72 FR 69160, Dec. 7, 2007]

252.227–7039 Patents—reporting of subject inventions.

As prescribed in 227.303(1), use the following clause:

PATENTS—REPORTING OF SUBJECT INVENTIONS (APR 1990)

The Contractor shall furnish the Contracting Officer the following:

(a) Interim reports every twelve (12) months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no such inventions.

(b) A final report, within three (3) months after completion of the contracted work, listing all subject inventions or stating that there were no such inventions.

(c) Upon request, the filing date, serial number and title, a copy of the patent application and patent number, and issue data for any subject invention for which the Contractor has retained title.

(d) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 72 FR 69162, Dec. 7, 2007]

252.228–7000 Reimbursement for war-hazard losses.

As prescribed in 228.370(a), use the following clause:

REIMBURSEMENT FOR WAR-HAZARD LOSSES (DEC 1991)

(a) Costs for providing employee war-hazard benefits in accordance with paragraph (b) of the Workers' Compensation and War-Hazard Insurance clause of this contract are allowable if the Contractor—

(1) Submits proof of loss files to support payment or denial of each claim;

(2) Subject to Contracting Officer approval, makes lump sum final settlement of any open claims and obtains necessary release documents within one year of the expiration or termination of this contract, unless otherwise extended by the Contracting Officer; and

(3) Provides the Contracting Officer at the time of final settlement of this contract—

(i) An investigation report and evaluation of any potential claim; and

(ii) An estimate of the dollar amount involved should the potential claim mature.

(b) The cost of insurance for liabilities reimbursable under this clause is not allowable.

(c) The Contracting Officer may require the Contractor to assign to the Government all right, title, and interest to any refund, rebate, or recapture arising out of any claim settlements.

(d) The Contractor agrees to—

(1) Investigate and promptly notify the Contracting Officer in writing of any occurrence which may give rise to a claim or potential claim, including the estimated amount of the claim;

(2) Give the Contracting Officer immediate written notice of any suit or action filed which may result in a payment under this clause; and

(3) Provide assistance to the Government in connection with any third party suit or claim relating to this clause which the Government elects to prosecute or defend in its own behalf.

(End of clause)

252.228–7001 Ground and flight risk.

As prescribed in 228.370(b), use the following clause:

GROUND AND FLIGHT RISK (SEP 1996)

(a) Definitions. As used in this clause—

(1) *Aircraft*, unless otherwise provided in the Schedule, means—

(i) Aircraft to be delivered to the Government under this contract (either before or after Government acceptance), including complete aircraft and aircraft in the process of being manufactured, disassembled, or reassembled; provided that an engine, portion of a wing or a wing is attached to a fuselage of the aircraft; and

(ii) Aircraft, whether in a state of disassembly or reassembly, furnished by the Government to the Contractor under this contract, including all property installed, in the process of installation, or temporarily removed; provided that the aircraft and property are not covered by a separate bailment agreement.

(2) *Contractor's premises* means those premises designated in the Schedule or in writing by the Contracting Officer, and any other place the aircraft is moved for safeguarding.

(3) *Flight* means any flight demonstration, flight test, taxi test, or other flight made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Contracting Officer.

(i) For land based aircraft, *flight* begins with the taxi roll from a flight line on the Contractor's premises and continues until the aircraft has completed the taxi roll in returning to a flight line on the Contractor's premises;

(ii) For seaplanes, *flight* begins with the launching from a ramp on the Contractor's premises and continues until the aircraft has completed its landing run and is beached at a ramp on the Contractor's premises;

(iii) For helicopters, *flight* begins upon engagement of the rotors for the purpose of take-off from the Contractor's premises and continues until the aircraft has returned to the ground on the Contractor's premises and the rotors are disengaged; and

(iv) For vertical take-off aircraft, *flight* begins upon disengagement from any launching platform or device on the Contractor's premises and continues until the aircraft has been engaged to any launching platform or device on the Contractor's premises;

(v) All aircraft off the Contractor's premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of this contract, or landings approved in writing by the Contracting Officer.

(4) *Flight crew member* means the pilot, the co-pilot, and, unless otherwise provided in the Schedule, the flight engineer, navigator, and bombardier-navigator when assigned to their respective crew positions for the purpose of conducting any flight on behalf of the Contractor. If required, a defense systems operator may also be assigned as a flight crew member.

(5) *In the open* means located wholly outside of buildings on the Contractor's premises or other places described in the Schedule as being *in the open*. Government furnished aircraft shall be considered to be located *in the open* at all times while in the Contractor's possession, care, custody, or control.

(6) *Operation* means operations and tests of the aircraft and its installed equipment, accessories, and power plants, while the aircraft is in the open or in motion. The term does not apply to aircraft on any production line or in flight.

(b) Except as may be specifically provided in the Schedule as an exception to this clause, the Government assumes the risk of damage to, or loss or destruction of aircraft *in the open,* during *operation,* and in *flight*. The Contractor shall not be liable to the Government for such damage, loss, or destruction.

(c) The Government's assumption of risk for aircraft in the open shall continue unless the Contracting Officer finds that the aircraft is in the open under unreasonable conditions, and the Contractor fails to take prompt corrective action.

(1) The Contracting Officer, when finding aircraft in the open under unreasonable conditions, shall notify the Contractor in writing of the unreasonable conditions and require the Contractor to make corrections within a reasonable time.

(2) Upon receipt of the notice, the Contractor shall promptly correct the cited conditions, regardless of whether there is agreement that the conditions are unreasonable. If the Contracting Officer later determines that the cited conditions were not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred in correcting the conditions. Any dispute as to the unreasonableness of the conditions or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(3) If the Contracting Officer finds that the Contractor failed to act promptly to correct the cited conditions or failed to correct the conditions within a reasonable time, the Contracting Officer may terminate the Government's assumption of risk for any aircraft in the open under the cited conditions. The termination will be effective at 12:01 am on the fifteenth day following the day the written notice is received by the Contractor. If the Contracting Officer later determines that the Contractor acted promptly to correct the cited conditions or that the time taken by the Contractor was not unreasonable, an equitable adjustment shall be made in the contract price for any additional costs incurred as a result of termination of the Government's assumption of risk. Any dispute as to the timeliness of the Contractor's action or the equitable adjustment shall be considered a dispute under the Disputes clause of this contract.

(4) If the Government terminates its assumption of risk, the risk of loss for Government-furnished property shall be determined in accordance with the Government Property clause of this contract.

(5) The Contractor shall promptly notify the Contracting Officer when unreasonable conditions have been corrected. If the Government elects to again assume the risk of loss and relieve the Contractor of liabilities, the Contracting Officer will notify the Contractor. The Contractor shall be entitled to an equitable adjustment in the contract price for any insurance costs extending from the end of the third working day after the Contractor notice of correction until the Contractor is notified that the Government will assume the risk of loss. If the Government does not again assume the risk of loss and conditions have been corrected, the Contractor shall be entitled to an equitable adjustment for insurance costs, if any, extending after the third working day.

(d) The Government's assumption of risk shall not extend to damage, loss, or destruction of aircraft which—

(1) Results from failure of the Contractor, due to willful misconduct or lack of good faith of any of the Contractor's managerial personnel, to maintain and administer a program for the protection and preservation of aircraft in the open and during operation in accordance with sound industrial practice. The term *Contractor's managerial personnel* means the Contractor's directors, officers, and any of the Contractor's managers, superintendents, or other equivalent representatives who supervise or direct all or substantially all of the Contractor's business; or all or substantially all of the Contractor's operations at any one plant or separate location at which this contract is performed; or a separate and complete major industrial operation in connection with the performance of this contract;

(2) Is sustained during flight if the flight crew members have not been approved in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled ''Contractor's Flight and Ground Operations'' (Air Force Regulation 55–22, Army Regulation 95–20, NAVAIR Instruction 3710.1C, and Defense Logistics Agency Manual 8210.1);

(3) Occurs in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, except for Government-furnished property;

(4) Is covered by insurance;

(5) Consists of wear and tear; deterioration (including rust and corrosion); freezing; or mechanical, structural, or electrical breakdown or failure, unless these are the result of other loss, damage or destruction covered by this clause. (This exclusion does not apply to Government-furnished property if damage consists of reasonable wear and tear or deterioration, or results from inherent vice in the property.); or

(6) Is sustained while the aircraft is being worked on and is a direct result of the work unless such damage, loss, or destruction would be covered by insurance which would have been maintained by the Contractor, but for the Government's assumption of risk.

(e) With the exception of damage, loss, or destruction in flight, the Contractor assumes the risk and shall be responsible for the first $25,000 of loss or damage to aircraft in the open or during operation resulting from each separate event, except for reasonable wear and tear and to the extent the loss or damage is caused by negligence of Government personnel. If the Government elects to require that the aircraft be replaced or restored by the Contractor to its condition immediately prior to the damage, the equitable adjustment in the price authorized by paragraph (i) of this clause shall not include the dollar amount of the risk assumed by the Contractor. In the event the Government does not elect repair or replacement, the Contractor agrees to credit the contract price or pay the Government $25,000 (or the amount of the loss, if less) as directed by the Contracting Officer.

(f) A subcontractor shall not be relieved from liability for damage, loss, or destruction of aircraft while in its possession or control, except to the extent that the subcontract, with the written approval of the Contracting Officer, provides for relief from each liability. In the absence of approval, the subcontract shall contain provisions requiring the return of aircraft in as good condition as when received, except for reasonable wear and tear or for the utilization of the property in accordance with the provisions of this contract. Where a subcontractor has not been relieved from liability, and damage, loss, or destruction occurs, the Contractor shall enforce liability against the subcontractor for the benefit of the Government.

(g) The Contractor warrants that the contract price does not and will not include, except as may be authorized in this clause, any charge or contingency reserve for insurance covering damage, loss, or destruction of aircraft while in the open, during operation, or in flight when the risk has been assumed by the Government, even if the assumption may be terminated for aircraft in the open.

(h) In the event of damage, loss, or destruction of aircraft in the open, during operation, or in flight, the Contractor shall take all reasonable steps to protect the aircraft from further damage, to separate damaged and undamaged aircraft, to put all aircraft in the best possible order and further, except in cases covered by paragraph (e) of this clause, the Contractor shall furnish to the Contracting Officer a statement of—

(1) The damaged, lost, or destroyed aircraft;

(2) The time and origin of the damage, loss, or destruction;

(3) All known interests in commingled property of which aircraft are a part; and

(4) The insurance, if any, covering the interest in commingled property.

Except in cases covered by paragraph (e) of this clause, the Contracting Officer will make an equitable adjustment in the contract price for expenditures made by the Contractor in performing the obligations under this paragraph.

(i) If prior to delivery and acceptance by the Government, aircraft is damaged, lost, or destroyed and the Government assumed the risk, the Government shall either—

(1) Require that the aircraft be replaced or restored by the Contractor to the condition immediately prior to the damage, in which event the Contracting Officer will make an equitable adjustment in the contract price and the time for contract performance; or

(2) Terminate this contract with respect to the aircraft, in which event the Contractor

shall be paid the contract price for the aircraft (or, if applicable, any work to be performed on the aircraft) less any amount the Contracting Officer determines—

(i) It would have cost the Contractor to complete the aircraft (or any work to be performed on the aircraft) together with anticipated profit on uncompleted work; and

(ii) Would be the value of the damaged aircraft or any salvage retained by the Contractor.

The Contracting Officer shall prescribe the manner of disposition of the damaged, lost, or destroyed aircraft, or any parts of the aircraft. If any additional costs of such disposition are incurred by the Contractor, a further equitable adjustment will be made in the amount due the Contractor. Failure of the parties to agree upon termination costs or an equitable adjustment with respect to any aircraft shall be considered a dispute under the Disputes clause.

(j) In the event the Contractor is reimbursed or compensated by a third person for damage, loss, or destruction of aircraft and has also been compensated by the Government, the Contractor shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for damage, loss, or destruction. Upon the request of the Contracting Officer or authorized representative, the Contractor shall at Government expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment of subrogation) in obtaining recovery.

(k) The Contractor agrees to be bound by the operating procedures contained in the combined regulation entitled ''Contractor's Flight and Ground Operations'' in effect on the date of contract award.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 56 FR 67221, Dec. 30, 1991; 61 FR 50456, Sept. 26, 1996]

252.228–7002 Aircraft flight risk.

As prescribed in 228.370(c), use the following clause:

AIRCRAFT FLIGHT RISK (SEP 1996)

(a) *Definitions.* As used in this clause—

(1) *Aircraft,* unless otherwise provided in the Schedule, means—

(i) Aircraft furnished by the Contractor under this contract (either before or after Government acceptance); or

(ii) Aircraft furnished by the Government to the Contractor, including all Government property placed on, installed or attached to the aircraft; provided that the aircraft and property are not covered by a separate bailment agreement.

(2) *Flight* means any flight demonstration, flight test, taxi test, or other flight made in the performance of this contract, or for the purpose of safeguarding the aircraft, or previously approved in writing by the Contracting Officer.

(i) For land-based aircraft, *flight* begins with the taxi roll from a flight line and continues until the aircraft has completed the taxi roll to a flight line.

(ii) For seaplanes, *flight* begins with the launching from a ramp and continues until the aircraft has completed its landing run and is beached at a ramp.

(iii) For helicopters, *flight* begins upon engagement of the rotors for the purpose of take-off and continues until the aircraft has returned to the ground and rotors are disengaged.

(iv) For vertical take-off aircraft, *flight* begins upon disengagement from any launching platform or device and continues until the aircraft has been reengaged to any launching platform or device.

(3) *Flight crew members* means the pilot, copilot, and unless otherwise provided in the Schedule, the flight engineer, navigator, bombardier-navigator, and defense systems operator as required, when assigned to their respective crew positions to conduct any flight on behalf of the Contractor.

(b) This clause takes precedence over any other provision of this contract (particularly paragraph (g) of the Government Property (Cost-Reimbursement, Time-and-Materials, or Labor-Hour Contracts) clause and paragraph (c) of the Insurance—Liability to Third Persons clause).

(c) Unless the flight crew members previously have been approved in writing by the Government Flight Representative, who has been authorized in accordance with the combined regulation entitled ''Contractor's Flight and Ground Operations'' (Air Force Regulation 55–22, Army Regulation 95–20, NAVAIR Instruction 3710.1C, and Defense Logistics Agency Manual 8210.1), the Contractor shall not be—

(1) Relieved of liability for damage, loss, or destruction of aircraft sustained during flight; or

(2) Reimbursed for liabilities to third persons for loss or damage to property or for death or bodily injury caused by aircraft during flight.

(d)(1) The loss, damage, or destruction of aircraft during flight in an amount exceeding $100,000 or 20 percent of the estimated cost of this contract, whichever is less, is subject to an equitable adjustment when the Contractor is not liable under—

(i) The Government Property (Cost-Reimbursement, Time-and-Materials, or Labor-Hour Contracts) clause, and

(ii) Paragraph (c) of this clause.

(2) The equitable adjustment under this contract for the resulting repair, restoration, or replacement of aircraft shall be made—

(i) In the estimated cost, the delivery schedule, or both; and

(ii) In the amount of any fee to be paid to the Contractor.

(3) In determining the amount of equitable adjustment in the fee, the Contracting Officer will consider any fault of the Contractor, its employees, or any subcontractor that materially contributed to the damage, loss, or destruction.

(4) Failure to agree on any adjustment shall be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract.

(e) The Contractor agrees to be bound by the operating procedures contained in the combined regulation entitled ''Contractor's Flight and Found Operations'' in effect on the date of contract award.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 61 FR 50456, Sept. 26, 1996]

252.228–7003 Capture and detention.

As prescribed in 228.370(d), use the following clause:

CAPTURE AND DETENTION (DEC. 1991)

(a) As used in this clause—

(1) *Captured person* means any employee of the Contractor who is—

(i) Assigned to duty outside the United States for the performance of this contract; and

(ii) Found to be missing from his or her place of employment under circumstances that make it appear probable that the absence is due to the action of the force of any power not allied with the United States in a common military effort; or

(iii) Known to have been taken prisoner, hostage, or otherwise detained by the force of such power, whether or not actually engaged in employment at the time of capture; provided, that at the time of capture or detention, the person was either—

(A) Engaged in activity directly arising out of and in the course of employment under this contract; or

(B) Captured in an area where required to be only in order to perform this contract.

(2) A *period of detention* begins with the day of capture and continues until the captured person is returned to the place of employment, the United States, or is able to be returned to the jurisdiction of the United States, or until the person's death is established or legally presumed to have occurred by evidence satisfactory to the Contracting Officer, whichever occurs first.

(3) *United States* comprises geographically the 50 states and the District of Columbia.

(4) *War Hazards Compensation Act* refers to the statute compiled in chapter 12 of title 42, U.S. Code (sections 1701–1717), as amended.

(b) If pursuant to an agreement entered into prior to capture, the Contractor is obligated to pay and has paid detention benefits to a captured person, or the person's dependents, the Government will reimburse the Contractor up to an amount equal to the lesser of—

(1) Total wage or salary being paid at the time of capture due from the Contractor to the captured person for the period of detention; or

(2) That amount which would have been payable if the detention had occurred under circumstances covered by the War Hazards Compensation Act.

(c) The period of detention shall not be considered as time spent in contract performance, and the Government shall not be obligated to make payment for that time except as provided in this clause.

(d) The obligation of the Government shall apply to the entire period of detention, except that it is subject to the availability of funds from which payment can be made. The rights and obligations of the parties under this clause shall survive prior expiration, completion, or termination of this contract.

(e) The Contractor shall not be reimbursed under this clause for payments made if the employees were entitled to compensation for capture and detention under the War Hazards Compensation Act, as amended.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 57 FR 42633, Sept. 15, 1992]

252.228–7004 Bonds or other security.

As prescribed in 228.170, use the following provision:

BONDS OR OTHER SECURITY (DEC. 1991)

(a) Offerors shall furnish a bid guarantee in the amount of $_____ with their bids. The offeror receiving notice of award shall furnish—

(1) A performance bond in the penal amount of $_____; and

(2) Payment in full of any sum due the Government.

(b) The Contractor shall furnish the performance bond to the Contracting Officer within ___ days after receipt of the notice of award. The Contracting Officer will not issue the notice to proceed until receipt of an acceptable performance bond and payment of any sum due the Government.

(c) Bonds supported by sureties whose names appear on the list contained in Treasury Department Circular 570 are acceptable. Performance bonds from individual sureties are acceptable if each person acting as a surety provides a SF 28, Affidavit of Individual Surety, and a pledge of assets acceptable to the Contracting Officer.

(End of provision)

252.228–7005 Accident reporting and investigation involving aircraft, missiles, and space launch vehicles.

As prescribed in 228.370(e), use the following clause:

ACCIDENT REPORTING AND INVESTIGATION INVOLVING AIRCRAFT, MISSILES, AND SPACE LAUNCH VEHICLES (DEC. 1991)

(a) The Contractor shall report promptly to the Administrative Contracting Officer all pertinent facts relating to each accident involving an aircraft, missile, or space launch vehicle being manufactured, modified, repaired, or overhauled in connection with this contract.

(b) If the Government conducts an investigation of the accident, the Contractor will cooperate and assist the Government's personnel until the investigation is complete.

(c) The Contractor will include a clause in subcontracts under this contract to require subcontractor cooperation and assistance in accident investigations.

(End of clause)

252.228–7006 Compliance with Spanish laws and insurance.

As prescribed at 228.370(f), use the following clause:

COMPLIANCE WITH SPANISH LAWS AND INSURANCE (DEC 1998)

(a) The requirements of this clause apply only if the Contractor is not a Spanish concern.

(b) The Contractor shall, without additional expense to the United States Government, comply with all applicable Spanish Government laws pertaining to sanitation, traffic, security, employment of labor, and all other laws relevant to the performance of this contract. The Contractor shall hold the United States Government harmless and free from any liability resulting from the Contractor's failure to comply with such laws.

(c) The contractor shall, at its own expense, provide and maintain during the entire performance of this contract, all workmen's compensation, employees' liability, bodily injury insurance, and other required insurance adequate to cover the risk assumed by the Contractor. The Contractor shall indemnify and hold harmless the United States Government from liability resulting from all claims for damages as a result of death or injury to personnel or damage to real or personal property related to the performance of this contract.

(d) The Contractor agrees to represent in writing to the Contracting Officer, prior to commencement of work and not later than 15 days after the date of the Notice to Proceed, that the Contractor has obtained the required types of insurance in the following minimum amounts. The representation also shall state that the Contractor will promptly notify the Contracting Officer of any notice of cancellation of insurance or material change in insurance coverage that could affect the United States Government's interests.

Type of insurance	Coverage per person	Coverage per accident	Property damage
Comprehensive General Liability	$300,000	$1,000,000	$100,000

(e) The Contractor shall provide the Contracting Officer with a similar representation for all subcontracts with non-Spanish concerns that will perform work in Spain under this contract.

(f) Insurance policies required herein shall be purchased from Spanish insurance companies or other insurance companies legally authorized to conduct business in Spain. Such policies shall conform to Spanish laws and regulations and shall—

(1) Contain provisions requiring submission to Spanish law and jurisdiction of any problem that may arise with regard to the interpretation or application of the clauses and conditions of the insurance policy;

(2) Contain a provision authorizing the insurance company, as subrogee of the insured entity, to assume and attend to directly, with respect to any person damaged, the legal consequences arising from the occurrence of such damages;

(3) Contain a provision worded as follows: ''The insurance company waives any right of subrogation against the United States of America that may arise by reason of any payment under this policy.'';

(4) Not contain any deductible amount or similar limitation; and

(5) Not contain any provisions requiring submission to any type of arbitration.

(End of clause)

[62 FR 34132, June 24, 1997, as amended at 63 FR 69006, Dec. 15, 1998]

252.229–7000 Invoices exclusive of taxes or duties.

As prescribed in 229.402–1, use the following clause:

INVOICES EXCLUSIVE OF TAXES OR DUTIES (JUNE 1997)

Invoices submitted in accordance with the terms and conditions of this contract shall be exclusive of all taxes or duties for which relief is available.

(End of clause)

[62 FR 34132, June 24, 1997]

252.229–7001 Tax relief.

As prescribed in 229.402–70(a), use the following clause:

TAX RELIEF (JUNE 1997)

(a) Prices set forth in this contract are exclusive of all taxes and duties from which the United States Government is exempt by virtue of tax agreements between the United States Government and the Contractor's government. The following taxes or duties have been excluded from the contract price:

NAME OF TAX: (Offeror Insert) RATE (PERCENTAGE): (Offeror Insert)

(b) The Contractor's invoice shall list separately the gross price, amount of tax deducted, and net price charged.

(c) When items manufactured to United States Government specifications are being acquired, the Contractor shall identify the materials or components intended to be imported in order to ensure that relief from import duties is obtained. If the Contractor intends to use imported products from inventories on hand, the price of which includes a factor for import duties, the Contractor shall ensure the United States Government's exemption from these taxes. The Contractor may obtain a refund of the import duties from its government or request the duty-free import of an amount of supplies or components corresponding to that used from inventory for this contract.

(End of clause)

Alternate I (JUN 1997). As prescribed in 229.402–70(a), add the following paragraph (d) to the basic clause:

(d) Tax relief will be claimed in Germany pursuant to the provisions of the Agreement Between the United States of America and Germany Concerning Tax Relief to be Accorded by Germany to United States Expenditures in the Interest of Common Defense. The Contractor shall use Abwicklungsschein fuer abgabenbeguenstigte Lieferungen/Leistungen nach dem Offshore Steuerabkommen (Performance Certificate for Tax-Free Deliveries/Performance according to the Offshore Tax Relief Agreement) or other documentary evidence acceptable to the German tax authorities. All purchases made and paid for on a tax-free basis during a 30-day period may be accumulated, totaled, and reported as tax-free.

[62 FR 34132, June 24, 1997]

252.229–7002 Customs exemptions (Germany).

As prescribed in 229.402–70(b), use the following clause:

CUSTOMS EXEMPTIONS (GERMANY) (JUNE 1997)

Imported products required for the direct benefit of the United States Forces are authorized to be acquired duty-free by the Contractor in accordance with the provisions of the Agreement Between the United States of America and Germany Concerning Tax Relief to be Accorded by Germany to United States Expenditures in the Interest of Common Defense.

(End of clause)

[62 FR 34133, June 24, 1997]

252.229–7003 Tax Exemptions (Italy).

As prescribed in 229.402–70(c), use the following clause:

TAX EXEMPTIONS (ITALY) (JAN 2002)

(a) The Contractor represents that the contract price, including the prices in subcontracts awarded under this contract, does not include taxes from which the United States Government is exempt.

(b) The United States Government is exempt from payment of Imposta Valore Aggiunto (IVA) tax in accordance with Article 72 of the IVA implementing decree on all supplies and services sold to United States Military Commands in Italy.

(1) The Contractor shall include the following information on invoices submitted to the United States Government:

(i) The contract number.

(ii) The IVA tax exemption claimed pursuant to Article 72 of Decree Law 633, dated October 26, 1972.

(iii) The following fiscal code(s): [*Contracting Officer must insert the applicable fiscal code(s) for military activities within Italy: 80028250241 for Army, 80156020630 for Navy, or 91000190933 for Air Force*].

(2)(i) Upon receipt of the invoice, the paying office will include the following certification on one copy of the invoice:

''I certify that this invoice is true and correct and reflects expenditures made in Italy

for the Common Defense by the United States Government pursuant to international agreements. The amount to be paid does not include the IVA tax, because this transaction is not subject to the tax in accordance with Article 72 of Decree Law 633, dated October 26, 1972.'' An authorized United States Government official will sign the copy of the invoice containing this certification.

(ii) The paying office will return the certified copy together with payment to the Contractor. The payment will not include the amount of the IVA tax.

(iii) The Contractor shall retain the certified copy to substantiate non-payment of the IVA tax.

(3) The Contractor may address questions regarding the IVA tax to the Ministry of Finance, IVA Office, Rome (06) 520741.

(c) In addition to the IVA tax, purchases by the United States Forces in Italy are exempt from the following taxes:

(1) Imposta di Fabbricazione (Production Tax for Petroleum Products).

(2) Imposta di Consumo (Consumption Tax for Electrical Power).

(3) Dazi Doganali (Customs Duties).

(4) Tassa di Sbarco e d'Imbarco sulle Merci Transportate per Via Aerea e per Via Maritima (Port Fees).

(5) Tassa de Circolazione sui Veicoli (Vehicle Circulation Tax).

(6) Imposta di Registro (Registration Tax).

(7) Imposta di Bollo (Stamp Tax).

(End of clause)

[67 FR 4210, Jan. 29, 2002]

252.229–7004 Status of contractors as a direct contractor (Spain).

As prescribed in 229.402–70(d), use the following clause:

STATUS OF CONTRACTOR AS A DIRECTOR CONTRACTOR (SPAIN) (JUNE 1997)

(a) ''Direct Contractor,'' as used in this clause, means an individual, company, or entity with whom an agency of the United States Department of Defense has executed a written agreement that allows duty-free import of equipment, materials, and supplies into Spain for the construction, development, maintenance, and operation of Spanish-American installations and facilities.

(b) The Contractor is hereby designated as a Direct Contractor under the provisions of Complementary Agreement 5, articles 11, 14, 15, 17, and 18 of the Agreement on Friendship, Defense and Cooperation between the United States Government and the Kingdom of Spain, dated July 2, 1982. The Agreement relates to contacts to be performed in whole or part in Spain, the provisions of which are hereby incorporated into and made a part of this contract by reference.

(c) The Contractor shall apply to the appropriate Spanish authorities for approval of status as a Direct Contractor in order to complete duty-free import of non-Spanish equipment, materials, and supplies represented as necessary for contract performance by the Contracting Officer. Orders for equipment, materials, and supplies placed prior to official notification of such approval shall be at the Contractor's own risk. The Contractor must submit its documentation in sufficient time to permit processing by the appropriate United States and Spanish Government agencies prior to the arrival of the equipment, material, or supplies in Spain. Seasonal variations in processing times are common, and the Contractor should program its projects accordingly. Any delay or expense arising directly or indirectly from this process shall not excuse untimely performance (except as expressly allowed in other provisions of this contract), constitute a direct or constructive change, or otherwise provide a basis for additional compensation or adjustment of any kind.

(d) To ensure that all duty-free imports are properly accounted for, exported, or disposed of, in accordance with Spanish law, the Contractor shall obtain a written bank letter of guaranty payable to the Treasurer of the United States, or such other authority as may be designated by the Contracting Officer, in the amount set forth in paragraph (g) of this clause, prior to effecting any duty-free imports for the performance of this contract.

(e) If the Contractor fails to obtain the required guaranty, the Contractor agrees that the Contracting Officer may withhold a portion of the contract payments in order to establish a fund in the amount set forth in paragraph (g) of this clause. The fund shall be used for the payment of import taxes in the event that the Contractor fails to properly account for, export, or dispose of equipment, materials, or supplies imported on a duty-free basis.

(f) The amount of the bank letter of guaranty or size of the fund required under paragraph (d) or (e) of this clause normally shall be 5 percent of the contract value. However, if the Contractor demonstrates to the Contracting Officer's satisfaction that the amount retained by the United States Government or guaranteed by the bank is excessive, the amount shall be reduced to an amount commensurate with contingent import tax and duty-free liability. This bank guaranty or fund shall not be released to the Contractor until the Spanish General Directorate of Customs verifies the accounting, export, or disposition of the equipment, material, or supplies imported on a duty-free basis.

(g) The amount required under paragraph (d), (e), or (f) of this clause is (*Contracting Officer insert amount at time of contract award).*

(h) The Contractor agrees to insert the provisions of this clause, including this paragraph (h), in all subcontracts.

(End of clause)

[62 FR 34133, June 24, 1997, as amended at 63 FR 11548, Mar. 9, 1998]

252.229–7005 Tax exemptions (Spain).

As prescribed in 229.402–70(e), use the following clause:

TAX EXEMPTIONS (SPAIN) (JUNE 1997)

(a) The Contractor represents that the contract prices, including subcontract prices, do not include the taxes identified herein, or any other taxes from which the United States Government is exempt.

(b) In accordance with tax relief agreements between the United States Government and the Spanish Government, and because the incumbent contract arises from the activities of the United States Forces in Spain, the contract will be exempt from the following excise, luxury, and transaction taxes:

(1) Derechos de Aduana (Customs Duties).

(2) Impuesto de Compensacion a la Importacion (Compensation Tax on Imports).

(3) Transmissiones Patrionomiales (Property Transfer Tax).

(4) Impuesto Sobre el Lujo (Luxury Tax).

(5) Actos Juridocos Documentados (Legal Official Transactions).

(6) Impuesto Sobre el Trafico de Empresas (Business Trade Tax).

(7) Impuestos Especiales de Fabricacion (Special Products Tax).

(8) Impuesto Sobre el Petroleo y Derivados (Tax on Petroleum and its By-Products).

(9) Impuesto Sobre el Uso de Telefona (Telephone Tax).

(10) Impuesto General Sobre la Renta de Sociedades y demas Entidades Juridicas (General Corporation Income Tax).

(11) Impuesto Industrial (Industrial Tax).

(12) Impuesto de Rentas Sobre el Capital (Capital Gains Tax).

(13) Plus Vailia (Increase on Real Property).

(14) Contribucion Territorial Urbana (Metropolitan Real Estate Tax).

(15) Contribucion Territorial Rustica y Pecuaria (Farmland Real Estate Tax).

(16) Impuestos de la Diputacion (County Service Charges).

(17) Impuestos Municipal y Tasas Parafiscales (Municipal Tax and Charges).

(End of clause)

[62 FR 34133, June 24, 1997]

252.229–7006 Value added tax exclusion (United Kingdom).

As prescribed in 229.402–70(f), use the following clause:

VALUE ADDED TAX EXCLUSION (UNITED KINGDOM) (JUNE 1997)

The supplies or services identified in this contract are to be delivered at a price exclusive of value added tax under arrangements between the appropriate United States authorities and Her Majesty's Customs and Excise (Reference Priv 46/7). By executing this contract, the Contracting Officer certifies that these supplies or services are being purchased for United States Government official purposes only.

(End of clause)

[62 FR 34134, June 24, 1997]

252.229–7007 Verification of United States receipt of goods.

As prescribed in 229.402–70(g), use the following clause:

VERIFICATION OF UNITED STATES RECEIPT OF GOODS (JUNE 1997)

The Contractor shall insert the following statement on all Material Inspection and Receiving Reports (DD Form 250 series) for Contracting Officer approval: ''I certify that the items listed on this invoice have been received by the United States.''

(End of clause)

[62 FR 34134, June 24, 1997]

252.229–7008 Relief from import duty (United Kingdom).

As prescribed in 229.402–70(h), use the following clause:

RELIEF FROM IMPORT DUTY (UNITED KINGDOM) (JUNE 1997)

Any import dutiable articles, components, or raw materials supplied to the United States Government under this contract shall be exclusive of any United Kingdom import duties. Any imported items supplied for which import duty already has been paid will be supplied at a price exclusive of the amount of import duty paid. The Contractor is advised to contact Her Majesty's (HM) Customs and Excise to obtain a refund upon completion of the contract (Reference HM Customs and Excise Notice No. 431, February 1973, entitled ''Relief from Customs Duty and/or Value Added Tax on United States Government Expenditures in the United Kingdom'').

(End of clause)

[62 FR 34134, June 24, 1997]

252.229–7009 Relief from customs duty and value added tax on fuel (passenger vehicles) (United Kingdom).

As prescribed in 229.402–70(i), use the following clause:

RELIEF FROM CUSTOMS DUTY AND VALUE ADDED TAX ON FUEL (PASSENGER VEHICLES) (UNITED KINGDOM) (JUNE 1997)

(a) Pursuant to an agreement between the United States Government and Her Majesty's (HM) Customs and Excise, fuels and lubricants used by passenger vehicles (except taxis) in the performance of this contract will be exempt from customs duty and value added tax. Therefore, the procedures outlined in HM Customs and Excise Notice No. 431B, August 1982, and any amendment thereto, shall be used to obtain relief from both customs duty and value added tax for fuel used under the contract. These procedures shall apply to both loaded and unloaded miles. The unit prices shall be based on the recoupment by the Contractor of customs duty in accordance with the following allowances:

(1) Vehicles (except taxis) with a seating capacity of less than 29, one gallon for every 27 miles.

(2) Vehicles with a seating capacity of 29–53, one gallon for every 13 miles.

(3) Vehicles with a seating capacity of 54 or more, one gallon for every 10 miles.

(b) In the event the mileage of any route is increased or decreased within 10 percent, resulting in no change in route price, the customs duty shall be reclaimed from HM Customs and Excise on actual mileage performed.

(End of clause)

[62 FR 34134, June 24, 1997]

252.229–7010 Relief from customs duty on fuel (United Kingdom).

As prescribed in 229.402–70(j), use the following clause:

RELIEF FROM CUSTOMS DUTY ON FUEL (UNITED KINGDOM) (JUNE 1997)

(a) Pursuant to an agreement between the United States Government and Her Majesty's (HM) Customs and Excise, it is possible to obtain relief from customs duty on fuels and lubricants used in support of certain contracts. If vehicle fuels and lubricants are used in support of this contract, the Contractor shall seek relief from customs duty in accordance with HM Customs Notice No. 431, February 1973, entitled ''Relief from Customs Duty and/or Value Added Tax on United States Government Expenditures in the United Kingdom.'' Application should be sent to the Contractor's local Customs and Excise Office.

(b) Specific information should be included in the request for tax relief, such as the number of vehicles involved, types of vehicles, rating of vehicles, fuel consumption, estimated mileage per contract period, and any other information that will assist HM Customs and Excise in determining the amount of relief to be granted.

(c) Within 30 days after the award of this contract, the Contractor shall provide the Contracting Officer with evidence that an attempt to obtain such relief has been initiated. In the event the Contractor does not attempt to obtain relief within the time specified, the Contracting Officer may deduct from the contract price the amount of relief that would have been allowed if HM Customs and Excise had favorably considered the request for relief.

(d) The amount of any rebate granted by HM Customs and Excise shall be paid in full to the United States Government. Checks shall be made payable to the Treasurer of the United States and forwarded to the Administrative Contracting Officer.

(End of clause)

[62 FR 34134, June 24, 1997]

252.229–7011 Reporting of Foreign Taxes—U.S. Assistance Programs.

As prescribed in 229.170–4, use the following clause:

REPORTING OF FOREIGN TAXES—U.S. ASSISTANCE PROGRAMS (SEP 2005)

(a) *Definition. Commodities,* as used in this clause, means any materials, articles, supplies, goods, or equipment.

(b) Commodities acquired under this contract shall be exempt from all value added taxes and customs duties imposed by the recipient country. This exemption is in addition to any other tax exemption provided through separate agreements or other means.

(c) The Contractor shall inform the foreign government of the tax exemption, as documented in the Letter of Offer and Acceptance, country-to-country agreement, or interagency agreement.

(d) If the foreign government or entity nevertheless imposes taxes, the Contractor shall promptly notify the Contracting Officer and shall provide documentation showing that the foreign government was apprised of the tax exemption in accordance with paragraph (c) of this clause.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts for commodities that exceed $500.

(End of clause)

[70 FR 57192, Sept. 30, 2005]

252.231–7000 Supplemental cost principles.

As prescribed in 231.100–70, use the following clause:

SUPPLEMENTAL COST PRINCIPLES (DEC 1991)

When the allowability of costs under this contract is determined in accordance with part 31 of the Federal Acquisition Regulation (FAR), allowability shall also be determined in accordance with part 231 of the Defense FAR Supplement, in effect on the date of this contract.

(End of clause)

252.232–7000 Advance payment pool.

As prescribed in 232.412–70(a), use the following clause:

ADVANCE PAYMENT POOL (DEC. 1991)

(a) Notwithstanding any other provision of this contract, advance payments will be made for contract performance in accordance with the Determinations, Findings, and Authorization for Advance payment dated _____.

(b) Payments made in accordance with this clause shall be governed by the terms and conditions of the Advance Payment Pool Agreement between the United States of America and (*insert the name of the contractor*). The Agreement is incorporated in the contract by reference.

(End of clause)

252.232–7001 Disposition of payments.

As prescribed in 232.412–70(b), use the following clause:

DISPOSITION OF PAYMENTS (DEC 1991)

Payment will be by a dual payee Treasury check made payable to the contractor or the (*insert the name of the disbursing office in the advance payment pool agreement*), and will be forwarded to that disbursing office for appropriate disposition.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 57 FR 42633, Sept. 15, 1992]

252.232–7002 Progress payments for foreign military sales acquisitions.

As prescribed in 232.502–4–70(a), use the following clause:

PROGRESS PAYMENTS FOR FOREIGN MILITARY SALES ACQUISITIONS (DEC 1991)

If this contract includes foreign military sales (FMS) requirements, the Contractor shall—

(a) Submit a separate progress payment request for each progress payment rate; and

(b) Submit a supporting schedule showing—

(1) The amount of each request distributed to each country's requirements; and

(2) Total price per contract line item applicable to each separate progress payment rate.

(c) Identify in each progress payment request the contract requirements to which it applies (i.e., FMS or U.S.);

(d) Calculate each request on the basis of the prices, costs (including costs to complete), subcontractor progress payments, and progress payment liquidations of the contract requirements to which it applies; and

(e) Distribute costs among contract line items and countries in a manner acceptable to the Administrative Contracting Officer.

(End of clause)

252.232–7003 Electronic submission of payment requests and receiving reports.

As prescribed in 232.7004, use the following clause:

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS AND RECEIVING REPORTS (MAR 2008)

(a) *Definitions.* As used in this clause—

(1) *Contract financing payment* and *invoice payment* have the meanings given in section 32.001 of the Federal Acquisition Regulation.

(2) *Electronic form* means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. However, scanned documents are acceptable when they are part of a submission of a payment request made using Wide Area WorkFlow (WAWF) or another electronic form authorized by the Contracting Officer.

(3) *Payment request* means any request for contract financing payment or invoice payment submitted by the Contractor under this contract.

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests and receiving reports using WAWF, in one of the following electronic

formats that WAWF accepts: Electronic Data Interchange, Secure File Transfer Protocol, or World Wide Web input. Information regarding WAWF is available on the Internet at *https://wawf.eb.mil/*.

(c) The Contractor may submit a payment request and receiving report using other than WAWF only when—

(1) The Contracting Officer authorizes use of another electronic form. With such an authorization, the Contractor and the Contracting Officer shall agree to a plan, which shall include a timeline, specifying when the Contractor will transfer to WAWF;

(2) DoD is unable to receive a payment request or provide acceptance in electronic form;

(3) The Contracting Officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the Contractor. In such cases, the Contractor shall include a copy of the Contracting Officer's determination with each request for payment; or

(4) DoD makes payment for commercial transportation services provided under a Government rate tender or a contract for transportation services using a DoD-approved electronic third party payment system or other exempted vendor payment/invoicing system (e.g., PowerTrack, Transportation Financial Management System, and Cargo and Billing System).

(d) The Contractor shall submit any nonelectronic payment requests using the method or methods specified in Section G of the contract.

(e) In addition to the requirements of this clause, the Contractor shall meet the requirements of the appropriate payment clauses in this contract when submitting payments requests.

(End of clause)

[68 FR 8455, Feb. 21, 2003, as amended at 68 FR 15380, Mar. 31, 2003; 68 FR 69630, Dec. 15, 2003; 69 FR 1926, Jan. 13, 2004; 71 FR 27644, May 12, 2006; 72 FR 14241, Mar. 27, 2007; 73 FR 11358, Mar. 3, 2008]

252.232–7004 DoD progress payment rates.

As prescribed in 232.502–4–70(b), use the following clause:

DOD PROGRESS PAYMENT RATES (OCT 2001)

(a) If the contractor is a small business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate (excepting paragraph (k), *Limitations on Undefinitized Contract Actions*) to 90 percent.

(b) If the contractor is a small disadvantaged business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate (excepting paragraph (k), *Limitations on Undefinitized Contract Actions*) to 95 percent.

(End of clause)

[66 FR 49865, Oct. 1, 2001]

252.232–7005 Reimbursement of subcontractor advance payments—DoD pilot mentor-protege program.

As prescribed in 232.412–70(c), use the following clause:

REIMBURSEMENT OF SUBCONTRACTOR ADVANCE PAYMENTS—DOD PILOT MENTOR-PROTEGE PROGRAM (SEP 2001)

(a) The Government will reimburse the Contractor for any advance payments made by the Contractor, as a mentor firm, to a protege firm, pursuant to an approved mentor-protege agreement, provided—

(1) The Contractor's subcontract with the protege firm includes a provision substantially the same as FAR 52.232–12, Advance Payments;

(2) The Contractor has administered the advance payments in accordance with the policies of FAR subpart 32.4; and

(3) The Contractor agrees that any financial loss resulting from the failure or inability of the protege firm to repay any unliquidated advance payments is the sole financial responsibility of the Contractor.

(b) For a fixed price type contract, advance payments made to a protege firm shall be paid and administered as if there were 100 percent progress payments. The Contractor shall include as a separate attachment with each Standard Form (SF) 1443, Contractor's Request for Progress Payment, a request for reimbursement of advance payments made to a protege firm. The attachment shall provide a separate calculation of lines 14a through 14e of SF 1443 for each protege, reflecting the status of advance payments made to that protege.

(c) For cost reimbursable, contracts, reimbursement of advance payments shall be made via public voucher. The Contractor shall show the amounts of advance payments made to each protege on the public voucher, in the form and detail directed by the cognizant contracting officer or contract auditor.

(End of clause)

[56 FR 67221, Dec. 30, 1991, as amended at 57 FR 53602, Nov. 12, 1992; 66 FR 47109, Sept. 11, 2001]

252.232–7006 [Reserved]

252.232–7007 Limitation of Government's obligation.

As prescribed in 232.705–70, use the following clause:

LIMITATION OF GOVERNMENT'S OBLIGATION (MAY 2006)

(a) Contract line item(s) _____* through _____* are incrementally funded. For these item(s), the sum of $_____* of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (j) of this clause.

(b) For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled ''Termination for Convenience of the Government.'' As used in this clause, the total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those items(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j) of this clause, the Contractor will notify the Contracting Officer in writing at least ninety days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (j) of this clause, or to a mutually agreed upon substitute date. The notification will also advise the Contracting Officer of the estimated amount of additional funds that will be required for the timely performance of the item(s) funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (j) of this clause, or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled ''Termination for Convenience of the Government.''

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) of this clause, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraph (b) through (d) of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled ''Disputes.''

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) of this clause.

(g) The termination provisions of this clause do not limit the rights of the Government under the clause entitled ''Default.'' The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) or (e) of this clause.

(h) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled ''Termination for Convenience of the Government.''

(i) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract $____

(month) (day), (year) $____

(month) (day), (year) $____

(month) (day), (year) $____

(End of clause)

Alternate I (MAY 2006). If only one line item will be incrementally funded, substitute the following paragraph (a) for paragraph (a) of the basic clause.

(a) Contract line item _____ is incrementally funded. The sum of $_____* is presently available for payment and allotted to this contract. An allotment schedule is contained in paragraph (j) of this clause.

*To be inserted after negotiation.

[58 FR 46093, Sept. 1, 1993, as amended at 71 FR 18673, Apr. 12, 2006; 71 FR 27644, May 12, 2006]

252.232–7008 Assignment of claims (overseas).

As prescribed in 232.806(a)(1), use the following clause:

ASSIGNMENT OF CLAIMS (OVERSEAS) (JUNE 1997)

(a) No claims for monies due, or to become due, shall be assigned by the Contractor unless—

(1) Approved in writing by the Contracting Officer;

(2) Made in accordance with the laws and regulations of the United States of America; and

(3) Permitted by the laws and regulations of the Contractor's country.

(b) In no event shall copies of this contract of any plans, specifications, or other similar documents relating to work under this contract, if marked ''Top Secret,'' ''Secret,'' or ''Confidential'' be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive such documents. However, a copy of any part or all of this contract so marked may be furnished, or any information contained herein may be disclosed, to such assignee upon the Contracting Officer's prior written authorization.

(c) Any assignment under this contract shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. On each invoice or voucher submitted for payment under this contract to which any assignment applies, and for which direct payment thereof is to be made to an assignee, the Contractor shall—

(1) Identify the assignee by name and complete address; and

(2) Acknowledge the validity of the assignment and the right of the named assignee to receive payment in the amount invoiced or vouchered.

(End of clause)

[62 FR 34134, June 24, 1997]

252.232–7009 Mandatory payment by Governmentwide commercial purchase card.

As prescribed in 232.1110, use the following clause:

MANDATORY PAYMENT BY GOVERNMENTWIDE COMMERCIAL PURCHASE CARD (DEC 2006)

The Contractor agrees to accept the Governmentwide commercial purchase card as the method of payment for orders or calls valued at or below the micro-purchase threshold in Part 2 of the Federal Acquisition Regulation, under this contract or agreement.

(End of clause)

[65 FR 46626, July 31, 2000, as amended at 71 FR 75893, Dec. 19, 2006]

252.232–7010 Levies on Contract Payments.

As prescribed in 232.7102, use the following clause:

LEVIES ON CONTRACT PAYMENTS (DEC 2006)

(a) 26 U.S.C. 6331(h) authorizes the Internal Revenue Service (IRS) to continuously levy up to 100 percent of contract payments, up to the amount of tax debt.

(b) When a levy is imposed on a payment under this contract and the Contractor believes that the levy may result in an inability to perform the contract, the Contractor shall promptly notify the Procuring Contracting Officer in writing, with a copy to the Administrative Contracting Officer, and shall provide—

(1) The total dollar amount of the levy;

(2) A statement that the Contractor believes that the levy may result in an inability to perform the contract, including rationale and adequate supporting documentation; and

(3) Advice as to whether the inability to perform may adversely affect national security, including rationale and adequate supporting documentation.

(c) DoD shall promptly review the Contractor's assessment, and the Procuring Contracting Officer shall provide a written notification to the Contractor including—

(1) A statement as to whether DoD agrees that the levy may result in an inability to perform the contract; and

(2)(i) If the levy may result in an inability to perform the contract and the lack of performance will adversely affect national security, the total amount of the monies collected that should be returned to the Contractor; or

(ii) If the levy may result in an inability to perform the contract but will not impact national security, a recommendation that the Contractor promptly notify the IRS to attempt to resolve the tax situation.

(d) Any DoD determination under this clause is not subject to appeal under the Contract Disputes Act.

(End of clause)

[70 FR 52032, Sept. 1, 2005, as amended at 71 FR 69492, Dec. 1, 2006]

252.233–7000 [Reserved]

252.233–7001 Choice of law (overseas).

As prescribed in 233.215–70, use the following clause:

CHOICE OF LAW (OVERSEAS) (JUNE 1997)

This contract shall be construed and interpreted in accordance with the substantive laws of the United States of America. By the execution of this contract, the Contractor expressly agrees to waive any rights to invoke the jurisdiction of local national courts where this contract is performed and agrees to accept the exclusive jurisdiction of the United States Armed Services Board of Contract Appeals and the United States Court of Federal Claims for hearing and determination of any and all disputes that may arise under the Disputes clause of this contract.

(End of clause)

[62 FR 34135, June 24, 1997]

252.234–7001 Notice of Earned Value Management System.

As prescribed in 234.203(1), use the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM (APR 2008)

(a) If the offeror submits a proposal in the amount of $50,000,000 or more—

(1) The offeror shall provide documentation that the Cognizant Federal Agency (CFA) has determined that the proposed Earned Value Management System (EVMS) complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA–748) (current version at time of solicitation). The Government reserves the right to perform reviews of the EVMS when deemed necessary to verify compliance.

(2) If the offeror proposes to use a system that has not been determined to be in compliance with the requirements of paragraph (a)(1) of this provision, the offeror shall submit a comprehensive plan for compliance with the guidelines in ANSI/EIA–748.

(i) The plan shall—

(A) Describe the EVMS the offeror intends to use in performance of the contract, and how the proposed EVMS complies with the EVMS guidelines in ANSI/EIA–748;

(B) Distinguish between the offeror's existing management system and modifications proposed to meet the EVMS guidelines;

(C) Describe the management system and its application in terms of the EVMS guidelines;

(D) Describe the proposed procedure for administration of the EVMS guidelines as applied to subcontractors; and

(E) Describe the process the offeror will use to determine subcontractor compliance with ANSI/EIA–748.

(ii) The offeror shall provide information and assistance as required by the Contracting Officer to support review of the plan.

(iii) The offeror's EVMS plan must provide milestones that indicate when the offeror anticipates that the EVMS will be compliant with the guidelines in ANSI/EIA–748.

(b) If the offeror submits a proposal in an amount less than $50,000,000—

(1) The offeror shall submit a written description of the management procedures it will use and maintain in the performance of any resultant contract to comply with the requirements of the Earned Value Management System clause of the contract. The description shall include—

(i) A matrix that correlates each guideline in ANSI/EIA–748 (current version at time of solicitation) to the corresponding process in the offeror's written management procedures; and

(ii) The process the offeror will use to determine subcontractor compliance with ANSI/EIA–748.

(2) If the offeror proposes to use an EVMS that has been determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA–748, the offeror may submit a copy of the documentation of such determination instead of the written description required by paragraph (b)(1) of this provision.

(c) The offeror shall identify the subcontractors (or the subcontracted effort if subcontractors have not been selected) to whom the EVMS requirements will apply. The offeror and the Government shall agree to the subcontractors or the subcontracted effort selected for application of the EVMS requirements. The offeror shall be responsible for ensuring that the selected subcontractors comply with the requirements of

the Earned Value Management System clause of the contract.

(End of provision)

[73 FR 21848, Apr. 23, 2008]

252.234–7002 Earned Value Management System.

As prescribed in 234.203(2), use the following clause:

EARNED VALUE MANAGEMENT SYSTEM (APR 2008)

(a) In the performance of this contract, the Contractor shall use—

(1) An Earned Value Management System (EVMS) that complies with the EVMS guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA–748); and

(2) Management procedures that provide for generation of timely, reliable, and verifiable information for the Contract Performance Report (CPR) and the Integrated Master Schedule (IMS) required by the CPR and IMS data items of this contract.

(b) If this contract has a value of $50,000,000 or more, the Contractor shall use an EVMS that has been determined by the Cognizant Federal Agency (CFA) to be in compliance with the EVMS guidelines as stated in paragraph (a)(1) of this clause. If, at the time of award, the Contractor's EVMS has not been determined by the CFA to be in compliance with the EVMS guidelines as stated in paragraph (a)(1) of this clause, the Contractor shall apply its current system to the contract and shall take necessary actions to meet the milestones in the Contractor's EVMS plan.

(c) If this contract has a value of less than $50,000,000, the Government will not make a formal determination that the Contractor's EVMS complies with the EVMS guidelines in ANSI/EIA–748 with respect to the contract. The use of the Contractor's EVMS for this contract does not imply a Government determination of the Contractor's compliance with the EVMS guidelines in ANSI/EIA–748 for application to future contracts. The Government will allow the use of a Contractor's EVMS that has been formally reviewed and determined by the CFA to be in compliance with the EVMS guidelines in ANSI/EIA–748.

(d) The Contractor shall submit notification of any proposed substantive changes to the EVMS procedures and the impact of those changes to the CFA. If this contract has a value of $50,000,000 or more, unless a waiver is granted by the CFA, any EVMS changes proposed by the Contractor require approval of the CFA prior to implementation. The CFA will advise the Contractor of the acceptability of such changes as soon as practicable (generally within 30 calendar days) after receipt of the Contractor's notice of proposed changes. If the CFA waives the advance approval requirements, the Contractor shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(e) The Government will schedule integrated baseline reviews as early as practicable, and the review process will be conducted not later than 180 calendar days after (1) contract award, (2) the exercise of significant contract options, and (3) the incorporation of major modifications. During such reviews, the Government and the Contractor will jointly assess the Contractor's baseline to be used for performance measurement to ensure complete coverage of the statement of work, logical scheduling of the work activities, adequate resourcing, and identification of inherent risks.

(f) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS complies, and continues to comply, with the performance criteria referenced in paragraph (a) of this clause.

(g) When indicated by contract performance, the Contractor shall submit a request for approval to initiate an over-target baseline or over-target schedule to the Contracting Officer. The request shall include a top-level projection of cost and/or schedule growth, a determination of whether or not performance variances will be retained, and a schedule of implementation for the rebaselining. The Government will acknowledge receipt of the request in a timely manner (generally within 30 calendar days).

(h) The Contractor shall require its subcontractors to comply with EVMS requirements as follows:

(1) For subcontracts valued at $50,000,000 or more, the following subcontractors shall comply with the requirements of this clause:

[Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.]

_____

_____

_____

_____

(2) For subcontracts valued at less than $50,000,000, the following subcontractors shall comply with the requirements of this clause, excluding the requirements of paragraph (b) of this clause:

[Contracting Officer to insert names of subcontractors (or subcontracted effort if subcontractors have not been selected) designated for application of the EVMS requirements of this clause.]

(End of clause)

[73 FR 21848, Apr. 23, 2008]

252.235–7000 Indemnification under 10 U.S.C. 2354—fixed price.

As prescribed in 235.070–3, use the following clause:

INDEMNIFICATION UNDER 10 U.S.C. 2354—FIXED PRICE (DEC 1991)

(a) This clause provides for indemnification under 10 U.S.C. 2354 if the Contractor meets all the terms and conditions of this clause.

(b) Claims, losses, and damages covered—

(1) Claims by third persons for death, bodily injury, sickness, or disease, or the loss, damage, or lost use of property. Claims include those for reasonable expenses of litigation or settlement. The term *third persons* includes employees of the contractor;

(2) The loss, damage, and lost use of the Contractor's property, but excluding lost profit; and

(3) Loss, damage, or lost use of the Government's property.

(c) The claim, loss, or damage—

(1) Must arise from the direct performance of this contract;

(2) Must not be compensated by insurance or other means, or be within deductible amounts of the Contractor's insurance;

(3) Must result from an unusually hazardous risk as specifically defined in the contract;

(4) Must not result from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, managers, superintendents, or other equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location where this contract is being performed; or

(iii) A separate and complete major industrial operation connected with the performance of this contract;

(5) Must not be a liability assumed under any contract or agreement (except for subcontracts covered by paragraph (h) of this clause), unless the Contracting Officer (or in contracts with the Department of the Navy, the Department) specifically approved the assumption of liability; and

(6) Must be certified as just and reasonable by the Secretary of the department or designated representative.

(d) The Contractor shall buy and maintain, to the extent available, insurance against unusually hazardous risks in the form, amount, period(s) of time, at the rate(s), and with such insurers, as the Contracting Officer (or, for Navy contracts, the Department) may from time to time require and approve. If the cost of this insurance is higher than the cost of the insurance the Contractor had as of the date of the contract, the Government shall reimburse the Contractor for the difference in cost, as long as it is properly allocable to this contract and is not included in the contract price. The Government shall not be liable for claims, loss, or damage if insurance was available and is either required or approved under this paragraph.

(e) A reduction of the insurance coverage maintained by the Contractor on the date of the execution of this contract shall not increase the Government's liability under this clause unless the Contracting Officer consents, and the contract price is equitably adjusted, if appropriate, to reflect the Contractor's consideration for the Government's assumption of increased liability.

(f) *Notice.* The Contractor shall—

(1) Promptly notify the Contracting Officer of any occurrence, action, or claim that might trigger the Government's liability under this clause;

(2) Furnish the proof or evidence of any claim, loss, or damage in the form and manner that the Government requires; and

(3) Immediately provide copies of all pertinent papers that the Contractor receives or has received.

(g) The Government may direct, participate in, and supervise the settlement or defense of the claim or action. The Contractor shall comply with the Government's directions and execute any authorizations required.

(h) *Flowdown.* The Government shall indemnify the Contractor if the Contractor has an obligation to indemnify a subcontractor under any subcontract at any tier under this contract for the unusually hazardous risk identified in this contract only if—

(1) The Contracting Officer gave prior written approval for the Contractor to provide in a subcontract for the Contractor to indemnify the subcontractor for unusually hazardous risks defined in this contract;

(2) The Contracting Officer approved those indemnification provisions;

(3) The subcontract indemnification provisions entitle the Contractor, or the Government, or both, to direct, participate in, and supervise the settlement or defense of relevant actions and claims; and

(4) The subcontract provides the same rights and duties, the same provisions for notice, furnishing of papers and the like, between the Contractor and the subcontractor, as exist between the Government and the Contractor under this clause.

(i) The Government may discharge its obligations under paragraph (h) of this clause by making payments directly to subcontractors or to persons to whom the subcontractors may be liable.

(j) The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(End of clause)

252.235–7001 Indemnification under 10 U.S.C. 2354—cost reimbursement.

As prescribed in 235.070–3, use the following clause:

INDEMNIFICATION UNDER 10 U.S.C. 2354—COST REIMBURSEMENT (DEC 1991)

(a) This clause provides for indemnification under 10 U.S.C. 2354 if the Contractor meets all the terms and conditions of this clause.

(b) Claims, losses, and damages covered—

(1) Claims by third persons for death, bodily injury, sickness, or disease, or the loss, damage, or lost use of property. Claims include those for reasonable expenses of litigation or settlement. The term ''third persons'' includes employees of the Contractor;

(2) The loss, damage, and lost use of the Contractor's property, but excluding lost profit; and

(3) Loss, damage, or lost use of the Government's property.

(c) The claim, loss, or damage—

(1) Must arise from the direct performance of this contract;

(2) Must not be compensated by insurance or other means, or be within deductible amounts of the Contractor's insurance;

(3) Must result from an unusually hazardous risk as specifically defined in the contract;

(4) Must not result from willful misconduct or lack of good faith on the part of any of the Contractor's directors or officers, managers, superintendents, or other equivalent representatives who have supervision or direction of—

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location where this contract is being performed; or

(iii) A separate and complete major industrial operation connected with the performance of this contract;

(5) Must not be a liability assumed under any contract or agreement (except for subcontracts covered by paragraph (i) of this clause), unless the Contracting Officer (or in contracts with the Department of the Navy, the Department) specifically approved the assumption of liability; and

(6) Must be certified as just and reasonable by the Secretary of the department or designated representative.

(d) A reduction of the insurance coverage maintained by the Contractor on the date of the execution of this contract shall not increase the Government's liability under this clause unless the Contracting Officer consents, and the contract price is equitably adjusted, if appropriate, to reflect the Contractor's consideration for the Government's assumption of increased liability.

(e) *Notice.* The Insurance—Liability to Third Persons clause of this contract applies also to claims under this clause. In addition, the Contractor shall—

(1) Promptly notify the Contracting Officer of any occurrence, action, or claim that might trigger the Government's liability under this clause;

(2) Furnish the proof or evidence of any claim, loss, or damage in the form and manner that the Government requires; and

(3) Immediately provide copies of all pertinent papers that the contractor receives or has received.

(f) The Government may direct, participate in, and supervise the settlement or defense of the claim or action. The Contractor shall comply with the Government's directions, and execute any authorizations required.

(g) The Limitation of Cost clause of this contract does not apply to the Government's obligations under this clause. The obligations under this clause are excepted from the release required by the Allowable Cost, Fee, and Payment clause of this contract.

(h) Under this clause, a claim, loss, or damage arises from the direct performance of this contract if the cause of the claim, loss, or damage occurred during the period of performance of this contract or as a result of the performance of this contract.

(i) *Flowdown.* The Government shall indemnify the Contractor if the Contractor has an obligation to indemnify a subcontractor under any subcontract at any tier under this contract for the unusually hazardous risk identified in this contract only if—

(1) The Contracting Officer gave prior written approval for the Contractor to provide in a subcontract for the Contractor to indemnify the subcontractor for unusually hazardous risks defined in this contract;

(2) The Contracting Officer approved those indemnification provisions;

(3) The subcontract indemnification provisions entitle the Contractor, or the Government, or both, to direct, participate in, and supervise the settlement or defense of relevant actions and claims; and

(4) The subcontract provides the same rights and duties, the same provisions for notice, furnishing of paper and the like, between the Contractor and the subcontractor,

as exist between the Government and the Contractor under this clause.

(j) The Government may discharge its obligations under paragraph (i) of this clause by making payments directly to subcontractors or to persons to whom the subcontractors may be liable.

(k) The rights and obligations of the parties under this clause shall survive the termination, expiration, or completion of this contract.

(End of clause)

252.235–7002 Animal welfare.

As prescribed in 235.072(a), use the following clause:

ANIMAL WELFARE (DEC 1991)

(a) The Contractor shall register its research facility with the Secretary of Agriculture in accordance with 7 U.S.C. 2316 and 9 CFR subpart C, and §2.30, and furnish evidence of such registration to the Contracting Officer before beginning work under this contract.

(b) The Contractor shall acquire animals only from dealers licensed by the Secretary of Agriculture under 7 U.S.C. 2133 and 9 CFR subpart A, §§2.1 through 2.11, or from sources that are exempt from licensing under those sections.

(c) The Contractor agrees that the care and use of animals will conform with the pertinent laws of the United States and regulations of the Department of Agriculture (see 7 U.S.C. 2131 *et seq.* and 9 CFR subchapter A, parts 1 through 4).

(d) The Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract for failure to comply with the requirements of paragraphs (a) through (c) of this clause.

(1) The suspension will stay in effect until the Contractor complies with the requirements.

(2) Failure to complete corrective action within the time specified by the Contracting Officer may result in termination of this contract and removal of the Contractor's name from the list of contractors with approved Public Health Service Welfare Assurances.

(e) The Contractor may request registration of its facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture (USDA), for the region in which its research facility is located. The location of the appropriate APHIS regional office, as well as information concerning this program may be obtained by contacting the Senior Staff Officer, Animal Care Staff, USDA/APHIS, Federal Center Building, Hyattsville, MD 20782.

(f) The Contractor shall include this clause, including this paragraph (f), in all subcontracts involving research of live vertebrate animals.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 73 FR 42279, July 21, 2008]

252.235–7003 Frequency authorization.

As prescribed in 235.072(b), use the following clause:

FREQUENCY AUTHORIZATION (DEC 1991)

(a) The Contractor shall obtain authorization for radio frequencies required in support of this contract.

(b) For any experimental, developmental, or operational equipment for which the appropriate frequency allocation has not been made, the Contractor shall provide the technical operating characteristics of the proposed electromagnetic radiating device to the Contracting Officer during the initial planning, experimental, or developmental phase of contract performance.

(c) The Contracting Officer shall furnish the procedures for obtaining radio frequency authorization.

(d) The Contractor shall include this clause, including this paragraph (d), in all subcontracts requiring the development, production, construction, testing, or operation of a device for which a radio frequency authorization is required.

(End of clause)

Alternate I (AUG 2008). Substitute the following paragraph (c) for paragraph (c) of the basic clause if agency procedures authorize use of DD Form 1494, Application for Equipment Frequency Allocation:

(c) The Contractor shall use DD Form 1494, Application for Equipment Frequency Allocation, to obtain radio frequency authorization.

[56 FR 36479, July 31, 1991, as amended at 73 FR 42279, July 21, 2008]

252.235–7004—252.235–7009 [Reserved]

252.235–7010 Acknowledgment of support and disclaimer.

As prescribed in 235.072(c), use the following clause:

ACKNOWLEDGMENT OF SUPPORT AND DISCLAIMER (MAY 1995)

(a) The Contractor shall include an acknowledgment of the Government's support

in the publication of any material based on or developed under this contract, stated in the following terms: This material is based upon work supported by the (name of contracting agency(ies)) under Contract No. (Contracting agency(ies) contract number(s)).

(b) All material, except scientific articles or papers published in scientific journals, must, in addition to any notices or disclaimers by the Contractor, also contain the following disclaimer: Any opinions, findings and conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the (name of contracting agency(ies)).

(End of clause)

[60 FR 29503, June 5, 1995, as amended at 73 FR 42279, July 21, 2008]

252.235–7011 Final scientific or technical report.

As prescribed in 235.072(d), use the following clause:

FINAL SCIENTIFIC OR TECHNICAL REPORT (NOV 2004)

The Contractor shall—

(a) Submit two copies of the approved scientific or technical report delivered under this contract to the Defense Technical Information Center, Attn: DTIC-O, 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6218;

(b) Include a completed Standard Form 298, Report Documentation Page, with each copy of the report; and

(c) For submission of reports in other than paper copy, contact the Defense Technical Information Center or follow the instructions at *http://www.dtic.mil.*

(End of clause)

[69 FR 65092, Nov. 10, 2004, 1991, as amended at 73 FR 42279, July 21, 2008]

252.236–7000 Modification proposals—price breakdown.

As prescribed in 236.570(a), use the following clause:

MODIFICATION PROPOSALS—PRICE BREAKDOWN (DEC 1991)

(a) The Contractor shall furnish a price breakdown, itemized as required and within the time specified by the Contracting Officer, with any proposal for a contract modification.

(b) The price breakdown—

(1) Must include sufficient detail to permit an analysis of profit, and of all costs for—

(i) Material;

(ii) Labor;

(iii) Equipment;

(iv) Subcontracts; and

(v) Overhead; and

(2) Must cover all work involved in the modification, whether the work was deleted, added, or changed.

(c) The Contractor shall provide similar price breakdowns to support any amounts claimed for subcontracts.

(d) The Contractor's proposal shall include a justification for any time extension proposed.

(End of clause)

252.236–7001 Contract drawings and specifications.

As prescribed in 236.570(a), use the following clause:

CONTRACT DRAWINGS AND SPECIFICATIONS (AUG 2000)

(a) The Government will provide to the Contractor, without charge, one set of contract drawings and specifications, except publications incorporated into the technical provisions by reference, in electronic or paper media as chosen by the Contracting Officer.

(b) The Contractor shall—

(1) Check all drawings furnished immediately upon receipt;

(2) Compare all drawings and verify the figures before laying out the work;

(3) Promptly notify the Contracting Officer of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

(5) Reproduce and print contract drawings and specifications as needed.

(c) In general—

(1) Large-scale drawings shall govern small-scale drawings; and

(2) The Contractor shall follow figures marked on drawings in preference to scale measurements.

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings:

Title File Drawing No.

(End of clause)

[65 FR 50152, Aug. 17, 2000]

252.236–7002 Obstruction of navigable waterways.

As prescribed in 236.570(b)(1), use the following clause:

OBSTRUCTION OF NAVIGABLE WATERWAYS (DEC 1991)

(a) The Contractor shall—

(1) Promptly recover and remove any material, plant, machinery, or appliance which the contractor loses, dumps, throws overboard, sinks, or misplaces, and which, in the opinion of the Contracting Officer, may be dangerous to or obstruct navigation;

(2) Give immediate notice, with description and locations of any such obstructions, to the Contracting Officer; and

(3) When required by the Contracting Officer, mark or buoy such obstructions until the same are removed.

(b) The Contracting Officer may—

(1) Remove the obstructions by contract or otherwise should the Contractor refuse, neglect, or delay compliance with paragraph (a) of this clause; and

(2) Deduct the cost of removal from any monies due or to become due to the Contractor; or

(3) Recover the cost of removal under the Contractor's bond.

(c) The Contractor's liability for the removal of a vessel wrecked or sunk without fault or negligence is limited to that provided in sections 15, 19, and 20 of the River and Harbor Act of March 3, 1899 (33 U.S.C. 410 *et seq.*).

(End of clause)

252.236–7003 Payment for mobilization and preparatory work.

As prescribed in 236.570(b)(2), use the following clause:

PAYMENT FOR MOBILIZATION AND PREPARATORY WORK (JAN 1997)

(a) The Government will make payment to the Contractor under the procedures in this clause for mobilization and preparatory work under item no. _____.

(b) Payments will be made for actual payments by the Contractor on work preparatory to commencing actual work on the construction items for which payment is provided under the terms of this contract, as follows—

(1) For construction plant and equipment exceeding $25,000 in value per unit (as appraised by the Contracting Officer at the work site) acquired for the execution of the work;

(2) Transportation of all plant and equipment to the site;

(3) Material purchased for the prosecution of the contract, but not to be incorporated in the work;

(4) Construction of access roads or railroads, camps, trailer courts, mess halls, dormitories or living quarters, field headquarters facilities, and construction yards;

(5) Personal services; and

(6) Hire of plant.

(c) Requests for payment must include—

(1) An account of the Contractor's actual expenditures;

(2) Supporting documentation, including receipted bills or copies of payrolls and freight bills; and

(3) The Contractor's documentation—

(i) Showing that it has acquired the construction plant, equipment, and material free from all encumbrances;

(ii) Agreeing that the construction plant, equipment, and material will not be removed from the site without the written permission of the Contracting Officer; and

(iii) Agreeing that structures and facilities prepared or erected for the prosecution of the contract work will be maintained and not dismantled prior to the completion and acceptance of the entire work, without the written permission of the Contracting Officer.

(d) Upon receiving a request for payment, the Government will make payment, less any prescribed retained percentage, if—

(1) The Contracting Officer finds the—

(i) Construction plant, material, equipment, and the mobilization and preparatory work performed are suitable and necessary to the efficient prosecution of the contract; and

(ii) Preparatory work has been done with proper economy and efficiency.

(2) Payments for construction plant, equipment, material, and structures and facilities prepared or erected for prosecution of the contract work do not exceed—

(i) The Contractor's cost for the work performed less the estimated value upon completion of the contract; and

(ii) 100 percent of the cost to the contractor of any items having no appreciable salvage value; and

(iii) 75 percent of the cost to the contractor of items which do have an appreciable salvage value.

(e) (1) Payments will continue to be made for item no. _____, and all payments will be deducted from the contract price for this item, until the total deductions reduce this item to zero, after which no further payments will be made under this item.

(2) If the total of payments so made does not reduce this item to zero, the balance will be paid to the Contractor in the final payment under the contract.

(3) The retained percentage will be paid in accordance with the Payments to Contractor clause of this contract.

(f) The Contracting Officer shall determine the value and suitability of the construction plant, equipment, materials, structures and facilities. The Contracting Officer's determinations are not subject to appeal.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2614, Jan. 17, 1997]

252.236–7004 Payment for mobilization and demobilization.

As prescribed in 236.570(b)(2), use the following clause:

PAYMENT FOR MOBILIZATION AND DEMOBILIZATION (DEC 1991)

(a) The Government will pay all costs for the mobilization and demobilization of all of the Contractor's plant and equipment at the contract lump sum price for this item.

(1) _____ percent of the lump sum price upon completion of the contractor's mobilization at the work site.

(2) The remaining _____ percent upon completion of demobilization.

(b) The Contracting Officer may require the Contractor to furnish cost data to justify this portion of the bid if the Contracting Officer believes that the percentages in paragraphs (a) (1) and (2) of this clause do not bear a reasonable relation to the cost of the work in this contract.

(1) Failure to justify such price to the satisfaction of the Contracting Officer will result in payment, as determined by the Contracting Officer, of—

(i) Actual mobilization costs at completion of mobilization;

(ii) Actual demobilization costs at completion of demobilization; and

(iii) The remainder of this item in the final payment under this contract.

(2) The Contracting Officer's determination of the actual costs in paragraph (b)(1) of this clause is not subject to appeal.

(End of clause)

252.236–7005 Airfield safety precautions.

As prescribed in 236.570(b)(3), use the following clause. At some airfields, the width of the primary surface is 1,500 feet (750 feet on each side of the runway centerline). In such instances, substitute the proper width in the clause.

AIRFIELD SAFETY PRECAUTIONS (DEC 1991)

(a) *Definitions.* As used in this clause—

(1) *Landing areas* means—

(i) The primary surfaces, comprising the surface of the runway, runway shoulders, and lateral safety zones. The length of each primary surface is the same as the runway length. The width of each primary surface is 2,000 feet (1,000 feet on each side of the runway centerline);

(ii) The *clear zone* beyond the ends of each runway, i.e., the extension of the primary surface for a distance of 1,000 feet beyond each end of each runway;

(iii) All taxiways, plus the lateral clearance zones along each side for the length of the taxiways (the outer edge of each lateral clearance zone is laterally 250 feet from the far or opposite edge of the taxiway, e.g., a 75-foot-wide taxiway would have a combined width of taxiway and lateral clearance zones of 425 feet); and

(iv) All aircraft parking aprons, plus the area 125 feet in width extending beyond each edge all around the aprons.

(2) *Safety precaution areas* means those portions of approach-departure clearance zones and transitional zones where placement of objects incident to contract performance might result in vertical projections at or above the approach-departure clearance, or the transitional surface.

(i) The *approach-departure clearance surface* is an extension of the primary surface and the clear zone at each end of each runway, for a distance of 50,000 feet, first along an inclined (glide angle) and then along a horizontal plane, both flaring symmetrically about the runway centerline extended.

(A) The inclined plane (glide angle) begins in the clear zone 200 feet past the end of the runway (and primary surface) at the same elevation as the end of the runway. It continues upward at a slope of 50:1 (1 foot vertically for each 50 feet horizontally) to an elevation of 500 feet above the established airfield elevation. At that point the plane becomes horizontal, continuing at that same uniform elevation to a point 50,000 feet longitudinally from the beginning of the inclined plane (glide angle) and ending there.

(B) The width of the surface at the beginning of the inclined plane (glide angle) is the same as the width of the clear zone. It then flares uniformly, reaching the maximum width of 16,000 feet at the end.

(ii) The *approach-departure clearance zone* is the ground area under the approach-departure clearance surface.

(iii) The *transitional surface* is a sideways extension of all primary surfaces, clear zones, and approach-departure clearance surfaces along inclined planes.

(A) The inclined plane in each case begins at the edge of the surface.

(B) The slope of the incline plane is 7:1 (1 foot vertically for each 7 feet horizontally). It continues to the point of intersection with the—

(*1*) Inner horizontal surface (which is the horizontal plane 150 feet above the established airfield elevation); or

(*2*) Outer horizontal surface (which is the horizontal plane 500 feet above the established airfield elevation), whichever is applicable.

(iv) The ''transitional zone'' is the ground area under the transitional surface. (It adjoins the primary surface, clear zone, and approach-departure clearance zone.)

(b) *General.* (1) The Contractor shall comply with the requirements of this clause while—

(i) Operating all ground equipment (mobile or stationary);

(ii) Placing all materials; and

(iii) Performing all work, upon and around all airfields.

(2) The requirements of this clause are in addition to any other safety requirements of this contract.

(c) The Contractor shall—

(1) Report to the Contracting Officer before initiating any work;

(2) Notify the Contracting Officer of proposed changes to locations and operations;

(3) Not permit either its equipment or personnel to use any runway for purposes other than aircraft operation without permission of the Contracting Officer, unless the runway is—

(i) Closed by order of the Contracting Officer; and

(ii) Marked as provided in paragraph (d)(2) of this clause;

(4) Keep all paved surfaces, such as runways, taxiways, and hardstands, clean at all times and, specifically, free from small stones which might damage aircraft propellers or jet aircraft;

(5) Operate mobile equipment according to the safety provisions of this clause, while actually performing work on the airfield. At all other times, the Contractor shall remove all mobile equipment to locations—

(i) Approved by the Contracting Officer;

(ii) At a distance of at least 750 feet from the runway centerline, plus any additional distance; and

(iii) Necessary to ensure compliance with the other provisions of this clause; and

(6) Not open a trench unless material is on hand and ready for placing in the trench. As soon as practicable after material has been placed and work approved, the Contractor shall backfill and compact trenches as required by the contract. Meanwhile, all hazardous conditions shall be marked and lighted in accordance with the other provisions of this clause.

(d) *Landing areas.* The Contractor shall—

(1) Place nothing upon the landing areas without the authorization of the Contracting Officer;

(2) Outline those landing areas hazardous to aircraft, using (unless otherwise authorized by the Contracting Officer) red flags by day, and electric, battery-operated low-intensity red flasher lights by night;

(3) Obtain, at an airfield where flying is controlled, additional permission from the control tower operator every time before entering any landing area, unless the landing area is marked as hazardous in accordance with paragraph (d)(2) of this clause;

(4) Identify all vehicles it operates in landing areas by means of a flag on a staff attached to, and flying above, the vehicle. The flag shall be three feet square, and consist of a checkered pattern of international orange and white squares of 1 foot on each side (except that the flag may vary up to ten percent from each of these dimensions);

(5) Mark all other equipment and materials in the landing areas, using the same marking devices as in paragraph (d)(2) of this clause; and

(6) Perform work so as to leave that portion of the landing area which is available to aircraft free from hazards, holes, piles of material, and projecting shoulders that might damage an airplane tire.

(e) *Safety precaution areas.* The Contractor shall—

(1) Place nothing upon the safety precaution areas without authorization of the Contracting Officer;

(2) Mark all equipment and materials in safety precaution areas, using (unless otherwise authorized by the Contracting Officer) red flags by day, and electric, battery-operated, low-intensity red flasher lights by night; and

(3) Provide all objects placed in safety precaution areas with a red light or red lantern at night, if the objects project above the approach-departure clearance surface or above the transitional surface.

(End of clause)

252.236–7006 Cost limitation.

As prescribed in 236.570(b)(4), use the following provision:

COST LIMITATION (JAN 1997)

(a) Certain items in this solicitation are subject to statutory cost limitations. The limitations are stated in the Schedule.

(b) An offer which does not state separate prices for the items identified in the Schedule as subject to a cost limitation may be considered nonresponsive.

(c) Prices stated in offers for items subject to cost limitations shall include an appropriate apportionment of all costs, direct and indirect, overhead, and profit.

(d) Offers may be rejected which—

(1) Are materially unbalanced for the purpose of bringing items within cost limitations; or

(2) Exceed the cost limitations, unless the limitations have been waived by the Government prior to award.

(End of provision)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2615, Jan. 17, 1997]

252.236–7007 Additive or deductive items.

As prescribed in 236.570(b)(5), use the following provision:

ADDITIVE OR DEDUCTIVE ITEMS (DEC 1991)

(a) The low offeror and the items to be awarded shall be determined as follows—

(1) Prior to the opening of bids, the Government will determine the amount of funds available for the project.

(2) The low offeror shall be the Offeror that—

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base bid item, plus or minus (in the order stated in the list of priorities in the bid schedule) those additive or deductive items that provide the most features within the funds determined available.

(3) The Contracting Officer shall evaluate all bids on the basis of the same additive or deductive items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds for all offerors, the Contracting Officer will skip that item and go to the next item from the bid schedule of priorities; and

(ii) Add that next item if an award may be made that includes that item and is within the available funds.

(b) The Contracting Officer will use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if—

(1) It is in the best interest of the Government;

(2) Funds are available at the time of award; and

(3) The low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror.

(c) *Example.* The amount available is $100,000. Offeror A's base bid and four additives (in the order stated in the list of priorities in the bid Schedule) are $85,000, $10,000, $8,000, $6,000, and $4,000. Offeror B's base bid and four additives are $80,000, $16,000, $9,000, $7,000, and $4,000. Offeror A is the low offeror. The aggregate amount of offeror A's bid for purposes of award would be $99,000, which includes a base bid plus the first and fourth additives. The second and third additives were skipped because each of them would cause the aggregate bid to exceed $100,000.

(End of provision)

252.236–7008 Contract prices—bidding schedules.

As prescribed in 236.570(b)(6), use the following provision:

CONTRACT PRICES—BIDDING SCHEDULES (DEC 1991)

(a) The Government's payment for the items listed in the Bidding Schedule shall constitute full compensation to the Contractor for—

(1) Furnishing all plant, labor, equipment, appliances, and materials; and

(2) Performing all operations required to complete the work in conformity with the drawings and specifications.

(b) The Contractor shall include in the prices for the items listed in the Bidding Schedule all costs for work in the specifications, whether or not specifically listed in the Bidding Schedule.

(End of provision)

252.236–7009 Option for supervision and inspection services.

As prescribed in 236.609–70, use the following clause:

OPTION FOR SUPERVISION AND INSPECTION SERVICES (DEC 1991)

(a) The Government may—

(1) At its option, direct the Contractor to perform any part or all of the supervision and inspection services for the construction contract as provided under appendix A of this contract; and

(2) Exercise its option, by written order, at any time prior to six months after satisfactory completion and acceptance of the work under this contract.

(b) Upon receipt of the Contracting Officer's written order, the Contractor shall proceed with the supervision and inspection services.

(End of clause)

252.236–7010 Overseas military construction—Preference for United States firms.

As prescribed in 236.570(c)(1), use the following provision:

OVERSEAS MILITARY CONSTRUCTION—PREFERENCE FOR UNITED STATES FIRMS (JAN 1997)

(a) *Definition.* ''United States firm,'' as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)

[62 FR 2857, Jan. 17, 1997, as amended at 63 FR 11549, Mar. 9, 1998]

252.236–7011 Overseas architect-engineer services—Restriction to United States firms.

As prescribed in 236.609–70(b), use the following provision:

OVERSEAS ARCHITECT-ENGINEER SERVICES—RESTRICTION TO UNITED STATES FIRMS (JAN 1997)

(a) *Definition. United States firm,* as used in this provision, means a firm incorporated in the United States that complies with the following:

(1) The corporate headquarters are in the United States;

(2) The firm has filed corporate and employment tax returns in the United States for a minimum of 12 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Restriction.* Military construction appropriations acts restrict award of a contract, resulting from this solicitation, to a United States firm or a joint venture of United States and host nation firms.

(c) *Status.* The offeror confirms, by submission of its offer, that it is a United States firm or a joint venture of United States and host nation firms.

(End of provision)

[62 FR 2858, Jan. 17, 1997]

252.236–7012 Military construction on Kwajalein Atoll—evaluation preference.

As prescribed in 236.570(c)(2), use the following provision:

MILITARY CONSTRUCTION ON KWAJALEIN ATOLL—EVALUATION PREFERENCE (MAR 1998)

(a) *Definitions.* As used in this provision—

(1) *Marshallese firm* means a local firm incorporated in the Marshall Islands, or otherwise legally organized under the laws of the Marshall Islands, that—

(i) Is more than 50 percent owned by citizens of the Marshall Islands; or

(ii) Complies with the following:

(A) The firm has done business in the Marshall Islands on a continuing basis for not less than 3 years prior to the date of issuance of this solicitation;

(B) Substantially all of the firm's directors of local operations, senior staff, and operating personnel are resident in the Marshall Islands or are U.S. citizens; and

(C) Most of the operating equipment and physical plant are in the Marshall Islands.

(2) *United States firm* means a firm incorporated in the United States that complies with the following:

(i) The corporate headquarters are in the United States;

(ii) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms or Marshallese firms will be evaluated by adding 20 percent to the offer, unless application of the factor would not result in award to a United States firm.

(c) *Status.* The offeror is _____ a United States firm; _____ a Marshallese firm; _____ Other.

(End of provision)

[63 FR 11549, Mar. 9, 1998]

252.237–7000 Notice of special standards of responsibility.

As prescribed in 237.270(d)(1), use the following provision:

NOTICE OF SPECIAL STANDARDS OF RESPONSIBILITY (DEC 1991)

(a) To be determined responsible, the Offeror must meet the general standards of responsibility set forth at FAR 9.104–1 and the following criteria, as described in Chapter 3,

General Standards, of ''Government Auditing Standards.''

(1) Qualifications;

(2) Independence; and

(3) Quality Control.

(b) ''Government Auditing Standards'' is issued by the Comptroller General of the United States and is available for sale from the: Superintendent of Documents, U.S. Government Printing Office. Washington, DC 20401, Stock number 020–000–00243–3.

(c) The apparently successful Offeror, before award, shall give the Contracting Officer evidence that it is licensed by the cognizant licensing authority in the state or other political jurisdiction where the Offeror operates its professional practice.

(End of provision)

[56 FR 36479, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

252.237–7001 Compliance with audit standards.

As prescribed in 237.270(d)(2), use the following clause:

COMPLIANCE WITH AUDIT STANDARDS (MAY 2000)

The Contractor, in performance of all audit services under this contract, shall comply with ''Government Auditing Standards'' issued by the Comptroller General of the United States.

(End of clause)

[65 FR 32041, May 22, 2000]

252.237–7002 Award to single offeror.

As prescribed in 237.7003(a), use the following provision:

AWARD TO SINGLE OFFEROR (DEC 1991)

(a) Award shall be made to a single offeror.

(b) Offerors shall include unit prices for each item. Failure to include unit prices for each item will be cause for rejection of the entire offer.

(c) The Government will evaluate offers on the basis of the estimated quantities shown.

(d) Award will be made to that responsive, responsible offeror whose total aggregate offer is the lowest price to the Government.

(End of provision)

Alternate I (DEC 1991). As prescribed in 237.7003(a), substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) Award will be made to that responsive, responsible offeror whose total aggregate offer is in the best interest of the Government.

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7003 Requirements.

As prescribed in 237.7003(b), use the following clause:

REQUIREMENTS (DEC 1991)

(a) Except as provided in paragraphs (c) and (d) of this clause, the Government will order from the Contractor all of its requirements in the area of performance for the supplies and services listed in the schedule of this contract.

(b) Each order will be issued as a delivery order and will list—

(1) The supplies or services being ordered;

(2) The quantities to be furnished;

(3) Delivery or performance dates;

(4) Place of delivery or performance;

(5) Packing and shipping instructions;

(6) The address to send invoices; and

(7) The funds from which payment will be made.

(c) The Government may elect not to order supplies and services under this contract in instances where the body is removed from the area for medical, scientific, or other reason.

(d) In an epidemic or other emergency, the contracting activity may obtain services beyond the capacity of the Contractor's facilities from other sources.

(e) Contracting Officers of the following activities may order services and supplies under this contract—

_____

_____

_____

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7004 Area of performance.

As prescribed in 237.7003(b), use the following clause:

AREA OF PERFORMANCE (DEC 1991)

(a) The area of performance is as specified in the contract.

(b) The Contractor shall take possession of the remains at the place where they are located, transport them to the Contractor's place of preparation, and later transport them to a place designated by the Contracting Officer.

(c) The Contractor will not be reimbursed for transportation when both the place

where the remains were located and the delivery point are within the area of performance.

(d) If remains are located outside the area of performance, the Contracting Officer may place an order with the Contractor under this contract or may obtain the services elsewhere. If the Contracting Officer requires the Contractor to transport the remains into the area of performance, the Contractor shall be paid the amount per mile in the schedule for the number of miles required to transport the remains by a reasonable route from the point where located to the boundary of the area of performance.

(e) The Contracting Officer may require the Contractor to deliver remains to any point within 100 miles of the area of performance. In this case, the Contractor shall be paid the amount per mile in the schedule for the number of miles required to transport the remains by a reasonable route from the boundary of the area of performance to the delivery point.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7005 Performance and delivery.

As prescribed in 237.7003(b), use the following clause:

PERFORMANCE AND DELIVERY (DEC 1991)

(a) The Contractor shall furnish the material ordered and perform the services specified as promptly as possible but not later than 36 hours after receiving notification to remove the remains, excluding the time necessary for the Government to inspect and check results of preparation.

(b) The Government may, at no additional charge, require the Contractor to hold the remains for an additional period not to exceed 72 hours from the time the remains are casketed and final inspection completed.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7006 Subcontracting.

As prescribed in 237.7003(b), use the following clause:

SUBCONTRACTING (DEC 1991)

The Contractor shall not subcontract any work under this contract without the Contracting Officer's written approval. This clause does not apply to contracts of employment between the Contractor and its personnel.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7007 Termination for default.

As prescribed in 237.7003(b), use the following clause:

TERMINATION FOR DEFAULT (DEC 1991)

(a) This clause supplements and is in addition to the Default clause of this contract.

(b) The Contracting Officer may terminate this contract for default by written notice without the ten day notice required by paragraph (a)(2) of the Default clause if—

(1) The Contractor, through circumstances reasonably within its control or that of its employees, performs any act under or in connection with this contract, or fails in the performance of any service under this contract and the act or failures may reasonably be considered to reflect discredit upon the Department of Defense in fulfilling its responsibility for proper care of remains;

(2) The Contractor, or its employees, solicits relatives or friends of the deceased to purchase supplies or services not under this contract. (The Contractor may furnish supplies or arrange for services not under this contract, only if representatives of the deceased voluntarily request, select, and pay for them.);

(3) The services or any part of the services are performed by anyone other than the Contractor or the Contractor's employees without the written authorization of the Contracting Officer;

(4) The Contractor refuses to perform the services required for any particular remains; or

(5) The Contractor mentions or otherwise uses this contract in its advertising in any way.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7008 Group interment.

As prescribed in 237.7003(b), use the following clause:

GROUP INTERMENT (DEC 1991)

The Government will pay the Contractor for supplies and services provided for remains interred as a group on the basis of the number of caskets furnished, rather than on the basis of the number of persons in the group.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7009 Permits.

As prescribed in 237.7003(b), use the following clause:

PERMITS (DEC 1991)

The Contractor shall meet all State and local licensing requirements and obtain and furnish all necessary health department and shipping permits at no additional cost to the Government. The Contractor shall ensure that all necessary health department permits are in order for disposition of the remains.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7010 [Reserved]

252.237–7011 Preparation history.

As prescribed in 237.7003(b), use the following clause:

PREPARATION HISTORY (DEC 1991)

For each body prepared, or for each casket handled in a group interment, the Contractor shall state briefly the results of the embalming process on a certificate furnished by the Contracting Officer.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7012 Instruction to offerors (count-of-articles).

As prescribed in 237.7101(a), use the following provision:

INSTRUCTION TO OFFERORS (COUNT-OF-ARTICLES) (DEC 1991)

(a) The Offeror shall include unit prices for each item in a lot. Unit prices shall include all costs to the Government of providing the services, including pickup and delivery charges.

(b) Failure to offer on any item in a lot shall be cause for rejection of the offer on that lot. The Contracting Officer will evaluate offers based on the estimated quantities in the solicitation.

(c) Award generally will be made to a single offeror for all lots. However, the Contracting Officer may award by individual lot when it is more advantageous to the Government.

(d) Prospective offerors may inspect the types of articles to be serviced. Contact the Contracting Officer to make inspection arrangements.

(End of provision)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7013 Instruction to offerors (bulk weight).

As prescribed in 237.7101(b), use the following provision:

INSTRUCTION TO OFFERORS (BULK WEIGHT) (DEC 1991)

(a) Offers shall be submitted on a unit price per pound of serviced laundry. Unit prices shall include all costs to the Government of providing the service, including pickup and delivery charges.

(b) The Contracting Officer will evaluate bids based on the estimated pounds of serviced laundry stated in the solicitation.

(c) Award generally will be made to a single offeror for all lots. However, the Contracting Officer may award by individual lot when it is more advantageous to the Government.

(d) Prospective offerors may inspect the types of articles to be serviced. Contact the Contracting Officer to make inspection arrangements.

(End of provision)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7014 Loss or damage (count-of-articles).

As prescribed in 237.7101(c), use the following clause:

LOSS OR DAMAGE (COUNT-OF-ARTICLES) (DEC 1991)

(a) The count-of-articles will be—

(1) The count of the Contracting Officer; or

(2) The count agreed upon as a result of a joint count by the Contractor and the Contracting Officer at the time of delivery to the Contractor.

(b) The Contractor shall—

(1) Be liable for return of the number and kind of articles furnished for service under this contract; and

(2) Shall indemnify the Government for any loss or damage to such articles.

(c) The Contractor shall pay to the Government the value of any lost or damaged property using Federal supply schedule price lists. If the property is not on these price

lists, the Contracting Officer shall determine a fair and reasonable price.

(d) The Contracting Officer will allow credit for any depreciation in the value of the property at the time of loss or damage. The Contracting Officer and the Contractor shall mutually determine the amount of the allowable credit.

(e) Failure to agree upon the value of the property or on the amount of credit due will be treated as a dispute under the Disputes clause of this contract.

(f) In case of damage to any property that the Contracting Officer and the Contractor agree can be satisfactorily repaired, the Contractor may repair the property at its expense in a manner satisfactory to the Contracting Officer, rather than make payment under paragraph (c) of this clause.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7015 Loss or damage (weight of articles).

As prescribed in 237.7101(d), use the following clause:

LOSS OR DAMAGE (WEIGHT OF ARTICLES) (DEC 1991)

(a) The Contractor shall—

(1) Be liable for return of the articles furnished for service under this contract; and

(2) Indemnify the Government for any articles delivered to the Contractor for servicing under this contract that are lost or damaged, and in the opinion of the Contracting Officer, cannot be repaired satisfactorily.

(b) The Contractor shall pay to the Government _____ per pound for lost or damaged articles. The Contractor shall pay the Government only for losses which exceed the maximum weight loss in paragraph (e) of this clause.

(c) Failure to agree on the amount of credit due will be treated as a dispute under the Disputes clause of this contract.

(d) In the case of damage to any articles that the Contracting Officer and the Contractor agree can be satisfactorily repaired, the Contractor shall repair the articles at its expense in a manner satisfactory to the Contracting Officer.

(e) The maximum weight loss allowable in servicing the laundry is _____ percent of the weight recorded on delivery tickets when the laundry is picked up. Any weight loss in excess of this amount shall be subject to the loss provisions of this clause.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7016 Delivery tickets.

As prescribed in 237.7101(e), use the following clause:

DELIVERY TICKETS (DEC 1991)

(a) The Contractor shall complete delivery tickets in the number of copies required and in the form approved by the Contracting Officer, when it receives the articles to be serviced.

(b) The Contractor shall include one copy of each delivery ticket with its invoice for payment.

(End of clause)

Alternate I (DEC 1991). As prescribed in 237.7101(e)(1), add the following paragraphs (c), (d), and (e) to the basic clause:

(c) Before the Contractor picks up articles for service under this contract, the Contracting Officer will ensure that—

(1) Each bag contains only articles within a single bag type as specified in the schedule; and

(2) Each bag is weighed and the weight and bag type are identified on the bag.

(d) The Contractor shall, at time of pickup—

(1) Verify the weight and bag type and record them on the delivery ticket; and

(2) Provide the Contracting Officer, or representative, a copy of the delivery ticket.

(e) At the time of delivery, the Contractor shall record the weight and bag type of serviced laundry on the delivery ticket. The Contracting Officer will ensure that this weight and bag type are verified at time of delivery.

Alternate II (DEC 1991). As prescribed in 237.7101(e)(2), add the following paragraphs (c), (d), and (e) to the basic clause—

(c) Before the Contractor picks up articles for service under this contract, the Contracting Officer will ensure that each bag is weighed and that the weight is identified on the bag.

(d) The Contractor, at time of pickup, shall verify and record the weight on the delivery ticket and shall provide the Contracting Officer, or representative, a copy of the delivery ticket.

(e) At the time of delivery, the Contractor shall record the weight of serviced laundry

on the delivery ticket. The Contracting Officer will ensure that this weight is verified at time of delivery.

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7017 Individual laundry.

As prescribed in 237.7101(f), use the following clause:

INDIVIDUAL LAUNDRY (DEC 1991)

(a) The Contractor shall provide laundry service under this contract on both a unit bundle and on a piece-rate bundle basis for individual personnel.

(b) The total number of pieces listed in the ''Estimated Quantity'' column in the schedule is the estimated amount of individual laundry for this contract. The estimate is for information only and is not a representation of the amount of individual laundry to be ordered. Individuals may elect whether or not to use the laundry services.

(c) Charges for individual laundry will be on a per unit bundle or a piece-rate basis. The Contractor shall provide individual laundry bundle delivery tickets for use by the individuals in designating whether the laundry is a unit bundle or a piece-rate bundle. An individual laundry bundle will be accompanied by a delivery ticket listing the contents of the bundle.

(d) The maximum number of pieces to be allowed per bundle is as specified in the schedule and as follows—

(1) *Bundle consisting of 26 pieces, including laundry bag.* This bundle will contain approximately _____ pieces of outer garments which shall be starched and pressed. Outer garments include, but are not limited to, shirts, trousers, jackets, dresses, and coats.

(2) *Bundle consisting of 13 pieces, including laundry bag.* This bundle will contain approximately _____ pieces of outer garments which shall be starched and pressed. Outer garments include, but are not limited to, shirts, trousers, jackets, dresses, and coats.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7018 Special definitions of Government property.

As prescribed in 237.7101(g), use the following clause:

SPECIAL DEFINITIONS OF GOVERNMENT PROPERTY (DEC 1991)

Articles delivered to the Contractor to be laundered or dry-cleaned, including any articles which are actually owned by individual Government personnel, are Government-owned property, not Government-furnished property. Government-owned property does not fall under the requirements of any Government-furnished property clause of this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 71 FR 3416, Jan. 23, 2006]

252.237–7019 Training for Contractor Personnel Interacting with Detainees.

As prescribed in 237.171–4, use the following clause:

TRAINING FOR CONTRACTOR PERSONNEL INTERACTING WITH DETAINEES (SEPT 2006)

(a) *Definitions.* As used in this clause—

Combatant Commander means the commander of a unified or specified combatant command established in accordance with 10 U.S.C. 161.

Detainee means a person in the custody or under the physical control of the Department of Defense on behalf of the United States Government as a result of armed conflict or other military operation by United States armed forces.

Personnel interacting with detainees means personnel who, in the course of their duties, are expected to interact with detainees.

(b) *Training requirement.* This clause implements Section 1092 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108–375).

(1) The Combatant Commander responsible for the area where a detention or interrogation facility is located will arrange for training to be provided to contractor personnel interacting with detainees. The training will address the international obligations and laws of the United States applicable to the detention of personnel, including the Geneva Conventions. The Combatant Commander will arrange for a training receipt document to be provided to personnel who have completed the training.

(2)(i) The Contractor shall arrange for its personnel interacting with detainees to—

(A) Receive the training specified in paragraph (b)(1) of this clause—

(*1*) Prior to interacting with detainees, or as soon as possible if, for compelling reasons, the Contracting Officer authorizes interaction with detainees prior to receipt of such training; and

(*2*) Annually thereafter; and

(B) Provide a copy of the training receipt document specified in paragraph (b)(1) of this clause to the Contractor for retention.

(ii) To make these arrangements, the following points of contact apply:

[Contracting Officer to insert applicable point of contact information cited in PGI 237.171–3(b).]

(3) The Contractor shall retain a copy of the training receipt document(s) provided in accordance with paragraphs (b)(1) and (2) of this clause until the contract is closed, or 3 years after all work required by the contract has been completed and accepted by the Government, whichever is sooner.

(c) *Subcontracts.* The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that may require subcontractor personnel to interact with detainees in the course of their duties.

(End of clause)

[70 FR 52034, Sept. 1, 2005, as amended at 71 FR 53049, Sept. 8, 2006]

252.237–7020—252.237–7021 [Reserved]

252.237–7022 Services at installations being closed.

As prescribed in 237.7402, use the following clause:

SERVICES AT INSTALLATIONS BEING CLOSED (MAY 1995)

Professional employees shall be used by the local government to provide services under this contract to the extent that professionals are available in the area under the jurisdiction of such government.

(End of clause)

[59 FR 36090, July 15, 1994, as amended at 60 FR 29503, June 5, 1995]

252.239–7000 Protection against compromising emanations.

As prescribed in 239.7103(a), use the following clause:

PROTECTION AGAINST COMPROMISING EMANATIONS (JUN 2004)

(a) The Contractor shall provide or use only information technology, as specified by the Government, that has been accredited to meet the appropriate information assurance requirements of—

(1) The National Security Agency National TEMPEST Standards (NACSEM No. 5100 or NACSEM No. 5100A, Compromising Emanations Laboratory Test Standard, Electromagnetics (U)); or

(2) Other standards specified by this contract, including the date through which the required accreditation is current or valid for the contract.

(b) Upon request of the Contracting Officer, the Contractor shall provide documentation supporting the accreditation.

(c) The Government may, as part of its inspection and acceptance, conduct additional tests to ensure that information technology delivered under this contract satisfies the information assurance standards specified. The Government may conduct additional tests—

(1) At the installation site or contractor's facility; and

(2) Notwithstanding the existence of valid accreditations of information technology prior to the award of this contract.

(d) Unless otherwise provided in this contract under the Warranty of Supplies or Warranty of Systems and Equipment clause, the Contractor shall correct or replace accepted information technology found to be deficient within 1 year after proper installations.

(1) The correction or replacement shall be at no cost to the Government.

(2) Should a modification to the delivered information technology be made by the Contractor, the 1-year period applies to the modification upon its proper installation.

(3) This paragraph (d) applies regardless of f.o.b. point or the point of acceptance of the deficient information technology.

(End of clause)

[69 FR 35535, June 25, 2004, as amended at 73 FR 1829, Jan. 10, 2008]

252.239–7001 Information Assurance Contractor Training and Certification.

As prescribed in 239.7103(b), use the following clause:

INFORMATION ASSURANCE CONTRACTOR TRAINING AND CERTIFICATION (JAN 2008)

(a) The Contractor shall ensure that personnel accessing information systems have the proper and current information assurance certification to perform information assurance functions in accordance with DoD 8570.01–M, Information Assurance Workforce Improvement Program. The Contractor shall meet the applicable information assurance certification requirements, including—

(1) DoD-approved information assurance workforce certifications appropriate for each category and level as listed in the current version of DoD 8570.01–M; and

(2) Appropriate operating system certification for information assurance technical positions as required by DoD 8570.01–M.

(b) Upon request by the Government, the Contractor shall provide documentation supporting the information assurance certification status of personnel performing information assurance functions.

(c) Contractor personnel who do not have proper and current certifications shall be denied access to DoD information systems for the purpose of performing information assurance functions.

(End of clause)

[73 FR 1829, Jan. 10, 2008]

252.239–7002 Access.

As prescribed in 239.7411(a), use the following clause:

ACCESS (DEC 1991)

(a) Subject to military security regulations, the Government shall permit the Contractor access at all reasonable times to Contractor furnished facilities. However, if the Government is unable to permit access, the Government at its own risk and expense shall maintain these facilities and the Contractor shall not be responsible for the service involving any of these facilities during the period of nonaccess, unless the service failure results from the Contractor's fault or negligence.

(b) During periods when the Government does not permit Contractor access, the Government will reimburse the Contractor at mutually acceptable rates for the loss of or damage to the equipment due to the fault or negligence of the Government. Failure to agree shall be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract.

(End of clause)

252.239–7003 [Reserved]

252.239–7004 Orders for facilities and services.

As prescribed in 239.7411(a), use the following clause:

ORDERS FOR FACILITIES AND SERVICES (NOV 2005)

The Contractor shall acknowledge a communication service authorization or other type order for supplies and facilities by—

(a) Commencing performance; or

(b) Written acceptance by a duly authorized representative.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 70 FR 67919, Nov. 9, 2005]

252.239–7005 Rates, charges, and services.

As prescribed in 239.7411(a), use the following clause:

RATES, CHARGES, AND SERVICES (NOV 2005)

(a) *Definition—Governmental regulatory body* means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating under the state authority. Regulatory bodies whose decisions are not subject to judicial appeal and regulatory bodies which regulate a company owned by the same entity which creates the regulatory body are not ''governmental regulatory bodies.''

(b) The Contractor shall furnish the services and facilities under this agreement/contract in accordance with—

(1) All applicable tariffs, rates, charges, rules, regulations, or requirements;

(i) Lawfully established by a governmental regulatory body; and

(ii) Applicable to service and facilities furnished or offered by the Contractor to the general public or the Contractor's subscribers;

(2) Rates, terms, and conditions of service and facilities furnished or offered by the Contractor to the general public or the Contractor's subscribers; or

(3) Rates, terms, and conditions of service as may be agreed upon, subject, when appropriate, to jurisdiction of a governmental regulatory body.

(c) The Government shall not prepay for services.

(d) For nontariffed services, the Contractor shall charge the Government at the lowest rate and under the most favorable terms and conditions for similar service and facilities offered to any other customer.

(e) Recurring charges for services and facilities shall, in each case, start with the satisfactory beginning of service or provision of facilities or equipment and are payable monthly in arrears.

(f) Subject to the Cancellation or Termination of Orders clause, of this agreement/contract, the Government may stop the use of any service or facilities furnished under this agreement/contract at any time. The Government shall pay the contractor all charges for services and facilities adjusted to the effective date of discontinuance.

(g) Expediting charges are costs necessary to get services earlier than normal. Examples are overtime pay or special shipment. When authorized, expediting charges shall be the additional costs incurred by the Contractor and the subcontractor. The Government shall pay expediting charges only when—

(1) They are provided for in the tariff established by a governmental regulatory body; or

(2) They are authorized in a communication service authorization or other contractual document.

(h) When services normally provided are technically unacceptable and the development, fabrication, or manufacture of special equipment is required, the Government may—

(1) Provide the equipment; or

(2) Direct the Contractor to acquire the equipment or facilities. If the Contractor acquires the equipment or facilities, the acquisition shall be competitive, if practicable.

(i) If at any time the Government defers or changes its orders for any of the services but does not cancel or terminate them, the amount paid or payable to the Contractor for the services deferred or modified shall be equitably adjusted under applicable tariffs filed by the Contractor with the regulatory commission in effect at the time of deferral or change. If no tariffs are in effect, the Government and the Contractor shall equitably adjust the rates by mutual agreement. Failure to agree on any adjustment shall be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 70 FR 67919, Nov. 9, 2005]

252.239–7006 Tariff information.

As prescribed in 239.7411(a), use the following clause:

TARIFF INFORMATION (JUL 1997)

(a) The Contractor shall provide to the Contracting Officer—

(1) Upon request, a copy of the Contractor's current existing tariffs (including changes);

(2) Before filing, any application to a Federal, State, or any other regulatory agency for new or changes to, rates, charges, services, or regulations relating to any tariff or any of the facilities or services to be furnished solely or primarily to the Government; and

(3) Upon request, a copy of all information, material, and data developed or prepared in support of or in connection with an application under paragraph (a)(2) of this clause.

(b) The Contractor shall notify the Contracting Officer of any application that anyone other than the Contractor files with a governmental regulatory body which affects or will affect the rate or conditions of services under this agreement/contract. These requirements also apply to applications pending on the effective date of this agreement/contract.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 40473, July 29, 1997]

252.239–7007 Cancellation or termination of orders.

As prescribed in 239.7411(a), use the following clause:

CANCELLATION OR TERMINATION OF ORDERS (NOV 2005)

(a) If the Government cancels any of the services ordered under this agreement/contract, before the services are made available to the Government, or terminates any of these services after they are made available to the Government, the Government shall reimburse the Contractor for the actual nonrecoverable costs the Contractor has reasonably incurred in providing facilities and equipment for which the Contractor has no foreseeable reuse.

(b) The amount of the Government's liability upon cancellation or termination of any of the services ordered under this agreement/contract will be determined under applicable tariffs governing cancellation and termination charges which—

(1) Are filed by the Contractor with a governmental regulatory body, as defined in the Rates, Charges, and Services clause of this agreement/contract;

(2) Are in effect on the date of termination; and

(3) Provide specific cancellation or termination charges for the facilities and equipment involved or show how to determine the charges.

(c) The amount of the Government's liability upon cancellation or termination of any of the services ordered under this agreement/contract, which are not subject to a governmental regulatory body, will be determined under a mutually agreed schedule in the communication services authorization (CSA) or other contractual document.

(d) If no applicable tariffs are in effect on the date of cancellation or termination or set forth in the applicable CSA or other contractual document, the Government's liability will be determined under the following settlement procedures—

(1) The Contractor agrees to provide the Contracting Officer, in such reasonable detail as the Contracting Officer may require, inventory schedules covering all items of property or facilities in the Contractor's possession, the cost of which is included in the Basic Cancellation or Termination Liability for which the Contractor has no foreseeable reuse.

(2) The Contractor shall use its best efforts to sell property or facilities when the Contractor has no foreseeable reuse or when the Government has not exercised its option to

take title under the title to Telecommunications Facilities and Equipment clause of this agreement/contract. The Contractor shall apply any proceeds of the sale to reduce any payments by the Government to the Contractor under a cancellation or termination settlement.

(3) The Contractor shall record actual nonrecoverable costs under established accounting procedures prescribed by the cognizant governmental regulatory authority or, if no such procedures have been prescribed, under generally accepted accounting procedures applicable to the provision of telecommunication services for public use.

(4) The actual nonrecoverable costs are the installed costs of the facilities and equipment, less cost of reusable materials, and less net salvage value. Installed costs shall include the actual cost of equipment and materials specifically provided or used, plus the actual cost of installing (including engineering, labor, supervision, transportation, rights-of-way, and any other items which are chargeable to the capital accounts of the Contractor) less any costs the Government may have directly reimbursed the Contractor under the Special Construction and Equipment Charges clause of this agreement/contract. Deduct from the Contractor's installed cost, the net salvage value (salvage value less cost of removal). In determining net salvage value, give consideration to foreseeable reuse of the facilities and equipment by the Contractor. Make allowance for the cost of dismantling, removal, reconditioning, and disposal of the facilities and equipment when necessary either to the sale of facilities or their reuse by the Contractor in another location.

(5) The Basic Cancellation Liability is defined as the actual nonrecoverable cost which the Government shall reimburse the Contractor at the time services are cancelled. The Basic Termination Liability is defined as the nonrecoverable cost amortized in equal monthly increments throughout the liability period. Upon termination of services, the Government shall reimburse the Contractor for the nonrecoverable cost less such costs amortized to the date services are terminated. Establish the liability period as mutually agreed to but not to exceed ten years.

(6) When the Basic Cancellation or Termination Liability established by the CSA or other contractual document is based on estimated costs, the Contractor agrees to settle on the basis of actual cost at the time of termination or cancellation.

(7) The Contractor agrees that, if after settlement but within the termination liability period of the services, should the Contractor make reuse of equipment or facilities which were treated as nonreusable or nonsalvagable in the settlement, the Contractor shall reimburse the Government for the value of the equipment or facilities.

(8) The Contractor agrees to exclude—

(i) Any costs which are not included in determining cancellation and termination charges under the Contractor's standard practices or procedures; and

(ii) Charges not ordinarily made by the Contractor for similar facilities or equipment, furnished under similar circumstances.

(e) The Government may, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the canceled or terminated portion of this agreement/contract. The Government may make these payments if in the opinion of the Contracting Officer the total of the payments is within the amount the Contractor is entitled. If the total of the payments is in excess of the amount finally agreed or determined to be due under this clause, the Contractor shall pay the excess to the Government upon demand.

(f) Failure to agree shall be a dispute concerning a question of fact within the meaning of the Disputes clause.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2615, Jan. 17, 1997; 70 FR 67919, Nov. 9, 2005]

252.239–7008 Reuse arrangements.

As prescribed in 239.7411(a), use the following clause:

REUSE ARRANGEMENTS (DEC 1991)

(a) When feasible, the Contractor shall reuse canceled or terminated facilities or equipment to minimize the charges to the Government.

(b) If at any time the Government requires that telecommunications facilities or equipment be relocated within the Contractor's service area, the Government shall have the option of paying the costs of relocating the facilities or equipment in lieu of paying any termination or cancellation charge under the Cancellation or Termination of Orders-Common Carriers clause of this agreement/contract. The Basic Termination Liability applicable to the facilities or equipment in their former location shall continue to apply to the facilities and equipment in their new location. Monthly rental charges shall continue to be paid during the period.

(c) When there is another requirement or foreseeable reuse in place of canceled or terminated facilities or equipment, no charge shall apply and the Basic Cancellation or Termination Liability shall be appropriately reduced. When feasible, the Contractor shall

promptly reuse discontinued channels or facilities, including equipment for which the Government is obligated to pay a minimum service charge.

(End of clause)

252.239–7009—252.239–7010 [Reserved]

252.239–7011 Special construction and equipment charges.

As prescribed in 239.7411(b), use the following clause:

SPECIAL CONSTRUCTION AND EQUIPMENT CHARGES (DEC 1991)

(a) The Government will not directly reimburse the Contractor for the cost of constructing any facilities or providing any equipment, unless the Contracting Officer authorizes direct reimbursement.

(b) If the Contractor stops using facilities or equipment which the Government has, in whole or part, directly reimbursed, the Contractor shall allow the Government credit for the value of the facilities or equipment attributable to the Government's contribution. Determine the value of the facilities and equipment on the basis of their foreseeable reuse by the Contractor at the time their use is discontinued or on the basis of the net salvage value, whichever is greater. The Contractor shall promptly pay the Government the amount of any credit.

(c) The amount of the direct special construction charge shall not exceed—

(1) The actual costs to the Contractor; and

(2) An amount properly allocable to the services to be provided to the Government.

(d) The amount of the direct special construction charge shall not include costs incurred by the Contractor which are covered by—

(1) A cancellation or termination liability; or

(2) The Contractor's recurring or other nonrecurring charges.

(e) The Contractor represents that—

(1) Recurring charges for the services, facilities, and equipment do not include in the rate base any costs that have been reimbursed by the Government to the Contractor; and

(2) Depreciation charges are based only on the cost of facilities and equipment paid by the Contractor and not reimbursed by the Government.

(f) If it becomes necessary for the Contractor to incur costs to replace any facilities or equipment, the Government shall assume those costs or reimburse the Contractor for replacement costs at mutually acceptable rates under the following circumstances—

(1) The Government paid direct special construction charges; or

(2) The Government reimbursed the Contractor for those facilities or equipment as a part of the recurring charges; and

(3) The need for replacement was due to circumstances beyond the control and without the fault of the Contractor.

(g) Before incurring any costs under paragraph (f) of this clause, the Government shall have the right to terminate the service under the Cancellation or Termination of Orders clause of this contract.

(End of clause)

252.239–7012 Title to telecommunication facilities and equipment.

As prescribed in 239.7411(b), use the following clause:

TITLE TO TELECOMMUNICATION FACILITIES AND EQUIPMENT (DEC 1991)

(a) Title to all Contractor furnished facilities and equipment used under this agreement/contract shall remain with the Contractor even if the Government paid the costs of constructing the facilities or equipment. A mutually accepted communications service authorization may provide for exceptions.

(b) The Contractor shall operate and maintain all telecommunication facilities and equipment used under this agreement/contract whether the Government or the Contractor has title.

(End of clause)

252.239–7013 Obligation of the Government.

As prescribed in 239.7411(c), use the following clause:

OBLIGATION OF THE GOVERNMENT (JUL 2006)

(a) This basic agreement is not a contract. The Government incurs no monetary liability under this agreement.

(b) The Government incurs liability only upon issuance of a communication service authorization, which is the contract and incorporates the terms of this agreement.

(End of clause)

[71 FR 39011, July 11, 2006]

252.239–7014 Term of agreement.

As prescribed in 239.7411(c), use the following clause:

TERM OF AGREEMENT (DEC 1991)

(a) This agreement shall continue in force from year to year, unless terminated by either party by 60 days written notice.

(b) Termination of this agreement does not cancel any communication service authorizations previously issued.

(End of clause)

252.239–7015 Continuation of communication service authorizations.

As prescribed in 239.7411(c), use the following clause:

CONTINUATION OF COMMUNICATION SERVICE AUTHORIZATIONS (JUL 2006)

(a) All communication service authorizations issued by_____incorporating Basic Agreement Number _____, dated _____, are modified to incorporate this basic agreement.

(b) Communication service authorizations currently in effect which were issued by the activity in paragraph (a) of this clause incorporating other agreements with the Contractor may also be modified to incorporate this agreement.

(c) This basic agreement is not a contract.

(End of clause)

[71 FR 39011, July 11, 2006]

252.239–7016 Telecommunications security equipment, devices, techniques, and services.

As prescribed in 239.7411(d), use the following clause:

TELECOMMUNICATIONS SECURITY EQUIPMENT, DEVICES, TECHNIQUES, AND SERVICES (DEC 1991)

(a) *Definitions.* As used in this clause—

(1) *Securing* means the application of Government-approved telecommunications security equipment, devices, techniques, or services to contractor telecommunications systems.

(2) *Sensitive information* means any information the loss, misuse, or modification of which, or unauthorized access to, could adversely affect the national interest or the conduct of Federal programs, or the privacy to which individuals are entitled under 5 U.S.C. 552a (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or Act of Congress to be kept secret in the interest of national defense or foreign policy.

(3) *Telecommunications systems* means voice, record, and data communications, including management information systems and local data networks that connect to external transmission media, when employed by Government agencies, contractors, and subcontractors to transmit—

(i) Classified or sensitive information;

(ii) Matters involving intelligence activities, cryptologic activities related to national security, the command and control of military forces, or equipment that is an integral part of a weapon or weapons system; or

(iii) Matters critical to the direct fulfillment of military or intelligence missions.

(b) This solicitation/contract identifies classified or sensitive information that requires securing during telecommunications and requires the Contractor to secure telecommunications systems. The Contractor agrees to secure information and systems at the following location: (Identify the location.)

(c) To provide the security, the Contractor shall use Government-approved telecommunications equipment, devices, techniques, or services. A list of the approved equipment, etc. may be obtained from (identify where list can be obtained). Equipment, devices, techniques, or services used by the Contractor must be compatible or interoperable with (list and identify the location of any telecommunications security equipment, device, technique, or service currently being used by the technical or requirements organization or other offices with which the Contractor must communicate).

(d) Except as may be provided elsewhere in this contract, the Contractor shall furnish all telecommunications security equipment, devices, techniques, or services necessary to perform this contract. The Contractor must meet ownership eligibility conditions for communications security equipment designated as controlled cryptographic items.

(e) The Contractor agrees to include this clause, including this paragraph (e), in all subcontracts which require securing telecommunications.

(End of clause)

252.241–7000 Superseding contract.

As prescribed in 241.501–70(a), use the following clause:

SUPERSEDING CONTRACT (DEC 1991)

This contract supersedes contract No. _____, dated ___ which provided similar services. Any capital credits accrued to the Government, any remaining credits due to the Government under the connection charge, or any termination liability are transferred to this contract, as follows:

CAPITAL CREDITS

(List years and accrued credits by year and separate delivery points.)

OUTSTANDING CONNECTION CHARGE CREDITS

(List by month and year the amount credited and show the remaining amount of outstanding credits due the Government.)

TERMINATION LIABILITY CHARGES

(List by month and year the amount of monthly facility cost recovered and show the remaining amount of facility cost to be recovered.)

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 63 FR 11549, Mar. 9, 1998]

252.241–7001 Government access.

As prescribed in 241.501–70(b), use the following clause:

GOVERNMENT ACCESS (DEC 1991)

Authorized representatives of the Government may have access to the Contractor's on-base facilities upon reasonable notice or in case of emergency.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 63 FR 11549, Mar. 9, 1998]

252.242–7000–252.242–7002 [Reserved]

252.242–7003 Application for U.S. Government shipping documentation/instructions.

As prescribed in 242.1404–2–70, use the following clause:

APPLICATION FOR U.S. GOVERNMENT SHIPPING DOCUMENTATION/INSTRUCTIONS (DEC 1991)

The Contractor shall request Government bills of lading by submitting a DD Form 1659, Application for U.S. Government Shipping Documentation/Instructions, to the—

(a) Transportation Officer, if named in the contract schedule; or

(b) Contract administration office.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 34135, June 24, 1997]

252.242–7004 Material management and accounting system.

As prescribed in 242.7204, use the following caluse:

MATERIAL MANAGEMENT AND ACCOUNTING SYSTEM (NOV 2005)

(a) *Definitions.* As used in this clause—

(1) *Material management and accounting system (MMAS)* means the Contractor's system or systems for planning, controlling, and accounting for the acquisition, use, issuing, and disposition of material. Material management and accounting systems may be manual or automated. They may be standalone systems or they may be integrated with planning, engineering, estimating, purchasing, inventory, accounting, or other systems.

(2) *Valid time-phased requirements* means material that is—

(i) Needed to fulfill the production plan, including reasonable quantities for scrap, shrinkage, yield, etc.; and

(ii) Charged/billed to contracts or other cost objectives in a manner consistent with the need to fulfill the production plan.

(3) ''Contractor'' means a business unit as defined in section 31.001 of the Federal Acquisition Regulation (FAR).

(b) *General.* The Contractor shall—

(1) Maintain an MMAS that—

(i) Reasonably forecasts material requirements;

(ii) Ensures that costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements; and

(iii) Maintains a consistent, equitable, and unbiased logic for costing of material transactions; and

(2) Assess its MMAS and take reasonable action to comply with the MMAS standards in paragraph (e) of this clause.

(c) *Disclosure and maintenance requirements.* The Contractor shall—

(1) Have policies, procedures, and operating instructions that adequately described its MMAS;

(2) Provide to the Administrative Contracting Officer (ACO), upon request, the results of the internal reviews that it has conducted to ensure compliance with established MMAS policies, procedures, and operating instructions; and

(3) Disclose significant changes in its MMAS to the ACO at least 30 days prior to implementation.

(d) *Deficiencies.* (1) If the Contractor receives a report from the ACO that identifies any deficiencies in its MMAS, the Contractor shall respond as follows:

(i) If the Contractor agrees with the report findings and recommendations, the Contractor shall—

(A) Within 30 days (or such other date as may be mutually agreed to by the ACO and the Contractor), state its agreement in writing; and

(B) Within 60 days (or such other date as may be mutually agreed to by the ACO and the Contractor), correct the deficiencies or submit a corrective action plan showing milestones and actions to eliminate the deficiencies.

(ii) If the Contractor disagrees with the report findings and recommendations, the Contractor shall, within 30 days (or such other date as may be mutually agreed to by the ACO and the Contractor), state its rationale for each area of disagreement.

(2) The ACO will evaluate the Contractor's response and will notify the Contractor in writing of the—

(i) Determination concerning any remaining deficiencies;

(ii) Adequacy of any proposed or completed corrective action plan; and

(iii) Need for any new or revised corrective action plan.

(3) When the ACO determines the MMAS deficiencies have a material impact on Government contract costs, the ACO must reduce progress payments by an appropriate percentage based on affected costs (in accordance with FAR 32.503–6) and/or disallow costs on vouchers (in accordance with FAR 42.803) until the ACO determines that—

(i) The deficiencies are corrected; or

(ii) The amount of the impact is immaterial.

(4) If the contractor fails to make adequate progress, the ACO must take further action. The ACO may—

(i) Elevate the issue to higher level management;

(ii) Further reduce progress payments and/or disallow costs on vouchers;

(iii) Notify the contractor of the inadequacy of the contractor's cost estimating system and/or cost accounting system; and

(iv) Issue cautions to contracting activities regarding the award of future contracts.

(e) *MMAS standards.* The MMAS shall have adequate internal controls to ensure system and data integrity, and shall—

(1) Have an adequate system description including policies, procedures, and operating instructions that comply with the FAR and Defense FAR Supplement;

(2) Ensure that costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements as impacted by minimum/economic order quantity restrictions.

(i) A 98 percent bill of material accuracy and a 95 percent master production schedule accuracy are desirable as a goal in order to ensure that requirements are both valid and appropriately time-phased.

(ii) If systems have accuracy levels below these, the Contractor shall provide adequate evidence that—

(A) There is no material harm to the Government due to lower accuracy levels; and

(B) The cost to meet the accuracy goals is excessive in relation to the impact on the Government;

(3) Provide a mechanism to identify, report, and resolve system control weaknesses and manual override. Systems should identify operational exceptions such as excess/residual inventory as soon as known;

(4) Provide audit trails and maintain records (manual and those in machine readable form) necessary to evaluate system logic and to verify through transaction testing that the system is operating as desired;

(5) Establish and maintain adequate levels of record accuracy, and include reconciliation of recorded inventory quantities to physical inventory by part number on a periodic basis. A 95 percent accuracy level is desirable. If systems have an accuracy level below 95 percent, the Contractor shall provide adequate evidence that—

(i) There is no material harm to the Government due to lower accuracy levels; and

(ii) The cost to meet the accuracy goal is excessive in relation to the impact on the Government;

(6) Provide detailed descriptions of circumstances that will result in manual or system generated transfers of parts;

(7) Maintain a consistent, equitable, and unbiased logic for costing of material transactions as follows:

(i) The Contractor shall maintain and disclose written policies describing the transfer methodology and the loan/pay-back technique.

(ii) The costing methodology may be standard or actual cost, or any of the inventory costing methods in 48 CFR 9904.411–50(b). The Contractor shall maintain consistency across all contract and customer types, and from accounting period to accounting period for initial charging and transfer charging.

(iii) The system should transfer parts and associated costs within the same billing period. In the few instances where this may not be appropriate, the Contractor may accomplish the material transaction using a loan/pay-back technique. The ''loan/pay-back technique'' means that the physical part is moved temporarily from the contract, but the cost of the part remains on the contract. The procedures for the loan/pay-back technique must be approved by the ACO. When the technique is used, the Contractor shall have controls to ensure—

(A) Parts are paid back expeditiously;

(B) Procedures and controls are in place to correct any overbilling that might occur;

(C) Monthly, at a minimum, identification of the borrowing contract and the date the part was borrowed; and

(D) The cost of the replacement part is charged to the borrowing contract;

(8) Where allocations from common inventory accounts are used, have controls (in addition to those in paragraphs (e)(2) and (7) of this clause) to ensure that—

(i) Reallocations and any credit due are processed no less frequently than the routine billing cycle;

(ii) Inventories retained for requirements that are not under contract are not allocated to contracts; and

(iii) Algorithms are maintained based on valid and current data;

(9) Regardless of the provisions of FAR 45.505–3(f)(1)(ii), have adequate controls to

ensure that physically commingled inventories that may include material for which costs are charged or allocated to fixed-price, cost-reimbursement, and commercial contracts do not compromise requirements of any of the standards in paragraphs (e)(1) through (8) of this clause. Government-furnished material shall not be—

(i) Physically commingled with other material; or

(ii) Used on commercial work; and

(10) Be subjected to periodic internal reviews to ensure compliance with established policies and procedures.

(End of clause)

[65 FR 77834, Dec. 13, 2000, as amended at 70 FR 67921, Nov. 9, 2005]

252.243–7000 [Reserved]

252.243–7001 Pricing of contract modifications.

As prescribed in 243.205–70, use the following clause:

PRICING OF CONTRACT MODIFICATIONS (DEC 1991)

When costs are a factor in any price adjustment under this contract, the contract cost principles and procedures in FAR part 31 and DFARS part 231, in effect on the date of this contract, apply.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 66 FR 49865, Oct. 1, 2001]

252.243–7002 Requests for equitable adjustment.

As prescribed in 243.205–71, use the following clause:

REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998)

(a) The amount of any request for equitable adjustment to contract terms shall accurately reflect the contract adjustment for which the Contractor believes the Government is liable. The request shall include only costs for performing the change, and shall not include any costs that already have been reimbursed or that have been separately claimed. All indirect costs included in the request shall be properly allocable to the change in accordance with applicable acquisition regulations.

(b) In accordance with 10 U.S.C. 2410(a), any request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold shall bear, at the time of submission, the following certificate executed by an individual authorized to certify the request on behalf of the Contractor:

I certify that the request is made in good faith, and that the supporting data are accurate and complete to the best of my knowledge and belief.

_____

(Official's Name)

_____

(Title)

(c) The certification in paragraph (b) of this clause requires full disclosure of all relevant facts, including—

(1) Cost or pricing data if required in accordance with subsection 15.403–4 of the Federal Acquisition Regulation (FAR); and

(2) Information other than cost or pricing data, in accordance with subsection 15.403–3 of the FAR, including actual cost data and data to support any estimated costs, even if cost or pricing data are not required.

(d) The certification requirement in paragraph (b) of this clause does not apply to—

(1) Requests for routine contract payments; for example, requests for payment for accepted supplies and services, routine vouchers under a cost-reimbursement type contract, or progress payment invoices; or

(2) Final adjustment under an incentive provision of the contract.

(End of clause)

[63 FR 11549, Mar. 9, 1998, as amended at 66 FR 49865, Oct. 1, 2001]

252.244–7000 Subcontracts for Commercial Items and Commercial Components (DoD Contracts).

As prescribed in 244.403, use the following clause:

SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS (DOD CONTRACTS) (JAN 2007)

In addition to the clauses listed in paragraph (c) of the Subcontracts for Commercial Items clause of this contract (Federal Acquisition Regulation 52.244–6), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract:

(a) 252.225–7014 Preference for Domestic Specialty Metals, Alternate I (10 U.S.C. 2241 note).

(b) 252.246–7003 Notification of Potential Safety Issues.

(c) 252.247–7023 Transportation of Supplies by Sea (10 U.S.C. 2631).

(d) 252.247–7024 Notification of Transportation of Supplies by Sea (10 U.S.C. 2631).

(End of clause)

[72 FR 2636, Jan. 22, 2007]

252.245–7000 Government-furnished mapping, charting, and geodesy property.

As prescribed in 245.310–70, use the following clause:

GOVERNMENT-FURNISHED MAPPING, CHARTING, AND GEODESY PROPERTY (DEC 1991)

(a) *Definition—Mapping, charting, and geodesy (MC&G) property* means geodetic, geomagnetic, gravimetric, aeronautical, topographic, hydrographic, cultural, and toponymic data presented in the form of topographic, planimetric, relief, or thematic maps and graphics; nautical and aeronautical charts and publications; and in simulated, photographic, digital, or computerized formats.

(b) The Contractor shall not duplicate, copy, or otherwise reproduce MC&G property for purposes other than those necessary for performance of the contract.

(c) At the completion of performance of the contract, the Contractor, as directed by the Contracting Officer, shall either destroy or return to the Government all Government-furnished MC&G property not consumed in the performance of this contract.

(End of clause)

252.246–7000 Material inspection and receiving report.

As prescribed in 246.370, use the following clause:

MATERIAL INSPECTION AND RECEIVING REPORT (MAR 2008)

(a) At the time of each delivery of supplies or services under this contract, the Contractor shall prepare and furnish to the Government a material inspection and receiving report in the manner and to the extent required by Appendix F, Material Inspection and Receiving Report, of the Defense FAR Supplement.

(b) Contractor submission of the material inspection and receiving information required by Appendix F of the Defense FAR Supplement by using the Wide Area WorkFlow (WAWF) electronic form (see paragraph (b) of the clause at 252.232–7003) fulfills the requirement for a material inspection and receiving report (DD Form 250). Two copies of the receiving report (paper copies of either the DD Form 250 or the WAWF report) shall be distributed with the shipment, in accordance with Appendix F, Part 4, F–401, Table 1, of the Defense FAR Supplement.

(End of clause)

[68 FR 8455, Feb. 21, 2003, as amended at 73 FR 1831, Jan. 10, 2008; 73 FR 11359, Mar. 3, 2008]

252.246–7001 Warranty of data.

As prescribed in 246.710 (1), use the following clause:

WARRANTY OF DATA (DEC 1991)

(a) *Definition—Technical data* has the same meaning as given in the clause in this contract entitled, Rights in Technical Data and Computer Software.

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.

(3) The remedies in this clause represent the only way to enforce the Government's rights under this clause.

(e) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

Alternate I (DEC 1991). As prescribed in 246.710(2), substitute the following for paragraph (d)(3) of the basic clause:

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed 75 percent of the target profit.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment subcontractor, the limit of the Contractor's liability shall be—

(A) Ten percent of the total subcontract price in a firm fixed price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price or cost-plus-incentive-type contract.

(iii) Damages due the Government under the provisions of this warranty are not an allowable cost.

(iv) The additional liability in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL-T-31000, General Specification for Technical Data Packages, Amendment 1, or MIL-T-47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL-D-1000A, Engineering and Associated Data Drawings, or DoD-D-1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL-D-1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

Alternate II (DEC 1991). As prescribed at 246.710(3), substitute the following paragraph for paragraph (d)(3) of the basic clause:

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of the warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed ten percent of the total contract price.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment subcontractor, the limit of the Contractor's liability shall be—

(A) Ten percent of the total subcontract price in a firm fixed-price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price or cost-plus-incentive-type contract.

(iii) The additional liability specified in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL-T-31000, General Specification for Technical Data Packages, Amendment 1, or MIL-T-47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL-D-1000A, Engineering and Associated Data Drawings, or DoD-D-1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL-D-1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

252.246–7002 Warranty of construction (Germany).

As prescribed in 246.710(4), use the following clause:

WARRANTY OF CONSTRUCTION (GERMANY) (JUNE 1997)

(a) In addition to any other representations in this contract, the Contractor warrants, except as provided in paragraph (j) of this clause, that the work performed under this contract conforms to the contract requirements and is free of any defect of equipment, material, or design furnished or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for the period(s) specified in Section 13, VOB, Part B, commencing from the date of final acceptance of the work under this contract. If the Government takes possession of any part of the work before final acceptance, this warranty shall continue for the period(s) specified in Section 13, VOB, Part B, from the date the Government takes possession.

(c) The Contractor shall remedy, at the Contractor's expense, any failure to conform or any defect. In addition, the Contractor shall remedy, at the Contractor's expense, any damage to Government-owned or -controlled real or personal property when that damage is the result of—

(1) The Contractor's failure to conform to contract requirements; or

(2) Any defect of equipment, material, or design furnished or workmanship performed.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable period of time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable period of time after receipt of notice, the Government shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall—

(1) Obtain all warranties that would be given in normal commercial practice;

(2) Require all warranties to be executed in writing, for the benefit of the Government, if directed by the Contracting Officer; and

(3) Enforce all warranties for the benefit of the Government as directed by the Contracting Officer.

(h) In the event the Contractor's warranty under paragraph (b) of this clause has expired, the Government may bring suit at its expense to enforce a subcontractor's, manufacturer's, or supplier's warranty.

(i) Unless a defect is caused by the Contractor's negligence, or the negligence of a subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by the Government or for the repair of any damage resulting from any defeat in Government-furnished material or design.

(j) This warranty shall not limit the Government's right under the Inspection clause of this contract, with respect to latent defects, gross mistakes, or fraud.

(End of clause)

[62 FR 34135, June 24, 1997; 62 FR 49306, Sept. 19, 1997]

252.246–7003 Notification of Potential Safety Issues.

As prescribed in 246.371(a), use the following clause:

NOTIFICATION OF POTENTIAL SAFETY ISSUES (JAN 2007)

(a) *Definitions.* As used in this clause—

Credible information means information that, considering its source and the surrounding circumstances, supports a reasonable belief that an event has occurred or will occur.

Critical safety item means a part, subassembly, assembly, subsystem, installation equipment, or support equipment for a system that contains a characteristic, any failure, malfunction, or absence of which could have a safety impact.

Safety impact means the occurrence of death, permanent total disability, permanent partial disability, or injury or occupational illness requiring hospitalization; loss of a weapon system; or property damage exceeding $1,000,000.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for the Contractor or another subcontractor under this contract.

(b) The Contractor shall provide notification, in accordance with paragraph (c) of this clause, of—

(1) All nonconformances for parts identified as critical safety items acquired by the Government under this contract; and

(2) All nonconformances or deficiencies that may result in a safety impact for systems, or subsystems, assemblies, subassemblies, or parts integral to a system, acquired by or serviced for the Government under this contract.

(c) The Contractor—

(1) Shall notify the Administrative Contracting Officer (ACO) and the Procuring Contracting Officer (PCO) as soon as practicable, but not later than 72 hours, after discovering or acquiring credible information concerning nonconformances and deficiencies described in paragraph (b) of this clause; and

(2) Shall provide a written notification to the ACO and the PCO within 5 working days that includes—

(i) A summary of the defect or nonconformance;

(ii) A chronology of pertinent events;

(iii) The identification of potentially affected items to the extent known at the time of notification;

(iv) A point of contact to coordinate problem analysis and resolution; and

(v) Any other relevant information.

(d) The Contractor—

(1) Is responsible for the notification of potential safety issues occurring with regard to an item furnished by any subcontractor; and

(2) Shall facilitate direct communication between the Government and the subcontractor as necessary.

(e) Notification of safety issues under this clause shall be considered neither an admission of responsibility nor a release of liability for the defect or its consequences. This clause does not affect any right of the Government or the Contractor established elsewhere in this contract.

(f)(1) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts for—

(i) Parts identified as critical safety items;

(ii) Systems and subsystems, assemblies, and subassemblies integral to a system; or

(iii) Repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, subassemblies, and parts integral to a system.

(2) For those subcontracts described in paragraph (f)(1) of this clause, the Contractor shall require the subcontractor to provide the notification required by paragraph (c) of this clause to—

(i) The Contractor or higher-tier subcontractor; and

(ii) The ACO and the PCO, if the subcontractor is aware of the ACO and the PCO for the contract.

(End of clause)

[72 FR 2636, Jan. 22, 2007]

252.247–7000 Hardship conditions.

As prescribed in 247.270–6(a), use the following clause:

HARDSHIP CONDITIONS (AUG 2000)

(a) If the Contractor finds unusual ship, dock, or cargo conditions associated with loading or unloading a particular cargo, that will work a hardship on the Contractor if loaded or unloaded at the basic commodity rates, the Contractor shall—

(1) Notify the Contracting Officer before performing the work, if feasible, but no later than the vessel sailing time; and

(2) Submit any associated request for price adjustment to the Contracting Officer within 10 working days of the vessel sailing time.

(b) Unusual conditions include, but are not limited to, inaccessibility of place of stowage to the ship's cargo gear, side port operations, and small quantities of cargo in any one hatch.

(c) The Contracting Officer will investigate the conditions promptly after receiving the notice. If the Contracting Officer finds that the conditions are unusual and do materially affect the cost of loading or unloading, the Contracting Officer will authorize payment at the applicable man-hour rates set forth in the schedule of rates of this contract.

(End of clause)

[65 FR 50147, Aug. 17, 2000]

252.247–7001 Price adjustment.

As prescribed in 247.270–6(b), use the following clause:

PRICE ADJUSTMENT (JAN 1997)

(a) The Contractor warrants that the prices set forth in this contract—

(1) Are based upon the wage rates, allowances, and conditions set forth in the collective bargaining agreements between the Contractor and its employees, in effect as of (*insert date*), and which are generally applicable to the ports where work under this contract is performed;

(2) Apply to operations by the Contractor on non-Government work as well as under this contract; and

(3) Do not include any allowance for cost increases that may—

(i) Become effective under the terms of the collective bargaining agreements after the date in paragraph (a)(1) of this clause; or

(ii) Result from modification of the collective bargaining agreements after the date in paragraph (a)(1).

(b) The Contractor shall notify the Contracting Officer within 60 days of receipt of notice of any changes (increase or decrease) in the wage rates, allowances, fringe benefits, and conditions that apply to its direct labor employees, if the changes—

(1) Are pursuant to the provisions of the collective bargaining agreements; or

(2) Are a result of effective modifications to the agreements; and

(3) Would change the Contractor's costs to perform this contract.

(c) The Contractor shall include in its notification—

(1) A proposal for an adjustment in the contract commodity, activity, or work-hour prices; and

(2) Data, in such form as the Contracting Officer may require, explaining the—

(i) Causes;

(ii) Effective date; and

(iii) Amount of the increase or decrease in the Contractor's proposal for the adjustment.

(d) Promptly upon receipt of any notice and data described in paragraph (c), the Contractor and the Contracting Officer shall negotiate an adjustment in the existing contract commodity, activity, or man-hour prices. However, no upward adjustment of the existing commodity, activity, or work-hour prices will be allowed in excess of _____ percent per year, except as provided in the Changes clause of this contract.

(1) Changes in the contract prices shall reflect, in addition to the direct and variable indirect labor costs, the associated changes in the costs for social security, unemployment compensation, taxes, and workman's compensation insurance.

(2) There will be no adjustment to increase the dollar amount allowances of the Contractor's profit.

(3) The agreed upon adjustment, its effective date, and the revised commodity, activity, or work-hour prices for services set forth in the schedule of rates, shall be incorporated in the contract by supplemental agreement.

(e) There will be no adjustment for any changes in the quantities of labor that the Contractor contemplated for each specific commodity, except as may result from modifications of the collective bargaining agreements. For the purpose of administering this clause, the Contractor shall submit to the Contracting Officer, within five days after award, the accounting data and computations the Contractor used to determine its estimated efficiency rate in the performance of this contract, to include the Contractor's computation of the costs apportioned for each rate set forth in the schedule of rates.

(f) Failure of the parties to agree to an adjustment under this clause will be deemed to be a dispute concerning a question of fact within the meaning of the Disputes clause of this contract. The Contractor shall continue performance pending agreement on, or determination of, any such adjustment and its effective date.

(g) The Contractor shall include with the final invoice submitted under this contract a statement that the Contractor has not experienced a decrease in rates of pay for labor, or that the Contractor has given notice of all such decreases in compliance with paragraph (b) of this clause.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 62 FR 2615, Jan. 17, 1997; 65 FR 50147, Aug. 17, 2000]

252.247–7002 Revision of prices.

As prescribed in 247.270–6(c), use the following clause:

REVISION OF PRICES (DEC 1991)

(a) *Definition. Wage adjustment,* as used in this clause, means a change in the wages, salaries, or other terms or conditions of employment which—

(1) Substantially affects the cost of performing this contract;

(2) Is generally applicable to the port where work under this contract is performed; and

(3) Applies to operations by the Contractor on non-Government work as well as to work under this contract.

(b) *General.* The prices fixed in this contract are based on wages and working conditions established by collective bargaining agreements, and on other conditions in effect on the date of this contract. The Contracting Officer and the Contractor may agree to increase or decrease such prices in accordance with this clause.

(c) *Demand for negotiation.* (1) At any time, subject to the limitations specified in this clause, either the Contracting Officer or the Contractor may deliver to the other a written demand that the parties negotiate to revise the prices under this contract.

(2) No such demand shall be made before 90 days after the date of this contract, and thereafter neither party shall make a demand having an effective date within 90 days of the effective date of any prior demand. However, this limitation does not apply to a wage adjustment during the 90 day period.

(3) Each demand shall specify a date (the same as or subsequent to the date of the delivery of the demand) as to when the revised prices shall be effective. This date is the effective date of the price revision.

(i) If the Contractor makes a demand under this clause, the demand shall briefly state the basis of the demand and include the statements and data referred to in paragraph (d) of this clause.

(ii) If the demand is made by the Contracting Officer, the Contractor shall furnish the statements and data within 30 days of the delivery of the demand.

(d) *Submission of data.* At the times specified in paragraphs (c)(3)(i) and (ii) of this clause, the Contractor shall submit—

(1) A new estimate and breakdown of the unit cost and the proposed prices for the services the Contractor will perform under this contract after the effective date of the price revision, itemized to be consistent with the original negotiations of the contract;

(2) An explanation of the difference between the original (or last preceding) estimate and the new estimate;

(3) Such relevant operating data, cost records, overhead absorption reports, and accounting statements as may be of assistance in determining the accuracy and reliability of the new estimate;

(4) A statement of the actual costs of performance under this contract to the extent that they are available at the time of the negotiation of the revision of prices under this clause; and

(5) Any other relevant data usually furnished in the case of negotiations of prices under a new contract. The Government may examine and audit the Contractor's accounts, records, and books as the Contracting Officer considers necessary.

(e) *Negotiations.* (1) Upon the filing of the statements and data required by paragraph (d) of this clause, the Contractor and the Contracting Officer shall negotiate promptly in good faith to agree upon prices for services the Contractor will perform on and after the effective date of the price revision.

(2) If the prices in this contract were established by competitive negotiation, they shall not be revised upward unless justified by changes in conditions occurring after the contract was awarded.

(3) The agreement reached after each negotiation will be incorporated into the contract by supplemental agreement.

(f) *Disagreements.* If, within 30 days after the date on which statements and data are required pursuant to paragraph (c) of this clause, the Contracting Officer and the Contractor fail to agree to revised prices, the failure to agree shall be resolved in accordance with the Disputes clause of this contract. The prices fixed by the Contracting Officer will remain in effect for the balance of the contract, and the Contractor shall continue performance.

(g) *Retroactive changes in wages or working conditions.* (1) In the event of a retroactive wage adjustment, the Contractor or the Contracting Officer may request an equitable adjustment in the prices in this contract.

(2) The Contractor shall request a price adjustment within 30 days of any retroactive wage adjustment. The Contractor shall support its request with—

(i) An estimate of the changes in cost resulting from the retroactive wage adjustment;

(ii) Complete information upon which the estimate is based; and

(iii) A certified copy of the collective bargaining agreement, arbitration award, or other document evidencing the retroactive wage adjustment.

(3) Subject to the limitation in paragraph (g)(2) of this clause as to the time of making a request, completion or termination of this contract shall not affect the Contractor's right under paragraph (g) of this clause.

(4) In case of disagreement concerning any question of fact, including whether any adjustment should be made, or the amount of such adjustment, the disagreement will be resolved in accordance with the Disputes clause of this contract.

(5) The Contractor shall notify the Contracting Officer in writing of any request by or on behalf of the employees of the Contractor which may result in a retroactive wage adjustment. The notice shall be given within 20 days after the request, or if the request occurs before contract execution, at the time of execution.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 65 FR 50147, Aug. 17, 2000]

252.247–7003 [Reserved]

252.247–7004 Indefinite quantities—fixed charges.

As prescribed in 247.270–6(d), use the following clause:

INDEFINITE QUANTITIES—FIXED CHARGES (DEC 1991)

The amount of work and services the Contractor may be ordered to furnish shall be the amount the Contracting Officer may order from time to time. In any event, the Government is obligated to compensate the Contractor the monthly lump sum specified in the Schedule entitled Fixed Charges, for each month or portion of a month the contract remains in effect.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 65 FR 50147, Aug. 17, 2000]

252.247–7005 Indefinite quantities—no fixed charges.

As prescribed in 247.270–6(e), use the following clause:

INDEFINITE QUANTITIES—NO FIXED CHARGES (DEC 1991)

The amount of work and services the Contractor may be ordered to furnish shall be the amount the Contracting Officer may order from time to time. In any event, the Government shall order, during the term of this contract, work or services having an aggregate value of not less than $100.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 65 FR 50148, Aug. 17, 2000]

252.247–7006 Removal of contractor's employees.

As prescribed in 247.270–6(f), use the following clause:

REMOVAL OF CONTRACTOR'S EMPLOYEES (DEC 1991)

The Contractor agrees to use only experienced, responsible, and capable people to perform the work. The Contracting Officer may require that the Contractor remove from the job, employees who endanger persons or property, or whose continued employment under this contract is inconsistent with the interest of military security.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 65 FR 50148, Aug. 17, 2000]

252.247–7007 Liability and insurance.

As prescribed in 247.270–6(g), use the following clause:

LIABILITY AND INSURANCE (DEC 1991)

(a) The Contractor shall be—

(1) Liable to the Government for loss or damage to property, real and personal, owned by the Government or for which the Government is liable;

(2) Responsible for, and hold the Government harmless from, loss of or damage to property not included in paragraph (a)(1); and

(3) Responsible for, and hold the Government harmless from, bodily injury and death of persons, resulting either in whole or in part from the negligence or fault of the Contractor, its officers, agents, or employees in the performance of work under this contract.

(b) For the purpose of this clause, all cargo loaded or unloaded under this contract is agreed to be property owned by the Government or property for which the Government is liable.

(1) The amount of the loss or damage as determined by the Contracting Officer will be withheld from payments otherwise due the Contractor.

(2) Determination of liability and responsibility by the Contracting Officer will constitute questions of fact within the meaning of the Disputes clause of this contract.

(c) The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations. The Contractor is not responsible to the Government for, and does not agree to hold the Government harmless from, loss or damage to property or bodily injury to or death of persons if—

(1) The unseaworthiness of the vessel, or failure or defect of the gear or equipment furnished by the Government, contributed jointly with the fault or negligence of the Contractor in causing such damage, injury, or death; and

(i) The Contractor, his officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness or defect of gear or equipment; or

(ii) Through the exercise of due diligence could not otherwise have avoided such damage, injury, or death.

(2) The damage, injury, or death resulted solely from an act or omission of the Government or its employees, or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer.

(d) The Contractor shall at its own expense acquire and maintain insurance during the term of this contract, as follows—

(1) Standard workmen's compensation and employer's liability insurance and longshoremen's and harbor workers' compensation insurance, or such of these as may be proper under applicable state or Federal statutes.

(i) The Contractor may, with the prior approval of the Contracting Officer, be a self-insurer against the risk of this paragraph (d)(1).

(ii) This approval will be given upon receipt of satisfactory evidence that the Contractor has qualified as a self-insurer under applicable provision of law.

(2) Bodily injury liability insurance in an amount of not less than $300,000 on account of any one occurrence.

(3) Property damage liability insurance (which shall include any and all property, whether or not in the care, custody, or control of the Contractor) in an amount of not less than $300,000 for any one occurrence.

(e) Each policy shall provide, by appropriate endorsement or otherwise, that cancellation or material change in the policy shall not be effective until after a 30 day written notice is furnished the Contracting Officer.

(f) The Contractor shall furnish the Contracting Officer with satisfactory evidence of the insurance required in paragraph (d) before performance of any work under this contract.

(g) The Contractor shall, at its own cost and expense, defend any suits, demands, claims, or actions, in which the United States might be named as a co-defendant of the Contractor, resulting from the Contractor's performance of work under this contract. This requirement is without regard to whether such suit, demand, claim, or action was the result of the Contractor's negligence. The Government shall have the right to appear in such suit, participate in defense, and take such actions as may be necessary to protect the interest of the United States.

(h) It is expressly agreed that the provisions in paragraphs (d) through (g) of this clause shall not in any manner limit the liability or extend the liability of the Contractor as provided in paragraphs (a) through (c) of this clause.

(i) The Contractor shall—

(1) Equitably reimburse the Government if the Contractor is indemnified, reimbursed, or relieved of any loss or damage to Government property;

(2) Do nothing to prevent the Government's right to recover against third parties for any such loss or damage; and

(3) Furnish the Government, upon the request of the Contracting Officer, at the Government's expense, all reasonable assistance and cooperation in obtaining recovery, including the prosecution of suit and the execution of instruments of assignment in favor of the Government.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 65 FR 50148, Aug. 17, 2000]

252.247–7008 Evaluation of bids.

As prescribed in 247.271–4(a), use the following provision:

EVALUATION OF BIDS (DEC 1991)

(a) The Government will evaluate bids on the basis of total aggregate price of all items within an area of performance under a given schedule.

(1) An offeror must bid on all items within a specified area of performance for a given schedule. Failure to do so shall be cause for rejection of the bid for that area of performance of that Schedule. If there is to be no charge for an item, an entry such as ''No Charge,'' or the letters ''N/C'' or ''0,'' must be made in the unit price column of the Schedule.

(2) Any bid which stipulates minimum charges or graduated prices for any or all items shall be rejected for that area of performance within the Schedule.

(b) In addition to other factors, the Contracting Officer will evaluate bids on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards).

(1) In making this evaluation, the Contracting Officer will assume that the administrative cost to the Government for issuing and administering each contract awarded under this solicitation would be $500.

(2) Individual awards will be for the items and combinations of items which result in the lowest aggregate cost to the Government, including the administrative costs in paragraph (b)(1).

(c) When drayage is necessary for the accomplishment of any item in the bid schedule, the Offeror shall include in the unit price any costs for bridge or ferry tolls, road use charges or similar expenses.

(d) Unless otherwise provided in this solicitation, the Offeror shall state prices in amounts per hundred pounds on gross or net weights, whichever is applicable. All charges shall be subject to, and payable on, the basis of 100 pounds minimum weight for unaccompanied baggage and a 500 pound minimum weight for household goods, net or gross weight, whichever is applicable.

(End of provision)

Alternate I (DEC 1991). As prescribed in 247.271–4(a), add the following paragraph (e) to the basic clause:

(e) Notwithstanding paragraph (a), when ''additional services'' are added to any schedule, such ''additional services'' items will not be considered in the evaluation of bids.

252.247–7009 Award.

As prescribed in 247.271–4(b), use the following provision:

AWARD (DEC 1991)

(a) The Government shall make award by area to the qualified low bidder under each of the specified schedules to the extent of the bidder's stated guaranteed daily capability as provided in this solicitation and the Estimated Quantities Schedule.

(b) The Government reserves the right to make an award of two or more areas to a single bidder if such award will result in an overall lower estimated cost to the Government.

(c) The Government also reserves the right to award additional contracts, as a result of this solicitation, to the extent necessary to meet its estimated maximum daily requirements.

(End of provision)

252.247–7010 Scope of contract.

As prescribed in 247.271–4(d), use the following clause:

SCOPE OF CONTRACT (DEC 1991)

(a) The Contractor shall furnish services and materials for the preparation of personal property (including servicing of appliances) for movement or storage, drayage and related services. Unless otherwise indicated in the Schedule, the Contractor shall—

(1) Furnish all materials except Government-owned containers (Federal Specification PPP-B-580), all equipment, plant and labor; and

(2) Perform all work in accomplishing containerization of personal property for

overseas or domestic movement or storage, including—

(i) Stenciling;

(ii) Cooperage;

(iii) Drayage of personal property in connection with other services;

(iv) Decontainerization of inbound shipments of personal property; and

(v) The handling of shipments into and out of the Contractor's facility.

(b) Excluded from the scope of this contract is the furnishing of like services or materials which are provided incident to complete movement of personal property when purchased by the Through Government Bill of Lading or other method/mode of shipment or property to be moved under the Do-It-Yourself moving program or otherwise moved by the owner.

(End of clause)

252.247–7011 Period of contract.

As prescribed in 247.271–4(e), use the following clause:

PERIOD OF CONTRACT (OCT 2001)

(a) This contract begins January 1, ____, and ends December 31, ____, both dates inclusive. Any work ordered before, and not completed by the expiration date shall be governed by the terms of this contract.

(b) The Government will not place new orders under this contract that require that performance commence more than 15 days after the expiration date.

(c) The Government may place orders required for the completion of services (for shipments in the Contractor's possession) for 180 days past the expiration date.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

252.247–7012 Ordering limitation.

As prescribed in 247.271–4(g), use the following clause:

ORDERING LIMITATION (DEC 1991)

(a) The Government will place orders for items of supplies or services with the contractor awarded the initial contract to the extent of the contractor's guaranteed maximum daily capability. However, the contractor may accept an additional quantity in excess of its capability to accommodate a single order.

(b) Orders for additional requirements will be placed in a like manner with the next higher contractor to the extent of its guaranteed maximum daily capability. The Government will repeat this procedure until its total daily requirement is fulfilled.

(c) In the event the procedure in paragraphs (a) and (b) does not fulfill the Government's total daily requirement, the Government may offer additional orders under the contract to contractors without regard to their guaranteed maximum daily capability.

(End of clause)

252.247–7013 Contract areas of performance.

As prescribed in 247.271–4(h), use the following clause and complete paragraph (b) by defining each area of performance as required (see 247.271–2(b)):

CONTRACT AREAS OF PERFORMANCE (DEC 1991)

(a) The Government will consider all areas of performance described in paragraph (b) as including the Contractor's facility, regardless of geographical location.

(b) The Contractor shall perform services within the following defined areas of performance, which include terminals identified therein: _____.

(End of clause)

252.247–7014 Demurrage.

As prescribed in 247.271–4(i), use the following clause:

DEMURRAGE (DEC 1991)

The Contractor shall be liable for all demurrage, detention, or other charges as a result of its failure to load or unload trucks, freight cars, freight terminals, vessel piers, or warehouses within the free time allowed under applicable rules and tariffs.

(End of clause)

252.247–7015 Requirements.

As prescribed in 216.506(d), substitute the following paragraph (f) for paragraph (f) of the basic clause at FAR 52.216–21.

Alternate I (DEC 1991)

(f) Orders issued during the effective period of this contract and not completed within that time shall be completed by the Contractor within the time specified in the order. The rights and obligations of the Contractor and the Government for those orders shall be governed by the terms of this contract to the same extent as if completed during the effective period.

[56 FR 36479, July 31, 1991, as amended at 65 FR 63805, Oct. 25, 2000]

252.247–7016 Contractor liability for loss or damage.

As prescribed in 247.271–4(k), use the following clause:

CONTRACTOR LIABILITY FOR LOSS OR DAMAGE (DEC 1991)

(a) Definitions. As used in this clause—

Article means any shipping piece or package and its contents.

Schedule means the level of service for which specific types of traffic apply as described in DoD 4500.34–R, Personal Property Traffic Management Regulation.

(b) For shipments picked up under Schedule I, Outbound Services, or delivered under Schedule II, Inbound Services—

(1) If notified within one year after delivery that the owner has discovered loss or damage to the owner's property, the Contractor agrees to indemnify the Government for loss or damage to the property which arises from any cause while it is in the Contractor's possession. The Contractor's liability is—

(i) *Non-negligent damage.* For any cause, other than the Contractor's negligence, indemnification shall be at a rate not to exceed sixty cents per pound per article.

(ii) *Negligent damage.* When loss or damage is caused by the negligence of the Contractor, the liability is for the full cost of satisfactory repair or for the current replacement value of the article.

(2) The Contractor shall make prompt payment to the owner of the property for any loss or damage for which the Contractor is liable.

(3) In the absence of evidence or supporting documentation which places liability on a carrier or another contractor, the destination contractor shall be presumed to be liable for the loss or damage, if timely notified.

(c) For shipments picked up or delivered under Schedule III, Intra-City and Intra-Area—

(1) If notified of loss or damage within 75 days following delivery, the Contractor agrees to indemnify the Government for loss or damage to the owner's property.

(2) The Contractor's liability shall be for the full cost of satisfactory repair, or for the current replacement value of the article less depreciation, up to a maximum liability of $1.25 per pound times the net weight of the shipment.

(3) The Contractor has full salvage rights to damaged items which are not repairable and for which the Government has received compensation at replacement value.

(End of clause)

252.247–7017 Erroneous shipments.

As prescribed in 247.271–4(l), use the following clause:

ERRONEOUS SHIPMENTS (DEC 1991)

(a) The Contractor shall—

(1) Forward to the rightful owner, articles of personal property inadvertently packed with goods of other than the rightful owner.

(2) Ensure that all shipments are stenciled correctly. When a shipment is sent to an incorrect address due to incorrect stenciling by the Contractor, the Contractor shall forward it to its rightful owner.

(3) Deliver to the designated air or surface terminal all pieces of a shipment, in one lot, at the same time. The Contractor shall forward to the owner any pieces of one lot not included in delivery, and remaining at its facility after departure of the original shipment.

(b) Forwarding under paragraph (a) shall be—

(1) With the least possible delay;

(2) By a mode of transportation selected by the Contracting Officer; and

(3) At the Contractor's expense.

(End of clause)

252.247–7018 Subcontracting.

As prescribed in 247.271–4(m), use the following clause:

SUBCONTRACTING (DEC 1991)

The Contractor shall not subcontract without the prior written approval of the Contracting Officer. The facilities of any approved subcontractor shall meet the minimum standards required by this contract.

(End of clause)

252.247–7019 Drayage.

As prescribed in 247.271–4(n), use the following clause:

DRAYAGE (DEC 1991)

(a) Drayage included for Schedule I, Outbound, applies in those instances when a shipment requires drayage to an air, water, or other terminal for onward movement after completion of shipment preparation by the Contractor. Drayage not included is when it is being moved from a residence or other pickup point to the Contractor's warehouse for onward movement by another freight company, carrier, etc.

(b) Drayage included for Schedule II, Inbound, applies in those instances when shipment is delivered, as ordered, from a destination Contractor's facility or other destination point to the final delivery point. Drayage not included is when shipment or partial removal of items from shipment is performed and prepared for member's pickup at destination delivery point.

(c) The Contractor will reposition empty Government containers—

(1) Within the area of performance;

(2) As directed by the Contracting Officer; and

(3) At no additional cost to the Government.

(End of clause)

252.247–7020 Additional services.

As prescribed in 247.271–4(o), use the following clause:

ADDITIONAL SERVICES (AUG 2000)

The Contractor shall provide additional services not included in the Schedule, but required for satisfactory completion of the services ordered under this contract, at a rate comparable to the rate for like services as contained in tenders on file with the Military Traffic Management Command in effect at time of order.

(End of clause)

[65 FR 50148, Aug. 17, 2000]

252.247–7021 Returnable containers other than cylinders.

As prescribed in 247.305–70, use the following clause:

RETURNABLE CONTAINERS OTHER THAN CYLINDERS (MAY 1995)

(a) *Returnable container,* as used in this clause, includes reels, spools, drums, carboys, liquid petroleum gas containers, and other returnable containers when the Contractor retains title to the container.

(b) Returnable containers shall remain the Contractor's property but shall be loaned without charge to the Government for a period of _____(insert number of days) calendar days after delivery to the f.o.b. point specified in the contract. Beginning with the first day after the loan period expires, to and including the day the containers are delivered to the Contractor (if the original delivery was f.o.b. origin) or are delivered or are made available for delivery to the Contractor's designated carrier (if the original delivery was f.o.b. destination), the Government shall pay the Contractor a rental of $_____ (insert dollar amount for rental) per container per day, computed separately for containers for each type, size, and capacity, and for each point of delivery named in the contract. No rental shall accrue to the Contractor in excess of the replacement value per container specified in paragraph (c) of this clause.

(c) For each container lost or damaged beyond repair while in the Government's possession, the Government shall pay to the Contractor the replacement value as follows, less the allocable rental paid for that container:

_____

(Insert the container types, sizes, capacities, and associated replacement values.)

These containers shall become Government property.

(d) If any lost container is located within _____ (insert number of days) calendar days after payment by the Government, it may be returned to the Contractor by the Government, and the Contractor shall pay to the Government the replacement value, less rental computed in accordance with paragraph (b) of this clause, beginning at the expiration of the loan period specified in paragraph (b) of this clause, and continuing to the date on which the container was delivered to the Contractor.

(End of clause)

[60 FR 29503, June 5, 1995]

252.247–7022 Representation of extent of transportation by sea.

As prescribed in 247.574(a), use the following provision:

REPRESENTATION OF EXTENT OF TRANSPORTATION BY SEA (AUG 1992)

(a) The Offeror shall indicate by checking the appropriate blank in paragraph (b) of this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term *supplies* is defined in the Transportation of Supplies by Sea clause of this solicitation.

(b) *Representation.* The Offeror represents that it—

_____ Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

_____ Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

(c) Any contract resulting from this solicitation will include the Transportation of Supplies by Sea clause. If the Offeror represents that it will not use ocean transportation, the resulting contract will also include the Defense FAR Supplement clause at 252.247–7024, Notification of Transportation of Supplies by Sea.

(End of provision)

[56 FR 67222, Dec. 30, 1991, as amended at 57 FR 42633, Sept. 15, 1992; 72 FR 49206, Aug. 28, 2007]

252.247–7023 Transportation of supplies by sea.

As prescribed in 247.573(b)(1), use the following clause:

TRANSPORTATION OF SUPPLIES BY SEA (MAY 2002)

(a) Definitions. As used in this clause—

(1) *Components* means articles, materials, and supplies incorporated directly into end products at any level of manufacture, fabrication, or assembly by the Contractor or any subcontractor.

(2) *Department of Defense* (DoD) means the Army, Navy, Air Force, Marine Corps, and defense agencies.

(3) *Foreign flag vessel* means any vessel that is not a U.S.-flag vessel.

(4) *Ocean transportation* means any transportation aboard a ship, vessel, boat, barge, or ferry through international waters.

(5) *Subcontractor* means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract.

(6) *Supplies* means all property, except land and interests in land, that is clearly identifiable for eventual use by or owned by the DoD at the time of transportation by sea. (i) An item is clearly identifiable for eventual use by the DoD if, for example, the contract documentation contains a reference to a DoD contract number or a military destination.

(ii) *Supplies* includes (but is not limited to) public works; buildings and facilities; ships; floating equipment and vessels of every character, type, and description, with parts, subassemblies, accessories, and equipment; machine tools; material; equipment; stores of all kinds; end items; construction materials; and components of the foregoing.

(7) *U.S.-flag vessel* means a vessel of the United States or belonging to the United States, including any vessel registered or having national status under the laws of the United States.

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract.

(2) A subcontractor transporting supplies by sea under this contract shall use U.S.-flag vessels if—

(i) This contract is a construction contract; or

(ii) The supplies being transported are—

(A) Noncommercial items; or

(B) Commercial items that—

(*1*) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it contracts for f.o.b. destination shipment);

(*2*) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations; or

(*3*) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

(c) The Contractor and its subcontractors may request that the Contracting Officer authorize shipment in foreign-flag vessels, or designate available U.S.-flag vessels, if the Contractor or a subcontractor believes that—

(1) U.S.-flag vessels are not available for timely shipment;

(2) The freight charges are inordinately excessive or unreasonable; or

(3) Freight charges are higher than charges to private persons for transportation of like goods.

(d) The Contractor must submit any request for use of other than U.S.-flag vessels in writing to the Contracting Officer at least 45 days prior to the sailing date necessary to meet its delivery schedules. The Contracting Officer will process requests submitted after such date(s) as expeditiously as possible, but the Contracting Officer's failure to grant approvals to meet the shipper's sailing date will not of itself constitute a compensable delay under this or any other clause of this contract. Requests shall contain at a minimum—

(1) Type, weight, and cube of cargo;

(2) Required shipping date;

(3) Special handling and discharge requirements;

(4) Loading and discharge points;

(5) Name of shipper and consignee;

(6) Prime contract number; and

(7) A documented description of efforts made to secure U.S.-flag vessels, including points of contact (with names and telephone numbers) with at least two U.S.-flag carriers contacted. Copies of telephone notes, telegraphic and facsimile message or letters will be sufficient for this purpose.

(e) The Contractor shall, within 30 days after each shipment covered by this clause, provide the Contracting Officer and the Maritime Administration, Office of Cargo Preference, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, one copy of the rated on board vessel operating carrier's ocean bill of lading, which shall contain the following information:

(1) Prime contract number;

(2) Name of vessel;

(3) Vessel flag of registry;

(4) Date of loading;

(5) Port of loading;

(6) Port of final discharge;

(7) Description of commodity;

(8) Gross weight in pounds and cubic feet if available;

(9) Total ocean freight in U.S. dollars; and

(10) Name of the steamship company.

(f) The Contractor shall provide with its final invoice under this contract a representation that to the best of its knowledge and belief—

(1) No ocean transportation was used in the performance of this contract;

(2) Ocean transportation was used and only U.S.-flag vessels were used for all ocean shipments under the contract;

(3) Ocean transportation was used, and the Contractor had the written consent of the Contracting Officer for all non-U.S.-flag ocean transportation; or

(4) Ocean transportation was used and some or all of the shipments were made on non-U.S.-flag vessels without the written consent of the Contracting Officer. The Contractor shall describe these shipments in the following format:

	Item Description	Contract Line Items	Quantity
Total.			

(g) If the final invoice does not include the required representation, the Government will reject and return it to the Contractor as an improper invoice for the purposes of the Prompt Payment clause of this contract. In the event there has been unauthorized use of non-U.S.-flag vessels in the performance of this contract, the Contracting Officer is entitled to equitably adjust the contract, based on the unauthorized use.

(h) In the award of subcontracts for the types of supplies described in paragraph (b)(2) of this clause, the Contractor shall flow down the requirements of this clause as follows:

(1) The Contractor shall insert the substance of this clause, including this paragraph (h), in subcontracts that exceed the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(2) The Contractor shall insert the substance of paragraphs (a) through (e) of this clause, and this paragraph (h), in subcontracts that are at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(End of clause)

Alternate I (MAR 2000). As prescribed in 247.574(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract.

(2) A subcontractor transporting supplies by sea under this contract shall use U.S.-flag vessels if the supplies being transported are—

(i) Noncommercial items; or

(ii) Commercial items that—

(A) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it subcontracts for f.o.b. destination shipment);

(B) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations (Note: This contract requires shipment of commercial items in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations); or

(C) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

Alternate II (MAR 2000). As prescribed in 247.574(b)(3), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b)(1) The Contractor shall use U.S.-flag vessels when transporting any supplies by sea under this contract.

(2) A subcontractor transporting supplies by sea under this contract shall use U.S.-flag vessels if the supplies being transported are—

(i) Noncommercial items; or

(ii) Commercial items that—

(A) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it subcontracts for f.o.b. destination shipment),

(B) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations; or

(C) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643 (Note: This contract requires transportation of commissary or exchange cargoes outside of the Defense Transportation System in accordance with 10 U.S.C. 2643).

Alternate III (MAY 2002). As prescribed in 247.574(b)(4), substitute the following paragraph (f) for paragraphs (f), (g), and (h) of the basic clause:

(f) The Contractor shall insert the substance of this clause, including this paragraph (f), in subcontracts that are for a type

of supplies described in paragraph (b)(2) of this clause.

[56 FR 36479, July 31, 1991, as amended at 60 FR 61602, Nov. 30, 1995; 65 FR 14401, Mar. 16, 2000; 67 FR 38022, May 31, 2002; 72 FR 49206, Aug. 28, 2007]

252.247–7024 Notification of transportation of supplies by sea.

As prescribed in 247.574(c), use the following clause:

NOTIFICATION OF TRANSPORTATION OF SUPPLIES BY SEA (MAR 2000)

(a) The Contractor has indicated by the response to the solicitation provision, Representation of Extent of Transportation by Sea, that it did not anticipate transporting by sea any supplies. If, however, after the award of this contract, the Contractor learns that supplies, as defined in the Transportation of Supplies by Sea clause of this contract, will be transported by sea, the Contractor—

(1) Shall notify the Contracting Officer of that fact; and

(2) Hereby agrees to comply with all the terms and conditions of the Transportation of Supplies by Sea clause of this contract.

(b) The Contractor shall include this clause; including this paragraph (b), revised as necessary to reflect the relationship of the contracting parties—

(1) In all subcontracts under this contract, if this contract is a construction contract; or

(2) If this contract is not a construction contract, in all subcontracts under this contract that are for—

(i) Noncommercial items; or

(ii) Commercial items that—

(A) The Contractor is reselling or distributing to the Government without adding value (generally, the Contractor does not add value to items that it subcontracts for f.o.b. destination shipment);

(B) Are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations; or

(C) Are commissary or exchange cargoes transported outside of the Defense Transportation System in accordance with 10 U.S.C. 2643.

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 61603, Nov. 30, 1995; 65 FR 14402, Mar. 16, 2000; 72 FR 49206, Aug. 28, 2007]

252.247–7025 Reflagging or repair work.

As prescribed in 247.574(d), use the following clause:

REFLAGGING OR REPAIR WORK (JUN 2005)

(a) *Definition.*

Reflagging or repair work, as used in this clause, means work performed on a vessel—

(1) To enable the vessel to meet applicable standards to become a vessel of the United States; or

(2) To convert the vessel to a more useful military configuration.

(b) *Requirement.* Unless the Secretary of Defense waives this requirement, reflagging or repair work shall be performed in the United States or its outlying areas, if the reflagging or repair work is performed—

(1) On a vessel for which the Contractor submitted an offer in response to the solicitation for this contract; and

(2) Prior to acceptance of the vessel by the Government.

(End of clause)

[60 FR 29503, June 5, 1995, as amended at 70 FR 35548, June 21, 2005; 72 FR 49206, Aug. 28, 2007]

252.247–7026 Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade.

As prescribed in 247.574(e), use the following provision:

EVALUATION PREFERENCE FOR USE OF DOMESTIC SHIPYARDS—APPLICABLE TO ACQUISITION OF CARRIAGE BY VESSEL FOR DOD CARGO IN THE COASTWISE OR NONCONTIGUOUS TRADE (AUG 2007)

(a) *Definitions.* As used in this provision—

Covered vessel means a vessel—

(1) Owned, operated, or controlled by the offeror; and

(2) Qualified to engage in the carriage of cargo in the coastwise or noncontiguous trade under Section 27 of the Merchant Marine Act, 1920 (46 U.S.C. App. 883), commonly referred to as ''Jones Act''; 46 U.S.C. 12106; and Section 2 of the Shipping Act, 1916 (46 U.S.C. App. 802).

Overhaul, repair, and maintenance work means work requiring a pierside shipyard period greater than or equal to 15 calendar days.

Shipyards means fixed facilities with drydocks and fabrication equipment capable of building a ship, defined as watercraft typically suitable or intended for other than personal or recreational use.

(b) This solicitation includes an evaluation factor that considers the extent to which the offeror has had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam.

(c) The offeror shall provide the following information with its offer, addressing all covered vessels for which overhaul, repair, and maintenance work has been performed during the period covering the current calendar year, up to the date of proposal submission, and the preceding four calendar years:

(1) Name of vessel.

(2) Description of qualifying shipyard work performed.

(3) Name of shipyard that performed the work.

(4) Inclusive dates of work performed.

(5) Cost of work performed.

(d) Offerors are responsible for submitting accurate information. The Contracting Officer—

(1) Will use the information to evaluate offers in accordance with the criteria specified in the solicitation; and

(2) Reserves the right to request supporting documentation if determined necessary in the proposal evaluation process.

(e) The Department of Defense will provide the information submitted in response to this provision to the congressional defense committees, as required by Section 1017 of Public Law 109–364.

(End of provision)

[72 FR 49206, Aug. 28, 2007]

252.249–7000 Special termination costs.

As prescribed in 249.501–70, use the following clause:

SPECIAL TERMINATION COSTS (DEC 1991)

(a) Definition. *Special termination costs,* as used in this clause, means only costs in the following categories as defined in part 31 of the Federal Acquisition Regulation (FAR)—

(1) Severance pay, as provided in FAR 31.205–6(g);

(2) Reasonable costs continuing after termination, as provided in FAR 31.205–42(b);

(3) Settlement of expenses, as provided in FAR 31.205–42(g);

(4) Costs of return of field service personnel from sites, as provided in FAR 31.205–35 and FAR 31.205–46(c); and

(5) Costs in paragraphs (a) (1), (2), (3), and (4) of this clause to which subcontractors may be entitled in the event of termination.

(b) Notwithstanding the Limitation of Cost/Limitation of Funds clause of this contract, the Contractor shall not include in its estimate of costs incurred or to be incurred, any amount for special termination costs to which the Contractor may be entitled in the event this contract is terminated for the convenience of the Government.

(c) The Contractor agrees to perform this contract in such a manner that the Contractor's claim for special termination costs will not exceed $_____. The Government shall have no obligation to pay the Contractor any amount for the special termination costs in excess of this amount.

(d) In the event of termination for the convenience of the Government, this clause shall not be construed as affecting the allowability of special termination costs in any manner other than limiting the maximum amount of the costs payable by the Government.

(e) This clause shall remain in full force and effect until this contract is fully funded.

(End of clause)

252.249–7001 [Reserved]

252.249–7002 Notification of anticipated contract termination or reduction.

As prescribed in 249.7003(c), use the following clause:

NOTIFICATION OF ANTICIPATED CONTRACT TERMINATION OR REDUCTION(DEC 2006)

(a) *Definitions. Major defense program* means a program that is carried out to produce or acquire a major system (as defined in 10 U.S.C. 2302(5)) (see also DoD 5000.2–R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs).

Substantial reduction means a reduction of 25 percent or more in the total dollar value of funds obligated by the contract.

(b) Section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160) and Section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104–201) are intended to help establish benefit eligibility under the Job Training Partnership Act (29 U.S.C. 1661 and 1662) for employees of DoD contractors and subcontractors adversely affected by contract terminations or substantial reductions under major defense programs.

(c) *Notice to employees and state and local officials.* Within 2 weeks after the Contracting Officer notifies the Contractor that contract funding will be terminated or substantially reduced, the Contractor shall provide notice of such anticipated termination or reduction to—

(1) Each employee representative of the Contractor's employees whose work is directly related to the defense contract; or

(2) If there is no such representative, each such employee;

(3) The State dislocated worker unit or office described in section 311(b)(2) of the Job Training Partnership Act (29 U.S.C. 1661(b)(2)); and

(4) The chief elected official of the unit of general local government within which the adverse effect may occur.

(d) *Notice to subcontractors.* Not later than 60 days after the Contractor receives the Contracting Officer's notice of the anticipated termination or reduction, the Contractor shall—

(1) Provide notice of the anticipated termination or reduction to each first-tier subcontractor with a subcontract of $550,000 or more; and

(2) Require that each such subcontractor—

(i) Provide notice to each of its subcontractors with a subcontract of $100,000 or more; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts of $100,000 or more.

(e) The notice provided an employee under paragraph (c) of this clause shall have the same effect as a notice of termination to the employee for the purposes of determining whether such employee is eligible for training, adjustment assistance, and employment services under section 325 or 325A of the Job Training Partnership Act (29 U.S.C. 1662d, 1662d-1). If the Contractor has specified that the anticipated contract termination or reduction is not likely to result in plant closure or mass layoff, as defined in 29 U.S.C. 2101, the employee shall be eligible only for services under section 314(b) and paragraphs (1) through (14), (16), and (18) of section 314(c) of the Job Training Partnership Act (29 U.S.C. 1661c(b) and paragraphs (1) through (14), (16), and (18) of section 1661c(c)).

(End of clause)

[61 FR 64637, Dec. 6, 1996, as amended at 71 FR 75893, Dec. 19, 2006]

252.251–7000 Ordering from Government supply sources.

As prescribed in 251.107, use the following clause:

ORDERING FROM GOVERNMENT SUPPLY SOURCES (NOV 2004)

(a) When placing orders under Federal Supply Schedules, Personal Property Rehabilitation Price Schedules, or Enterprise Software Agreements, the Contractor shall follow the terms of the applicable schedule or agreement and authorization. Include in each order:

(1) A copy of the authorization (unless a copy was previously furnished to the Federal Supply Schedule, Personal Property Rehabilitation Price Schedule, or Enterprise Software Agreement contractor).

(2) The following statement: Any price reductions negotiated as part of an Enterprise Software Agreement issued under a Federal Supply Schedule contract shall control. In the event of any other inconsistencies between an Enterprise Software Agreement, established as a Federal Supply Schedule blanket purchase agreement, and the Federal Supply Schedule contract, the latter shall govern.

(3) The completed address(es) to which the Contractor's mail, freight, and billing documents are to be directed.

(b) When placing orders under nonmandatory schedule contracts and requirements contracts, issued by the General Services Administration (GSA) Office of Information Resources Management, for automated data processing equipment, software and maintenance, communications equipment and supplies, and teleprocessing services, the Contractor shall follow the terms of the applicable contract and the procedures in paragraph (a) of this clause.

(c) When placing orders for Government stock, the Contractor shall—

(1) Comply with the requirements of the Contracting Officer's authorization, using FEDSTRIP or MILSTRIP procedures, as appropriate;

(2) Use only the GSA Form 1948–A, Retail Services Shopping Plate, when ordering from GSA Self-Service Stores;

(3) Order only those items required in the performance of Government contracts; and

(4) Pay invoices from Government supply sources promptly. For purchases made from DoD supply sources, this means within 30 days of the date of a proper invoice. The Contractor shall annotate each invoice with the date of receipt. For purposes of computing interest for late Contractor payments, the Government's invoice is deemed to be a demand for payment in accordance with the Interest clause of this contract. The Contractor's failure to pay may also result in the DoD supply source refusing to honor the requisition (see DFARS 251.102(f)) or in the Contracting Officer terminating the Contractor's authorization to use DoD supply sources. In the event the Contracting Officer decides to terminate the authorization due to the Contractor's failure to pay in a timely manner, the Contracting Officer shall provide the Contractor with prompt written notice of the intent to terminate the authorization and the basis for such action. The Contractor shall have 10 days after receipt of the Government's notice in which to provide additional information as to why the authorization should not be terminated. The termination shall not provide the Contractor with an excusable delay for failure to perform or complete the contract in accordance with the terms of the contract, and the Contractor shall be solely responsible for any increased costs.

(d) Only the Contractor may request authorization for subcontractor use of Government supply sources. The Contracting Officer will not grant authorizations for subcontractor use without approval of the Contractor.

(e) Government invoices shall be submitted to the Contractor's billing address, and Contractor payments shall be sent to the Government remittance address specified below:

Contractor's Billing Address (include point of contact and telephone number):

Government Remittance Address (include point of contact and telephone number):

(End of clause)

[56 FR 36479, July 31, 1991, as amended at 60 FR 29503, June 5, 1995; 67 FR 65512, Oct. 25, 2002; 69 FR 67858, Nov. 22, 2004]

252.251–7001 Use of Interagency Fleet Management System (IFMS) vehicles and related services.

As prescribed in 251.205, use the following clause:

USE OF INTERAGENCY FLEET MANAGEMENT SYSTEM (IFMS) VEHICLES AND RELATED SERVICES (DEC 1991)

(a) The Contractor, if authorized use of IFMS vehicles, shall submit requests for five or fewer vehicles and related services in writing to the appropriate General Services Administration (GSA) Regional Customer Service Bureau, Attention: Motor Equipment Activity. Submit requests for more than five vehicles to GSA headquarters: General Services Administration, FTM, Washington, DC 20406. Include the following in each request:

(1) Two copies of the agency authorization to obtain vehicles and related services from GSA.

(2) The number of vehicles and related services required and the period of use.

(3) A list of the Contractor's employees authorized to request vehicles and related services.

(4) A list of the makes, models, and serial numbers of Contractor-owned or leased equipment authorized to be serviced.

(5) Billing instructions and address.

(b) The Contractor should make requests for any unusual quantities of vehicles as far in advance as possible.

(c) The Contractor shall establish and enforce suitable penalties for employees who use or authorize the use of Government vehicles for other than performance of Government contracts.

(d) The Contractor shall assume, without the right of reimbursement from the Government, the cost or expense of any use of IFMS vehicles and services not related to the performance of the contract.

(e) Only the Contractor may request authorization for subcontractor use of IFMS vehicles. The Contracting Officer will not grant authorization for subcontractor use without approval of the Contractor.

(End of clause)

PART 253—FORMS

Subpart 253.2—Prescription of Forms

Sec.
253.204 Administrative matters.
253.204–70 DD Form 350, Individual Contracting Action Report.
253.208 Required sources of supplies and services.
253.208–1 DD Form 448, Military Interdepartmental Purchase Request.
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253.209 Contractor qualifications.
253.209–1 Responsible prospective contractors.
253.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and 348).
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253.215 Contracting by negotiation.
253.215–70 DD Form 1547, Record of Weighted Guidelines Application.

Subpart 253.3—Illustration of Forms

253.303 Agency forms.

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

SOURCE: 56 FR 36554, July 31, 1991, unless otherwise noted.

Subpart 253.2—Prescription of Forms

253.204 Administrative matters.

253.204–70 DD Form 350, Individual Contracting Action Report.

Follow the instructions at PGI 253.204–70 for completion of DD Form 350.

[71 FR 44926, Aug. 8, 2006]

253.208 Required sources of supplies and services.

253.208–1 DD Form 448, Military Interdepartmental Purchase Request.

Follow the procedures at PGI 253.208–1 for use of DD Form 448.

[71 FR 39005, July 11, 2006]

253.208–2 DD Form 448–2, Acceptance of MIPR.

Follow the procedures at PGI 253.208–2 for use of DD Form 448–2.

[71 FR 39005, July 11, 2006]

253.209 Contractor qualifications.

253.209–1 Responsible prospective contractors.

(a) *SF 1403, Preaward Survey of Prospective Contractor (General).* (i) The factors in Section III, Block 19, generally mean—

(A) *Technical capability.* An assessment of the prospective contractor's key management personnel to determine if they have the basic technical knowledge, experience, and understanding of the requirements necessary to produce the required product or provide the required service.

(B) *Production capability.* An evaluation of the prospective contractor's ability to plan, control, and integrate manpower, facilities, and other resources necessary for successful contract completion. This includes—

(*1*) An assessment of the prospective contractor's possession of, or the ability to acquire, the necessary facilities, material, equipment, and labor; and

(*2*) A determination that the prospective contractor's system provides for timely placement of orders and for vendor follow-up and control.

(C) *Quality assurance capability.* An assessment of the prospective contractor's capability to meet the quality assurance requirements of the proposed contract. It may involve an evaluation of the prospective contractor's quality assurance system, personnel, facilities, and equipment.

(D) *Financial capability.* A determination that the prospective contractor has or can get adequate financial resources to obtain needed facilities, equipment, materials, etc.

(E) *Accounting system and related internal controls.* An assessment by the auditor of the adequacy of the prospective contractor's accounting system and related internal controls as defined in 242.7501, Definition. Normally, a contracting officer will request an accounting system review when soliciting and awarding cost-reimbursement or incentive type contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion.

(ii) The factors in section III, Block 20, generally mean—

(A) *Government property control.* An assessment of the prospective contractor's capability to manage and control Government property.

(B) *Transportation.* An assessment of the prospective contractor's capability to follow the laws and regulations applicable to the movement of Government material, or overweight, oversized, hazardous cargo, etc.

(C) *Packaging.* An assessment of the prospective contractor's ability to meet all contractual packaging requirements including preservation, unit pack, packing, marking, and unitizing for shipment.

(D) *Security clearance.* A determination that the prospective contractor's facility security clearance is adequate and current. (When checked, the surveying activity will refer this factor to the Defense Security Service (DSS)).

(E) *Plant safety.* An assessment of the prospective contractor's ability to meet the safety requirements in the solicitation.

(F) *Environmental/energy consideration.* An evaluation of the prospective contractor's ability to meet specific environmental and energy requirements in the solicitation.

(G) *Flight operations and flight safety.* An evaluation of the prospective contractor's ability to meet flight operation and flight safety requirements on solicitations involving the overhaul and repair of aircraft.

(H) *Other.* If the contracting officer wants an assessment of other than major factors A-E and other factors A-G, check this factor. Explain the desired information in the Remarks sections.

[56 FR 36554, July 31, 1991, as amended at 60 FR 29504, June 5, 1995; 64 FR 51077, Sept. 21, 1999]

253.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, 1449, and OF's 336, 347, and 348).

(f) DoD uses the DD Form 1155, Order for Supplies or Services, instead of OF

347; and OF 336, Continuation Sheet, instead of OF 348. Follow the procedures at PGI 253.213(f) for use of forms.

[71 FR 3413, Jan. 23, 2006]

253.213–70 Completion of DD Form 1155, Order for Supplies or Services.

Follow the procedures at PGI 253.213–70 for completion of DD Form 1155.

[71 FR 3413, Jan. 23, 2006]

253.215 Contracting by negotiation.

253.215–70 DD Form 1547, Record of Weighted Guidelines Application.

Follow the procedures at PGI 253.215–70 for completing DD Form 1547.

[71 FR 69495, Dec. 1, 2006]

Subpart 253.3—Illustration of Forms

253.303 Agency forms.

DoD forms are available at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*.

[72 FR 14239, Mar. 27, 2007]

SUBCHAPTER I—AGENCY SUPPLEMENTARY REGULATIONS

APPENDIX A TO CHAPTER 2—ARMED SERVICES BOARD OF CONTRACT APPEALS

Pt.
PART 1—CHARTER
PART 2—RULES

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

ARMED SERVICES BOARD OF CONTRACT APPEALS

Approved 1 May 1962.
Revised 1 May 1969.
Revised 1 September 1973.
Revised 1 July 1979.

PART 1—CHARTER

1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. These appeals may be taken (a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sec. 601, *et seq.*), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative or board, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure. The Board may determine contract disputes for other departments and agencies by agreement. The Board shall operate under general policies established or approved by the Under Secretary of Defense (Research and Engineering).

2. Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Members of the Board are hereby designated Administrative Judges. There shall be appointed from members of the Board a chairman and two or more vice-chairmen. Appointment of the chairman and vice-chairmen and other members of the Board shall be made by the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement. The chairman and vice-chairmen shall serve in that capacity for a two-year term unless sooner removed or reappointed for an additional term or terms. The Under Secretary will also designate the order in which the vice-chairmen will act for the chairman in his absence. In the absence of a vice-chairman, the chairman or acting chairman may designate a member of the Board to serve as a temporary vice-chairman.

3. It shall be the duty and obligation of the members of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

4. The chairman of the Board shall be responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditous handling of appeals. He shall be reponsible for assigning appeals to the divisions for decision without regard to the military department or other procuring agency which entered into the contract. A division may consist of one or more members of the Board. The chairman shall designate one member of each division as the division head. The division heads and the chairman and vice-chairmen shall constitute the senior deciding group of the Board. A majority of the members of a division or of the senior deciding group shall constitute a quorum for the transaction of the business of each, respectively. Decisions of the Board shall be by majority vote of the members of a division participating and the chairman and a vice-chairman, unless the chairman refers the appeal for decision by the senior deciding group. The decision of the Board in cases so referred to the senior deciding group shall be by majority vote of the participating members of that group. The chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by the senior deciding group. An appeal involving $50,000 or less may be decided by a single member or fewer members of the Board than hereinbefore provided for cases of unlimited dollar amount, under accelerated or expedited procedures as provided in the Rules of the Board and the Contract Disputes Act of 1978.

5. The Board shall have all powers necessary and incident to the proper performance of its duties. Subject to the approval of the Under Secretary of Defense (Research and Engineering) and the Assistant Secretaries of the Military Departments responsible for procurement, the Board shall adopt its own methods of procedure, and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions. The Military Departments and other procuring agencies shall

provide legal personnel to prepare and present the contentions of the departments or agencies in relation to appeals filed with the Board. It shall not be necessary for the Board, unless it otherwise desires, to communicate with more than one trial attorney in each of the departments or agencies concerning the preparation and presentation of appeals and the obtaining of all records deemed by the Board to be pertinent thereto.

6. Any member of the Board or any examiner, designated by the chairman, shall be authorized to hold hearings, examine witnesses, and receive evidence and argument for consideration and determination of the appeal by the designated division. A member of the Board shall have authority to administer oaths and issue subpoenas as specified in section 11 of the Contract Disputes Act of 1978. The chairman may request orders of the court in cases of contumacy or refusal to obey a subpoena in the manner prescribed in that section.

7. The chairman shall be responsible for the internal organization of the Board and for its administration. He shall provide within approved ceilings for the staffing of the Board with non-member personnel, including hearing examiners, as may be required for the performance of the functions of the Board. The chairman shall appoint a recorder of the Board. Such personnel shall be responsible to and shall function under the direction, supervision and control of the chairman.

8. The Board will be serviced by the Department of the Army for administrative support for its operations as required. Administrative support will include budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration, supplies, and other administrative services. The Departments of the Army, Navy, Air Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Assistant Secretary of Defense (Comptroller). The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

9. The chairman of the Board will furnish the Secretary of Defense and to the Secretaries of the Military Departments by October 31 of each year a report containing an account of the Board's transactions and proceedings for the preceding fiscal year. Within 30 days following the close of a calendar quarter, the chairman shall forward a report of the Board's proceedings for the quarter to the Under Secretary of Defense (Research and Engineering), the Assistant Secretaries of the Military Departments responsible for procurement, and to the Director of the Defense Logistics Agency. Such reports shall disclose the number of appeals received, cases heard, opinions rendered, current reserve of pending matters, and such other information as may be required.

10. The Board shall have a seal bearing the following inscription: ''Armed Services Board of Contract Appeals.'' This seal shall be affixed to all authentications of copies of records and to such other instruments as the Board may determine.

11. This revised charter is effective April 21, 1980.

Approved:

W. Graham Claytor, Jr.
Deputy Secretary of Defense
Clifford L. Alexander, Jr.
Secretary of the Army
E. Hidalgo
Secretary of the Navy
Hans M. Mark
Secretary of the Air Force

PART 2—RULES

Approved 15 July 1963.
Revised 1 May 1969.
Revised 1 September 1973.
Revised 30 June 1980.

Preface

I. Jurisdiction for Considering Appeals

The Armed Services Board of Contract Appeals (referred to herein as the Board) shall consider and determine appeals from decisions of contracting officers pursuant to the Contract Disputes Act of 1978 Pub. L. 95–563, 41 U.S.C. 601–613) relating to contracts made by (i) the Departments of Defense, Army, Navy and Air Force or (ii) any other executive agency when such agency or the Administrator for Federal Procurement Policy has designated the Board to decide the appeal.

II. Location and Organization of the Board

(a) The Board's address is Skyline Six, 5109 Leesburg Pike, 7th Floor, Falls Church, VA 22041–3217, telephone (703) 681–8500 (receptionist), (703) 681–8502 (recorder).

(b) The Board consists of a chairman, two or more vice chairmen, and other members, all of whom are attorneys at law duly licensed by a state, commonwealth, territory, or the District of Columbia. Board members are designated Administrative Judges.

(c) There are a number of divisions of the Armed Services Board of Contract Appeals, established by the Chairman of the Board in such manner as to provide for the most effective and expeditious handling of appeals. The Chairman and a Vice Chairman of the Board act as members of each division. Appeals are assigned to the divisions for decision without regard to the military department or other procuring agency which entered into the contract involved. Hearing may be held by a designated member (Administrative Judge), or by a duly authorized examiner. Except for

appeals processed under the expedited or accelerated procedure, the decision of a majority of a division constitutes the decision of the Board, unless the chairman refers the appeal to the Board's Senior Deciding Group (consisting of the chairman, vice chairmen and all division heads), in which event a decision of a majority of that group constitutes the decision of the Board. Appeals referred to the Senior Deciding Group are those of unusual difficulty, significant precedential importance, or serious dispute within the normal division decision process. For decisions of appeals processed under the expedited or accelerated procedure, see rules 12.2(c) and 12.3(b).

Preliminary Procedures

1. *Appeals, How Taken.* (a) Notice of an appeal shall be in writing and mailed or otherwise furnished to the Board within 90 days from the date of receipt of a contracting officer's decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken.

(b) Where the contractor has submitted a claim of $50,000 or less to the contracting officer and has requested a written decision within 60 days from receipt of the request, and the contracting officer has not done so, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(c) Where the contractor has submitted a properly certified claim over $50,000 to the contracting officer or has requested a decision by the contracting officer which presently involves no monetary amount pursuant to the Disputes clause, and the contracting officer has failed to issue a decision within a reasonable time, taking into account such factors as the size and complexity of the claim, the contractor may file a notice of appeal as provided in subparagraph (a) above, citing the failure of the contracting officer to issue a decision.

(d) Upon docketing of appeals filed pursuant to (b) or (c) hereof, the Board may, at its option, stay further proceedings pending issuance of a final decision by the contracting officer within such period of time as is determined by the Board.

(e) In lieu of filing a notice of appeal under (b) or (c) hereof, the contractor may request the Board to direct the contracting officer to issue a decision in a specified period of time, as determined by the Board, in the event of undue delay on the part of the contracting officer.

2. *Notice of Appeal, Contents of.* A notice of appeal should indicate that an appeal is being taken and should identify the contract (by number), the department and/or agency involved in the dispute, the decision from which the appeal is taken, and the amount in dispute, if known. The notice of appeal should be signed personally by the appellant (the contractor taking the appeal), or by the appellant's duly authorized representative or attorney. The complaint referred to in rule 6 may be filed with the notice of appeal, or the appellant may designate the notice of appeal as a complaint, if it otherwise fulfills the requirements of a complaint.

3. *Docketing of Appeals.* When a notice of appeal in any form has been received by the Board, it shall be docketed promptly. Notice in writing shall be given to the appellant with a copy of these rules, and to the contracting officer.

4. *Preparation, Content, Organization, Forwarding, and Status of Appeal File*—(a) *Duties of Contracting Officer*—Within 30 days of receipt of an appeal, or notice that an appeal has been filed, the contracting officer shall assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal, including:

(1) The decision from which the appeal is taken;

(2) The contract, including pertinent specifications, amendments, plans and drawings;

(3) All correspondence between the parties relevant to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered relevant to the appeal.

Within the same time above specified the contracting officer shall furnish the appellant a copy of each document he transmits to the Board, except those in subparagraph (a)(2) above. As to the latter, a list furnished appellant indicating specific contractual documents transmitted will suffice.

(b) *Duties of the Appellant*—Within 30 days after receipt of a copy of the appeal file assembled by the contracting officer, the appellant shall transmit to the Board any documents not contained therein which he considers relevant to the appeal, and furnish two copies of such documents to the government trial attorney.

(c) *Organization of Appeal File*—Documents in the appeal file may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.

(d) *Lengthy Documents*—Upon request by either party, the Board may waive the requirement to furnish to the other party copies of bulky, lengthy, or out-of-size documents in the appeal file when inclusion would be burdensome. At the time a party files with the Board a document as to which such a waiver has been granted he shall notify the other

party that the document or a copy is available for inspection at the offices of the Board or of the party filing same.

(e) *Status of Documents in Appeal File*—Documents contained in the appeal file are considered, without further action by the parties, as part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document or documents reasonably in advance of hearing or, if there is no hearing, of settling the record. If such objection is made, the Board shall remove the document or documents from the appeal file and permit the party offering the document to move its admission as evidence in accordance with rules 13 and 20.

(f) Notwithstanding the foregoing, the filing of the rule 4 (a) and (b) documents may be dispensed with by the Board either upon request of the appellant in his notice of appeal or thereafter upon stipulation of the parties.

5. *Motions.* (a) Any motion addressed to the jurisdiction of the Board shall be promptly filed. Hearing on the motion shall be afforded on application of either party. However, the Board may defer its decision on the motion pending hearing on both the merits and the motion. The Board shall have the right at any time and on its own initiative to raise the issue of its jurisdiction to proceed with a particular case, and shall do so by an appropriate order, affording the parties an opportunity to be heard thereon.

(b) The Board may entertain and rule upon other appropriate motions.

6. *Pleadings*—(a) *Appellant*—Within 30 days after receipt of notice of docketing of the appeal, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of its claims. Appellant shall also set forth the basis, with appropriate reference to contract provisions, of each claim and the dollar amount claimed, to the extent known. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form is required. Upon receipt of the complaint, the Board shall serve a copy of it upon the Government. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth its complaint and the Government shall be so notified.

(b) *Government*—Within 30 days from receipt of the complaint, or the aforesaid notice from the Board, the Government shall prepare and file with the Board an original and two copies of an answer thereto. The answer shall set forth simple, concise and direct statements of Government's defenses to each claim asserted by appellant, including any affirmative defenses available. Upon receipt of the answer, the Board shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

(c) A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The Board, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rules 11, 13 or 20. The determination of foreign law shall be treated as a ruling on a question of law.

7. *Amendments of Pleadings or Record.* The Board upon its own initiative or upon application by a party may order a party to make a more definite statement of the complaint or answer, or to reply to an answer. The Board may, in its discretion, and within the proper scope of the appeal, permit either party to amend its pleading upon conditions fair to both parties. When issues within the proper scope of the appeal, but not raised by the pleadings, are tried by express or implied consent of the parties, or by permission of the Board, they shall be treated in all respects as if they had been raised therein. In such instances, motions to amend the pleadings to conform to the proof may be entered, but are not required. If evidence is objected to at a hearing on the ground that it is not within the issues raised by the pleadings, it may be admitted within the proper scope of the appeal, provided, however, that the objecting party may be granted a continuance if necessary to enable it to meet such evidence.

8. *Hearing Election.* After filing of the Government's answer or notice from the Board that it has entered a general denial on behalf of the Government, each party shall advise whether it desires a hearing as prescribed in Rules 17 through 25, or whether it elects to submit its case on the record without a hearing, as prescribed in Rule 11.

9. *Prehearing Briefs.* Based on an examination of the pleadings, and its determination of whether the arguments and authorities addressed to the issues are adequately set forth therein, the Board may, in its discretion, require the parties to submit prehearing briefs in any case in which a hearing has been elected pursuant to Rule 8. If the Board does not require prehearing briefs either party may, in its discretion and upon appropriate and sufficient notice to the other party, furnish a prehearing brief to the Board. In any case where a prehearing brief is submitted, it shall be furnished so as to be received by the Board at least 15 days prior to the date set for hearing, and a copy shall simultaneously be furnished to the other party as previously arranged.

10. *Prehearing or Presubmission Conference.* (a) Whether the case is to be submitted pursuant to Rule 11, or heard pursuant to Rules 17 through 25, the Board may upon its own initiative, or upon the application of either party, arrange a telephone conference or call upon the parties to appear before an administrative judge or examiner of the Board for a conference to consider:

(1) Simplification, clarification, or severing of the issues;

(2) The possibility of obtaining stipulations, admissions, agreements and rulings on admissibility of docments, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate discovery;

(4) Limitation of the number of expert witnesses, or avoidance of similar cumulative evidence;

(5) The possibility of agreement disposing of any or all of the issues in dispute; and

(6) Such other matters as may aid in the disposition of the appeal.

(b) The administrative judge or examiner of the Board shall make such rulings and orders as may be appropriate to aid in the disposition of the appeal. The results of pretrial conferences, including any rulings and orders, shall be reduced to writing by the administrative judge or examiner and this writing shall thereater constitute a part of the record.

11. *Submission Without a Hearing.* Either party may elect to waive a hearing and to submit its case upon the record before the Board, as settled pursuant to Rule 13. Submission of a case without hearing does not relieve the parties from the necessity of proving the facts supporting their allegations or defenses. Affidavits, depositions, admissions, answers to interrogatories, and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submissions to be supplemented by oral argument (transcribed if requested), and by briefs arranged in accordance with Rule 23.

12. *Optional SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures.* These procedures are available solely at the election of the appellant.

12.1 *Elections to Utilize SMALL CLAIMS (EXPEDITED) and ACCELERATED Procedures.* (a) In appeals where the amount in dispute is $10,000 or less, the appellant may elect to have the appeal processed under a SMALL CLAIMS (EXPEDITED) procedure requiring decision of the appeal, whenever possible, within 120 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.2 of this Rule. An appellant may elect the ACCELERATED procedure rather than the SMALL CLAIMS (EXPEDITED) procedure for any appeal eligible for the SMALL CLAIMS (EXPEDITED) procedure.

(b) In appeals where the amount in dispute is $50,000 or less, the appellant may elect to have the appeal processed under an ACCELERATED procedure requiring decision of the appeal, whenever possible, within 180 days after the Board receives written notice of the appellant's election to utilize this procedure. The details of this procedure appear in section 12.3 of this Rule.

(c) The appellant's election of either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure may be made by written notice within 60 days after receipt of notice of docketing, unless such period is extended by the Board for good cause. The election may not be withdrawn except with permission of the Board and for good cause.

12.2 *The Small Claims (Expedited) Procedure.* (a) In cases proceeding under the SMALL CLAIMS (EXPEDITED) procedure, the following time periods shall apply:

(1) Within 10 days from the Government's first receipt from either the appellant or the Board of a copy of the appellant's notice of election of the SMALL CLAIMS (EXPEDITED) procedure, the Government shall send the Board a copy of the contract, the contracting officer's final decision, and the appellant's claim letter or letters, if any; remaining documents required under Rule 4 shall be submitted in accordance with times specified in that rule unless the Board otherwise directs.

(2) Within 15 days after the Board has acknowledged receipt of appellant's notice of election, the assigned administrative judge shall take the following actions, if feasible, in an informal meeting or a telephone conference with both parties: (i) Identify and simplify the issues; (ii) establish a simplified procedure appropriate to the particular appeal involved; (iii) determine whether either party wants a hearing, and if so, fix a time and place therefor; (iv) require the Government to furnish all the additional documents relevant to the appeal; and (v) establish an expedited schedule for resolution of the appeal.

(b) Pleadings, discovery, and other prehearing activity will be allowed only as consistent with the requirement to conduct the hearing on the date scheduled, or if no hearing is scheduled, to close the record on a date that will allow decisions within the 120-day limit. The Board, in its discretion, may impose shortened time periods for any actions prescribed or allowed under these rules, as necessary to enable the Board to decide the appeal within the 120-day limit, allowing whatever time, up to 30 days, that the Board considers necessary for the preparation of the decision after closing the record and the filing of briefs, if any.

(c) Written decision by the Board in cases processed under the SMALL CLAIMS (EXPEDITED) procedure will be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge. If there has been a hearing, the administrative judge presiding at the hearing may, in the judge's discretion, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes and to establish the starting date for the period for filing a motion for reconsideration under rule 29.

(d) A decision against the Government or the contractor shall have no value as precedent, and in the absence of fraud shall be final and conclusive and may not be appealed or set aside.

12.3 *The Accelerated Procedure.* (a) In cases proceeding under the Accelerated procedure, the parties are encouraged, to the extent possible consistent with adequate presentation of their factual and legal positions, to waive pleadings, discovery, and briefs. The Board, in its discretion, may shorten time periods prescribed or allowed elsewhere in these rules, including rule 4, as necessary to enable the Board to decide the appeal within 180 days after the Board has received the appellant's notice of election of the ACCELERATED procedure, and may reserve 30 days for preparation of the decision.

(b) Written decision by the Board in cases processed under the ACCELERATED procedure will normally be short and contain only summary findings of fact and conclusions. Decisions will be rendered for the Board by a single administrative judge with the concurrence of a vice chairman, or by a majority among these two and the chairman in case of disagreement. Alternatively, in cases where the amount in dispute is $10,000 or less as to which the ACCELERATED procedure has been elected and in which there has been a hearing, the single administrative judge presiding at the hearing may, with the concurrence of both parties, at the conclusion of the hearing and after entertaining such oral arguments as deemed appropriate, render on the record oral summary findings of fact, conclusions, and a decision of the appeal. Whenever such an oral decision is rendered, the Board will subsequently furnish the parties a typed copy of such oral decision for record and payment purposes, and to establish the starting date for the period of filing a motion for reconsideration under Rule 29.

12.4 *Motions for Reconsideration in Rule 12 Cases.* Motions for Reconsideration of cases decided under either the SMALL CLAIMS (EXPEDITED) procedure or the ACCELERATED procedure need not be decided within the original 120-day or 180-day limit, but all such motions shall be processed and decided rapidly so as to fulfill the intent of this Rule.

13. *Settling the Record.* (a) The record upon which the Board's decision will be rendered consists of the documents furnished under Rules 4 and 12, to the extent admitted in evidence, and the following items, if any: pleadings, prehearing conference memoranda or orders, prehearing briefs, depositions or interrogatories received in evidence, admissions, stipulations, transcripts of conferences and hearings, hearing exhibits, posthearing briefs, and documents which the Board has specifically designated be made a part of the record. The record will, at all reasonable times, be available for inspection by the parties at the office of the Board.

(b) Except as the Board may otherwise order in its discretion, no proof shall be received in evidence after completion of an oral hearing or, in cases submitted on the record, after notification by the Board that the case is ready for decision.

(c) The weight to be attached to any evidence of record will rest within the sound discretion of the Board. The Board may in any case require either party, with appropriate notice to the other party, to submit additional evidence on any matter relevant to the appeal.

14. *Discovery—Depositions*—(a) *General Policy and Protective Orders*—The parties are encouraged to engage in voluntary discovery procedures. In connection with any deposition or other discovery procedure, the Board may make any order required to protect a party or person from annoyance, embarrassment, or undue burden or expense. Those orders may include limitations on the scope, method, time and place for discovery, and provisions for protecting the secrecy of confidential information or documents.

(b) *When Depositions Permitted*—After an appeal has been docketed and complaint filed, the parties may mutually agree to, or the Board may, upon application of either party, order the taking of testimony of any person by deposition upon oral examination or written interrogatories before any officer authorized to administer oaths at the place of examination, for use as evidence or for purpose of discovery. The application for order shall specify whether the purpose of the deposition is discovery or for use as evidence.

(c) *Orders on Depositions*—The time, place, and manner of taking depositions shall be as mutually agreed by the parties, or failing such agreement, governed by order of the Board.

(d) *Use as Evidence*—No testimony taken by depositions shall be considered as part of the evidence in the hearing of an appeal until

such testimony is offered and received in evidence at such hearing. It will not ordinarily be received in evidence if the deponent is present and can testify at the hearing. In such instances, however, the deposition may be used to contradict or impeach the testimony of the deponent given at the hearing. In cases submitted on the record, the Board may, in its discretion, receive depositions to supplement the record.

(e) *Expenses*—Each party shall bear its own expenses associated with the taking of any deposition.

(f) *Subpoenas*—Where appropriate, a party may request the issuance of a subpoena under the provisions of Rule 21.

15. *Interrogatories to Parties, Admission of Facts, and Production and Inspection of Documents.* After an appeal has been docketed and complaint filed with the Board, a party may serve on the other party: (a) Written interrogatories to be answered separately in writing, signed under oath and answered or objected to within 45 days after service; (b) a request for the admission of specified facts and/or the authenticity of any documents, to be answered or objected to within 45 days after service; the factual statements and the authenticity of the documents to be deemed admitted upon failure of a party to respond to the request; and (c) a request for the production, inspection and copying of any documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence, to be answered or objected to within 45 days after service. The Board may allow a shorter or longer time. Any discovery engaged in under this Rule shall be subject to the provisions of Rule 14(a) with respect to general policy and protective orders, and of Rule 35 with respect to sanctions.

16. *Service of Papers Other Than Subpoenas.* Papers shall be served personally or by mail, addressed to the party upon whom service is to be made. Copies of complaints, answers and briefs shall be filed directly with the Board. The party filing any other paper with the Board shall send a copy thereof to the opposing party, noting on the paper filed with the Board that a copy has been so furnished. Subpoenas shall be served as provided in Rule 21.

Hearings

17. *Where and When Held.* Hearings will be held at such places determined by the Board to best serve the interests of the parties and the Board. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals, Rule 12 requirements, and other pertinent factors. On request or motion by either party and for good cause, the Board may, in its discretion, adjust the date of a hearing.

18. *Notice of Hearings.* The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will consider the desires of the parties and the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

19. *Unexcused Absence of a Party.* The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

20. *Hearings: Nature, Examination of Witnesses*—(a) *Nature of Hearings*—Hearings shall be as informal as may be reasonable and appropriate under the circumstances. Appellant and the Government may offer such evidence as they deem appropriate and as would be admissible under the Federal Rules of Evidence or in the sound discretion of the presiding administrative judge or examiner. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Board may require evidence in addition to that offered by the parties.

(b) *Examination of Witnesses*—Witnesses before the Board will be examined orally under oath or affirmation, unless the presiding administrative judge or examiner shall otherwise order. If the testimony of a witness is not given under oath, the Board may advise the witness that his statements may be subject to the provisions of title 18, United States Code, sections 287 and 1001, and any other provision of law imposing penalties for knowingly making false representations in connection with claims against the United States or in any matter within the jurisdiction of any department or agency thereof.

21. *Subpoenas*—(a) *General*—Upon written request of either party filed with the recorder, or on his own initiative, the administrative judge to whom a case is assigned or who is otherwise designated by the chairman may issue a subpoena requiring:

(i) Testimony at a deposition—the deposing of a witness in the city or county where he resides or is employed or transacts his business in person, or at another location convenient for him that is specifically determined by the Board;

(ii) Testimony at a hearing—the attendance of a witness for the purpose of taking testimony at a hearing; and

(iii) Production of books and papers—in addition to (i) or (ii), the production by the witness at the deposition or hearing of books and papers designated in the subpoena.

(b) *Voluntary Cooperation*—Each party is expected (i) to cooperate and make available witnesses and evidence under its control as requested by the other party, without

issuance of a subpoena, and (ii) to secure voluntary attendance of desired third-party witnesses and production of desired third-party books, papers, documents, or tangible things whenever possible.

(c) *Requests for Subpoenas*—(1) A request for subpoena shall normally be filed at least:

(i) 15 days before a scheduled deposition where the attendance of a witness at a deposition is sought; or

(ii) 30 days before a scheduled hearing where the attendance of a witness at a hearing is sought.

In its discretion the Board may honor requests for subpoenas not made within these time limitations.

(2) A request for a subpoena shall state the reasonable scope and general relevance to the case of the testimony and of any books and papers sought.

(d) *Requests to Quash or Modify*—Upon written request by the person subpoenaed or by a party, made within 10 days after service but in any event not later than the time specified in the subpoena for compliance, the Board may (i) quash or modify the subpoena if it is unreasonable and oppressive or for other good cause shown, or (ii) require the person in whose behalf the subpoena was issued to advance the reasonable cost of producing subpoenaed books and papers. Where circumstances require, the Board may act upon such a request at any time after a copy has been served upon the opposing party.

(e) *Form; Issuance*—(1) Every subpoena shall state the name of the Board and the title of the appeal, and shall command each person to whom it is directed to attend and give testimony, and if appropriate, to produce specified books and papers at a time and place therein specified. In issuing a subpoena to a requesting party, the administrative judge shall sign the subpoena and may, in his discretion, enter the name of the witness and otherwise leave it blank. The party to whom the subpoena is issued shall complete the subpoena before service.

(2) Where the witness is located in a foreign country, a letter rogatory or subpoena may be issued and served under the circumstances and in the manner provided in 28 U.S.C. 1781–1784.

(f) *Service*—(1) The party requesting issuance of a subpoena shall arrange for service.

(2) A subpoena requiring the attendance of a witness at a deposition or hearing may be served at any place. A subpoena may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Government, money payments need not be tendered in advance of attendance.

(3) The party at whose instance a subpoena is issued shall be responsible for the payment of fees and mileage of the witness and of the officer who serves the subpoena. The failure to make payment of such charges on demand may be deemed by the Board as a sufficient ground for striking the testimony of the witness and the books or papers the witness has produced.

(g) *Contumacy or Refusal to Obey a Subpoena*—In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States District Court, the Board will apply to the Court through the Attorney General of the United States for an order requiring the person to appear before the Board or a member thereof to give testimony or produce evidence or both. Any failure of any such person to obey the order of the Court may be punished by the Court as a contempt thereof.

22. *Copies of Papers.* When books, records, papers, or documents have been received in evidence, a true copy thereof or of such part thereof as may be material or relevant may be substituted therefor, during the hearing or at the conclusion thereof.

23. *Post-Hearing Briefs.* Post-hearing briefs may be submitted upon such terms as may be directed by the presiding administrative judge or examiner at the conclusion of the hearing.

24. *Transcript of Proceedings.* Testimony and argument at hearings shall be reported verbatim, unless the Board otherwise orders. Waiver of transcript may be especially suitable for hearings under Rule 12.2. Transcripts of the proceedings shall be supplied to the parties at such rates as may be established by contract between the Board and the reporter, provided that ordinary copy of transcript shall be supplied to the appellant at an amount no greater than the cost of duplication.

25. *Withdrawal of Exhibits.* After a decision has become final the Board may, upon request and after notice to the other party, in its discretion permit the withdrawal of original exhibits, or any part thereof, by the party entitled thereto. The substitition of true copies of exhibits or any part thereof may be required by the Board in its discretion as a condition of granting permission for such withdrawal.

Representation

26. *The Appellant.* An individual appellant may appear before the Board in person, a corporation by one of its officers; and a partnership or joint venture by one of its members; or any of these by an attorney at law duly licensed in any state, commonwealth, territory, the District of Columbia, or in a

foreign country. An attorney representing an appellant shall file a written notice of appearance with the Board.

27. *The Government.* Government counsel may, in accordance with their authority, represent the interest of the Government before the Board. They shall file notices of appearance with the Board, and notice thereof will be given appellant or appellant's attorney in the form specified by the Board from time to time.

Decisions

28. *Decisions.* (a) Decisions of the Board will be made in writing and authenticated copies of the decision will be forwarded simultaneously to both parties. The rules of the Board and all final orders and decisions (except those required for good cause to be held confidential and not cited as precedents) shall be open for public inspection at the offices of the Board. Decisions of the Board will be made solely upon the record, as described in Rule 13.

(b) Any monetary award to a contractor by the Board shall be promptly paid in accordance with the procedures provided by section 1302 of the Act of July 27, 1956 (70 Stat. 694, as amended; 31 U.S.C. 724a). To assure prompt payment the Recorder will forward a waiver form to each party with the decision. If the parties do not contemplate an appeal or motion for reconsideration, they will execute waivers which so state, and return them to the Recorder. The Recorder will forward the waivers and a certified copy of the award decision to the General Accounting Office for certification for payment.

Motion for Reconsideration

29. *Motion for Reconsideration.* A motion for reconsideration may be filed by either party. It shall set forth specifically the grounds relied upon to sustain the motion. The motion shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

Suspensions, Dismissals and Defaults: Remands

30. *Suspensions; Dismissal Without Prejudice.* The Board may suspend the proceedings by agreement of counsel for settlement discussions, or for good cause shown. In certain cases, appeals docketed before the Board are required to be placed in a suspense status and the Board is unable to proceed with disposition thereof for reasons not within the control of the Board. Where the suspension has continued, or may continue, for an inordinate length of time, the Board may, in its discretion, dismiss such appeals from its docket without prejudice to their restoration when the cause of suspension has been removed. Unless either party or the Board acts within three years to reinstate any appeal dismissed without prejudice, the dismissal shall be deemed with prejudice.

31. *Dismissal or Default for Failure to Prosecute or Defend.* Whenever a record discloses the failure of either party to file documents required by these rules, respond to notices or correspondence from the Board, comply with orders of the Board, or otherwise indicates an intention not to continue the prosecution or defense of an appeal, the Board may, in the case of a default by the appellant, issue an order to show cause why the appeal should not be dismissed or, in the case of a default by the Government, issue an order to show cause why the Board should not act thereon pursuant to Rule 35. If good cause is not shown, the Board may take appropriate action.

32. *Remand from Court.* Whenever any court remands a case to the Board for further proceedings, each of the parties shall, within 20 days of such remand, submit a report to the Board recommending procedures to be followed so as to comply with the court's order. The Board shall consider the reports and enter special orders governing the handling of the remanded case. To the extent the court's directive and time limitations permit, such orders shall conform to these rules.

Time, Computation and Extensions

33. *Time, Computation and Extensions.* (a) Where possible, procedural actions should be taken in less time than the maximum time allowed. Where appropriate and justified, however, extensions of time will be granted. All requests for extensions of time shall be in writing.

(b) In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run to the end of the next business day.

Ex Parte Communications

34. *Ex parte Communications.* No member of the Board or the Board's staff shall entertain, nor shall any person directly or indirectly involved in an appeal, submit to the Board or the Board's staff, off the record, any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an appeal. This provision does not apply to consultation among Board members or to ex parte communications concerning the Board's administrative functions or procedures.

Sanctions

35. *Sanctions.* If any party fails or refuses to obey an order issued by the Board, the Board may then make such order as it considers

necessary to the just and expeditious conduct of the appeal.

Effective Date and Applicability

36. *Effective Date.* These rules shall apply (i) mandatorily, to all appeals relating to contracts entered into on or after 1 March 1979, and (ii) at the contractor's election, to appeals relating to earlier contracts, with respect to claims pending before the contracting officer on 1 March 1979 or initiated thereafter.

Pursuant to the Charter of the Armed Services Board of Contract Appeals, the attached rules are hereby approved for use and application to appeals to the Armed Services Board of Contract Appeals under the Contract Disputes Act of 1978.

(signed) William J. Perry (30 JUN 1980),
Under Secretary of Defense for Research and Engineering.
(signed) Percy A. Pierre,
Assistant Secretary of the Army (Research, Development and Acquisition).
(signed) J.A. Doyle,
Assistant Secretary of the Navy (Manpower, Reserve Affairs and Logistics).
(signed) Eugene H. Kopf,
(*Acting) Assistant Secretary of the Air Force (Research, Development and Logistics).*

[56 FR 36572, July 31, 1991, as amended at 58 FR 37868, July 14, 1993; 65 FR 39707, June 27, 2000]

APPENDIXES B–E TO CHAPTER 2 [RESERVED]

APPENDIX F TO CHAPTER 2—MATERIAL INSPECTION AND RECEIVING REPORT

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

Part 1—Introduction

F–101 General.

This appendix contains procedures and instructions for the use, preparation, and distribution of the material inspection and receiving report (MIRR) (DD Form 250 series) and commercial shipping/packing lists used to document Government contract quality assurance.

F–102 Applicability.

(a) The provisions of this appendix apply to supplies or services acquired by DoD when the clause at 252.246–7000, Material Inspection and Receiving Report, is included in the contract. If the contract contains the clause at FAR 52.213–1, Fast Payment Procedure, the contractor may elect not to prepare a DD Form 250.

(b) When DoD provides quality assurance or acceptance services for non-DoD activities, prepare a MIRR using the instructions in this appendix, unless otherwise specified in the contract.

F–103 Use.

(a) The DD Form 250 is a multipurpose report used—(1) To provide evidence of Government contract quality assurance at origin or destination;

(2) To provide evidence of acceptance at origin or destination;

(3) For packing lists;

(4) For receiving;

(5) For shipping;

(6) As a contractor invoice; and

(7) As commercial invoice support.

(b) Do not use the DD Form 250 for shipments—(1) By subcontractors, unless the subcontractor is shipping directly to the Government; or

(2) Of contract inventory.

(c) The contractor prepares the MIRR, except for entries that an authorized Government representative is required to complete. The contractor shall furnish sufficient copies of the completed form, as directed by the Government representative.

(d) Use the DD Form 250–1—(1) For bulk movements of petroleum products by tanker or barge to cover—

(i) Origin or destination acceptance of cargo; or

(ii) Shipment or receipt of Government owned products.

(2) To send quality data to the point of acceptance in the case of origin inspection on

FOB destination deliveries or preinspection at product source. Annotate the forms with the words ''INSPECTED FOR QUALITY ONLY.''

F–104 Application.

(a) *DD Form 250.* (1) Use the DD Form 250 for delivery of contract line, subline, exhibit line, or exhibit subline items. Do not use the DD Form 250 for those exhibit line or exhibit subline items on a DD Form 1423, Contract Data Requirements List, that indicate no DD Form 250 is required.

(2) If the shipped to, marked for, shipped from, mode of shipment, contract quality assurance and acceptance data are the same for more than one shipment made on the same day under the same contract, contractors may prepare one MIRR to cover all such shipments.

(3) If the volume of the shipment precludes the use of a single car, truck, or other vehicle, prepare a separate MIRR for the contents of each vehicle.

(4) When a shipment is consigned to an Air Force activity and the shipment includes items of more than one federal supply class (FSC) or material management code (MMC), prepare a separate DD Form 250 for items of each of the FSCs or MMCs in the shipment. However, the cognizant Government representative may authorize a single DD Form 250, listing each of the FSCs or MMCs included in the shipment on a separate continuation sheet. The MMC appears as a suffix to the national stock number applicable to the item.

(5) Consolidation of Petroleum Shipments on a Single MIRR—(i) *Contiguous United States.* Contractors may consolidate multiple car or truck load shipments of petroleum made on the same day, to the same destination, against the same contract line item, on one MIRR. To permit verification of motor deliveries, assign each load a load number which can be identified to the shipment number in Block 2 of the DD Form 250. Include a shipping document (commercial or government) with each individual load showing as a minimum—

(A) The shipper;

(B) Shipping point;

(C) Consignee;

(D) Contract and line item number;

(E) Product identification;

(F) Gross gallons (bulk only);

(G) Loading temperature (bulk only);

(H) American Petroleum Institute gravity (bulk only);

(I) Identification of carrier's equipment;

(J) Serial number of all seals applied; and

(K) Signature of supplier's representative.

When acceptance is at destination, the receiving activity retains the shipping document(s) to verify the entries on the consignee copy of the DD Form 250 forwarded by the contractor (reference F–401, Table 1) before signing Block 21b.

(ii) *Overseas.* The same criteria as for contiguous United States applies, except the consolidation period may be extended, if acceptable to the receiving activity, shipping activity, Government finance office, and the authorized Government representative having cognizance at the contractor's facility. In addition, the contractor may include more than one contract line item in each DD Form 250 if the shipped to, marked for, shipped from, mode of shipment, contract quality assurance, and acceptance data are the same for all line items.

(6) *Consolidation of Coal Shipments on a Single MIRR.* Contractors may consolidate multiple railcar or truck shipments of coal made on the same day, to the same destination, against the same contract line items, on one MIRR. To permit verification of truck deliveries, assign each load a load number which can be identified to the shipment number in Block 2 of the DD Form 250 and the analytical test report. Include a commercial shipping document with each individual truck load showing as a minimum—

(i) The shipper;

(ii) The name or names;

(iii) Location and shipping point of the mine or mines from which the coal originates;

(iv) The contract number;

(v) The exact size of the coal shipped; and

(vi) A certified weighmaster's certification of weight for the truckload.

Include a waybill with each rail shipment showing the identical information. To permit verification of rail deliveries, identify each railcar number comprising the shipment to the shipment number in Block 2 of the DD Form 250 and the analytical test report. When acceptance is at destination, the receiving activity must retain the shipping document(s) to verify the entries on the consignee copy of the DD Form 250.

(b) *DD Form 250–1.* (1) Use a separate form for each tanker or barge cargo loaded.

(2) The contractor may report more than one barge in the same tow on a single form if on the same contract and consigned to the same destination.

(3) When liftings involve more than one contract, prepare separate forms to cover the portion of cargo loaded on each contract.

(4) Prepare a separate form for each product or grade of product loaded.

(5) Use a separate document for each tanker or barge cargo and each grade of product discharged.

(6) For discharge, the contractor may report more than one barge in the same tow on a single form if from the same loading source.

Part 2—Contract Quality Assurance (CQA) on Shipments Between Contractors

F–201 Instructions.

F–201 Procedures.

Follow the procedures at PGI F–201 for evidence of required Government contract quality assurance at a subcontractor's facility.

Part 3—Preparation of the DD Form 250 and DD Form 250c

F–301 Preparation instructions.

(a) *General.* (1) Dates must use nine spaces consisting of the four digits of the year, three-position alphabetic month abbreviation, and two digits for the day. For example, 2000AUG07, 2000SEP24.

(2) Addresses must consist of the name, street address/P.O. box, city, state, and ZIP code.

(3) Enter to the right of and on the same line as the word ''Code'' in Blocks 9 through 12 and in Block 14—

(i) The Commercial and Government Entity Handbook (H4/H8) code;

(ii) The DoD activity address code (DoDAAC) as it appears in the DoD Activity Address Directory (DoDAAD), DoD 4000.25–6–M; or

(iii) The Military Assistance Program Address Directory (MAPAD) code.

(4) Enter the DoDAAC, CAGE (H4/H8), or MAPAD code in Block 13.

(5) The data entered in the blocks at the top of the DD Form 250c must be identical to the comparable entries in Blocks 1, 2, 3, and 6 of the DD Form 250.

(6) Enter overflow data from the DD Form 250 in Block 16 or in the body of the DD Form 250c with an appropriate cross-reference. Do not number or distribute additional DD Form 250c sheets, solely for continuation of Block 23 data as part of the MIRR.

(7) Do not include classified information in the MIRR. MIRRs must not be classified.

(b) *Completion instructions.* (1) Block 1—Procurement Instrument Identification (Contract) No.

(i) Enter the 13-position alpha-numeric basic Procurement Instrument Identification Number (PIIN) of the contract. When applicable, enter the four-position alpha-numeric call/order serial number that is supplementary to the 13-position basic PIIN. This number is also referred to as the Supplementary Procurement Instrument Identification Number (SPIIN). Use SPIINs for (also see Subpart 204.70)—

(A) Delivery orders under indefinite-delivery type contracts;

(B) Orders under basic ordering agreements; and

(C) Calls under blanket purchase agreements.

(ii) Except as indicated in paragraph (b)(1)(iii) of this section, do not enter supplementary numbers used in conjunction with basic PIINs to identify—

(A) Modifications of contracts and agreements;

(B) Modifications to calls or orders; or

(C) Document numbers representing contracts written between contractors.

(iii) When shipping instructions are furnished and shipment is made before receipt of the confirming contract modification (SF 30, Amendment of Solicitation/Modification of Contract), enter the contract modification six-digit number or the two-digit call or order number immediately following the PIIN or call/order four-digit SPIIN.

(iv) For DoD delivery orders on non-DoD contracts, enter the non-DoD contract number immediately below the PII number.

1. PROCUREMENT INSTRUMENT IDENTIFICATION (CONTRACT) NO. SP0400–00–F–1684 GS–000S–61917	ORDER NO.

(v) When a contract number other than PII number is used, enter that contract number.

(2) Block 2—Shipment No.

(i) The shipment number has a three-position alpha character prefix and a four-position numeric or alpha-numeric serial number.

(A) The prime contractor shall control and assign the shipment number prefix. The shipment number shall consist of three alphabetic characters for each ''Shipped From'' address (Block 11). The shipment number prefix shall be different for each ''Shipped From'' address and shall remain constant throughout the life of the contract. The prime contractor may assign separate prefixes when shipments are made from different locations within a facility identified by one ''Shipped From'' address.

(B) Number the first shipment 0001 for shipments made under the contract or contract and order number shown in Block 1 from each ''Shipped From'' address, or shipping location within the ''Shipped From'' address. Consecutively number all subsequent shipments with the identical shipment number prefix.

(*1*) Use alpha-numeric serial numbers when more than 9,999 numbers are required. Serially assign alpha-numeric numbers with the alpha in the first position (the letters I and O shall not be used) followed by the three-position numeric serial number. Use the following alpha-numeric sequence:

A000 through A999 (10,000 through 10,999)
B000 through B999 (11,000 through 11,999)
Z000 through Z999 (34,000 through 34,999)

(*2*) When this series is completely used, start over with 0001.

(ii) Reassign the shipment number of the initial shipment where a ''Replacement Shipment'' is involved (see paragraph (b)(16)(iv)(F) of this section).

(iii) The prime contractor shall control deliveries and on the final shipment of the contract shall end the shipment number with a ''Z.'' Where the final shipment is from other than the prime contractor's plant, the prime contractor may elect either to—

(A) Direct the subcontractor making the final shipment to end that shipment number with a ''Z''; or

(B) Upon determination that all subcontractors have completed their shipments, to correct the DD Form 250 (see F–305) covering the final shipment made from the prime contractor's plant by addition of a ''Z'' to that shipment number.

(iv) Contractors follow the procedures in F–306 to use commercial invoices.

(3) Block 3—Date Shipped. Enter the date the shipment is released to the carrier or the date the services are completed. If the shipment will be released after the date of CQA and/or acceptance, enter the estimated date of release. When the date is estimated, enter an ''E'' after the date. Do not delay distribution of the MIRR for entry of the actual shipping date. Reissuance of the MIRR is not required to show the actual shipping date (see F–303).

(4) Block 4—B/L TCN. When applicable, enter—

(i) The commercial or Government bill of lading number after ''B/L;''

(ii) The transportation control number after ''TCN'' (when a TCN is assigned for each line item on the DD Form 250 under Block 16 instructions, insert ''See Block 16''); and

(iii) The initial (line haul) mode of shipment code in the lower right corner of the block (see F–302).

(5) Block 5—Discount Terms. (i) The contractor may enter the discount in terms of percentages on all copies of the MIRR.

(ii) Use the procedures in F–306 when the MIRR is used as an invoice.

(6) Block 6—Invoice No./date. (i) The contractor may enter the invoice number and actual or estimated date of invoice submission on all copies of the MIRR. When the date is estimated, enter an ''E'' after the date. Do not correct MIRRs other than invoice copies to reflect the actual date of invoice submission.

(ii) Use the procedures in F–306 when the MIRR is used as an invoice.

(7) Block 7—Page/of.

Consecutively number the pages of the MIRR. On each page enter the total number of pages of the MIRR.

(8) Block 8—Acceptance point.

Enter an ''S'' for Origin or ''D'' for destination.

(9) Block 9—Prime contractor/code.

Enter the code and address.

(10) Block 10—Administered by/code.

Enter the code and address of the contract administration office (CAO) cited in the contract.

(11) Block 11—Shipped from/code/FOB.

(i) Enter the code and address of the ''Shipped From'' location. If identical to Block 9, enter ''See Block 9.''

(ii) For performance of services line items which do not require delivery of items upon completion of services, enter the code and address of the location at which the services were performed. If the DD Form 250 covers performance at multiple locations, or if identical to Block 9, enter ''See Block 9.''

(iii) Enter on the same line and to the right of ''FOB'' an ''S'' for Origin or ''D'' for Destination as specified in the contract. Enter an alphabetic ''O'' if the ''FOB'' point cited in the contract is other than origin or destination.

(iv) For destination or origin acceptance shipments involving discount terms, enter ''DISCOUNT EXPEDITE'' in at least one-half inch outline-type style letters across Blocks 11 and 12. Do not obliterate other information in these blocks.

(12) Block 12—Payment will be made by/code. Enter the code and address of the payment office cited in the contract.

(13) Block 13—Shipped to/code. Enter the code and address from the contract or shipping instructions.

(14) Block 14—Marked for/code. Enter the code and address from the contract or shipping instructions. When three-character project codes are provided in the contract or shipping instructions, enter the code in the body of the block, prefixed by ''Proj''; do not enter in the code block.

(15) Block 15—Item No. Enter the item number used in the contract.

(i) Use item numbers under the Uniform Contract Line Item Numbering System (see 204.71).

(ii) Position the item numbers as follows—

(A) For item numbers with four or less digits, enter the number immediately to the left of the vertical dashed line and prefix them with zeros, to achieve four digits.

(B) For item numbers with six digits, with alpha digits in the final two positions, enter

the last two digits to the right of the vertical dashed line.

(C) For item numbers with six digits, with numbers in the final two positions, enter the first four digits immediately to the left of the vertical dashed line. Do not use the last two digits.

(iii) Line item numbers not in accordance with the Uniform Contract Line Item Numbering System may be entered without regard to positioning.

(16) Block 16—Stock/part No./description. (i) Use single or double spacing between line items when there are less than four line items. Use double spacing when there are four or more line items. Enter the following for each line item:

(A) The national stock number (NSN) or noncatalog number. Where applicable, include a prefix or suffix. If a number is not provided, or it is necessary to supplement the number, include other identification such as the manufacturer's name or federal supply code (as published in Cataloging Handbook H4–1), and the part number. Show additional part numbers in parentheses or slashes. Show the descriptive noun of the item nomenclature and if provided, the Government assigned management/material control code. The contractor may use the following technique in the case of equal kind supply items. The first entry shall be the description without regard to kind. For example, ''Shoe-Low Quarter-Black,'' ''Resistor,'' ''Vacuum Tube,'' etc. Below this description, enter the contract line item number in Block 15 and Stock/Part number followed by the size or type in Block 16.

(B) On the next printing line, if required by the contract for control purposes, enter: the make, model, serial number, lot, batch, hazard indicator, or similar description.

(C) On the next printing lines enter—

(*1*) The MIPR number prefixed by ''MIPR'' or the MILSTRIP requisition number(s) when provided in the contract; or

(*2*) Shipping instructions followed on the same line (when more than one requisition is entered) by the unit for payment and the quantity shipped against each requisition.

Example:

V04696–185–750XY19059A—EA 5
N0018801776038XY3211BA—EA 200
AT650803050051AAT6391J—EA 1000

(D) When a TCN is assigned for each line item, enter on the next line the transportation control number prefixed by ''TCN.''

(ii) For service line items, enter the word ''SERVICE'' followed by as short a description as is possible in no more than 20 additional characters. Some examples of service line items are maintenance, repair, alteration, rehabilitation, engineering, research, development, training, and testing. Do not complete Blocks 4, 13, and 14 when there is no shipment of material.

(iii) For all contracts administered by the Defense Contract Management Agency, with the exception of fast pay procedures, enter and complete the following:

Gross Shipping Wt. _____
State weight in pounds only.

(iv) Starting with the next line, enter the following as appropriate (entries may be extended through Block 20). When entries apply to more than one line item in the MIRR, enter them only once after the last line item entry. Reference applicable line item numbers.

(A) Enter in capital letters any special handling instructions/limits for material environmental control, such as temperature, humidity, aging, freezing, shock, etc.

(B) When a shipment is chargeable to Navy appropriation 17X4911, enter the appropriation, bureau control number (BCN), and authorization accounting activity (AAA) number (e.g., 17X4911–14003–104).

(C) When the Navy transaction type code (TC), ''2T'' or ''7T'' is included in the appropriation data, enter ''TC 2T'' or ''TC 7T.''

(D) When an NSN is required by but not cited in a contract and has not been furnished by the Government, the contractor may make shipment without the NSN at the direction of the contracting officer. Enter the authority for such shipment.

(E) When Government furnished property (GFP) is included with or incorporated into the line item, enter the letters ''GFP.''

(F) When shipment consists of replacements for supplies previously furnished, enter in capital letters ''REPLACEMENT SHIPMENT.'' (See F–301, Block 17, for replacement indicators).

(G) On shipments of Government furnished aeronautical equipment (GFAE) under Air Force contracts, enter the assignment AERNO control number, e.g., ''AERNO 60–6354.''

(H) For items shipped with missing components, enter and complete the following:

''Item(s) shipped short of the following component(s): NSN or comparable identification _____, Quantity _____, Estimated Value _____, Authority _____''

(I) When shipment is made of components which were short on a prior shipment, enter and complete the following:

''These components were listed as shortages on shipment number _____, date shipped _____''

(J) When shipments involve drums, cylinders, reels, containers, skids, etc., designated as returnable under contract provisions, enter and complete the following:

''Return to _____, Quantity _____, Item _____, Ownership (Government/contractor).''

(K) Enter the total number of shipping containers, the type of containers, and the

container number(s) assigned for the shipment.

(L) On foreign military sales (FMS) shipments, enter the special markings, and FMS case identifier from the contract. Also enter the gross weight.

(M) When test/evaluation results are a condition of acceptance and are not available prior to shipment, the following note shall be entered if the shipment is approved by the contracting officer:

''NOTE: Acceptance and payment are contingent upon receipt of approved test/evaluation results.''

The contracting officer will advise—

(*1*) The consignee of the results (approval/disapproval); and

(*2*) The contractor to withhold invoicing pending attachment of the approved test/evaluation results.

(N) The copy of the DD Form 250 required to support payment for destination acceptance (top copy of those with shipment) or ARP origin acceptance shall be identified as follows: enter ''PAYMENT COPY'' in approximately one-half inch outline type style letters with ''FORWARD TO BLOCK 12 ADDRESS'' in approximately one-quarter inch letters immediately below. Do not obliterate any other entries.

(O) For clothing and textile contracts containing a bailment clause, enter the words ''GFP UNIT VALUE.''

(P) When the initial unit incorporating an approved value engineering change proposal (VECP) is shipped, enter the following statement:

This is the initial unit delivered which incorporates VECP No. _____, Contract Modification No. _____, dated _____

(17) Block 17—Quantity shipped/received. (i) Enter the quantity shipped, using the unit of measure in the contract for payment. When a second unit of measure is used for purposes other than payment, enter the appropriate quantity directly below in parentheses.

(ii) On the final shipment of a line item of a contract containing a clause permitting a variation of quantity and an underrun condition exists, the prime contractor shall enter a ''Z'' below the last digit of the quantity. Where the final shipment is from other than the prime contractor's plant and an underrun condition exists, the prime contractor may elect either to—

(A) Direct the subcontractor making the final shipment to enter a ''Z'' below the quantity; or

(B) Upon determination that all subcontractors have completed their shipments, correct the DD Form 250 (see F–305) covering the final shipment of the line item from the prime contractor's plant by addition of a ''Z'' below the quantity. Do not use the ''Z'' on deliveries which equal or exceed the contract line item quantity.

(iii) For replacement shipments, enter ''A'' below the last digit of the quantity, to designate first replacement, ''B'' for second replacement, etc. Do not use the final shipment indicator ''Z'' on underrun deliveries when a final line item shipment is replaced.

17. Quantity
Ship/rec'd
1000
(10)
Z

(iv) If the quantity received is the same quantity shipped and all items are in apparent good condition, enter by a check mark. If different, enter actual quantity received in apparent good condition below quantity shipped and circle. The receiving activity will annotate the DD Form 250 stating the reason for the difference.

(18) Block 18—Unit. Enter the abbreviation of the unit measure as indicated in the contract for payment. Where a second unit of measure is indicated in the contract for purposes other than payment or used for shipping purposes, enter the second unit of measure directly below in parentheses. Authorized abbreviations are listed in MIL-STD-129, Marking for Shipping and Storage. For example, LB for pound, SH for sheet.

18. Unit
LB
(SH)

(19) Block 19—Unit price. The contractor may, at its option, enter unit prices on all MIRR copies, except as a minimum:

(i) The contractor shall enter unit prices on all MIRR copies for each item of property fabricated or acquired for the Government and delivered to a contractor as Government furnished property (GFP). Get the unit price from Section B of the contract. If the unit price is not available, use an estimate. The estimated price should be the contractor's estimate of what the items will cost the Government. When the price is estimated, enter an ''E'' after the unit price.

(ii) Use the procedures in F–306 when the MIRR is used as an invoice.

(iii) For clothing and textile contracts containing a bailment clause, enter the cited Government furnished property unit value opposite ''GFP UNIT VALUE'' entry in Block 16.

(iv) Price all copies of DD Forms 250 for FMS shipments with actual prices, if available. If actual prices are not available, use estimated prices. When the price is estimated, enter an ''E'' after the price.

(20) Block 20—Amount. Enter the extended amount when the unit price is entered in Block 19.

(21) Block 21—Contract quality assurance (CQA). (i) The words ''conform to contract''

contained in the printed statements in Blocks 21a and 21b relate to quality and to the quantity of the items on the report. Do not modify the statements. Enter notes taking exception in Block 16 or on attached supporting documents with an appropriate block cross-reference.

(ii) When a shipment is authorized under alternative release procedure, attach or include the appropriate contractor signed certificate on the top copy of the DD Form 250 copies distributed to the payment office or attach or include the appropriate contractor certificate on the contract administration office copy when contract administration (Block 10 of the DD Form 250) is performed by the Defense Contract Management Agency (DCMA).

(iii) When contract terms provide for use of Certificate of Conformance and shipment is made under these terms, the contractor shall enter in capital letters ''CERTIFICATE OF CONFORMANCE'' in Block 21a on the next line following the CQA and acceptance statements. Attach or include the appropriate contractor signed certificate on the top copy of the DD Form 250 copies distributed to the payment office or attach or include the appropriate certificate on the contract administration office copy when contract administration (Block 10 of the DD Form 250) is performed by DCMA. In addition, attach a copy of the signed certificate to, or enter on, copies of the MIRR sent with shipment.

(iv) Origin. (A) The authorized Government representative must—

(*1*) Place an ''X'' in the appropriate CQA and/or acceptance box(es) to show origin CQA and/or acceptance. When the contract requires CQA at destination in addition to origin CQA, enter an asterisk at the end of the statement and an explanatory note in Block 16;

(*2*) Sign and date;

(*3*) Enter the typed, stamped, or printed name, title, mailing address, and commercial telephone number.

(B) When alternative release procedures apply—

(*1*) The contractor or subcontractor shall complete the entries required under paragraph (A) and enter in capital letters ''ALTERNATIVE RELEASE PROCEDURE'' on the next line following the printed CQA/acceptance statement.

(*2*) When acceptance is at origin and contract administration is performed by an office other than DCMA, the contractor shall furnish the four payment office copies of the MIRR to the authorized Government representative for dating and signing of one copy and forwarding of all copies to the payment office.

(*3*) When acceptance is at origin and contract administration is performed by DCMA, furnish the contract administration office copy of the MIRR to the authorized Government representative for dating and signing and forwarding to the contract administration office (see F–401, Table 1).

(C) When fast pay procedures apply, the contractor or subcontractor shall enter in capital letters ''FAST PAY'' on the next line following the printed CQA/acceptance statement. When CQA is required, the authorized Government representative shall execute the block as required by paragraph (A).

(D) When Certificate of Conformance procedures apply, inspection or inspection and acceptance are at source, and the contractor's Certificate of Conformance is required, the contractor shall enter in capital letters ''CERTIFICATE OF CONFORMANCE'' as required by paragraph (b)(21)(iii) of this section.

(*1*) For contracts administered by an office other than DCMA, furnish the four payment office copies of the MIRR to the authorized Government representative for dating and signing of one copy, and forwarding of all copies to the payment office.

(*2*) For contracts administered by DCMA, furnish the contract administration office copy of the MIRR to the authorized Government representative for dating and signing and forwarding to the contract administration office (see F–401, Table 1).

(*3*) When acceptance is at destination, no entry shall be made other than ''CERTIFICATE OF CONFORMANCE.''

(v) Destination. (A) When acceptance at origin is indicated in Block 21a, make no entries in Block 21b.

(B) When CQA and acceptance or acceptance is at destination, the authorized Government representative must—

(*1*) Place an ''X'' in the appropriate box(es);

(*2*) Sign and date; and

(*3*) Enter typed, stamped, or printed name, title, mailing address, and commercial telephone number.

(C) When ''ALTERNATIVE RELEASE PROCEDURE'' is entered in Block 21a and acceptance is at destination, the authorized Government representative must complete the entries required by paragraph (b)(21)(v)(B) of this section.

(D) Forward the executed payment copy or MILSCAP format identifier PKN or PKP to the payment office cited in Block 12 within 4 work days (5 days when MILSCAP Format is used) after delivery and acceptance of the shipment by the receiving activity. Forward one executed copy of the final DD Form 250 to the contract administration office cited in Block 10 for implementing contract closeout procedures.

(E) When ''FAST PAY'' is entered in Block 21a, make no entries in this block.

(22) Block 22—Receiver's Use. The authorized representative of the receiving activity (Government or contractor) must use this block to show receipt, quantity, and condition. The authorized representative must—

(i) Enter the date the supplies arrived. For example, when off-loading or in-checking occurs subsequent to the day of arrival of the carrier at the installation, the date of the carrier's arrival is the date received for purposes of this block;

(ii) Sign; and

(iii) Enter typed, stamped, or printed name, title, mailing address, and commercial telephone number.

(23) Block 23—Contractor use only. Self explanatory.

F–302 Mode/method of shipment codes.

Code	Description
A	Motor, truckload.
B	Motor, less than truckload.
C	Van (unpacked, uncrated personal or Government property).
D	Driveaway, truckaway, towaway.
E	Bus.
F	Air Mobility Command (Channel and Special Assignment Airlift Mission).
G	Surface parcel post.
H	Air parcel post.
I	Government trucks, for shipment outside local delivery area.
J	Air, small package carrier.
K	Rail, carload.[1]
L	Rail, less than carload.[1]
M	Surface, freight forwarder.
N	LOGAIR.
O	Organic military air (including aircraft of foreign governments).
P	Through Government Bill of Lading (TGBL).
Q	Commercial air freight (includes regular and expedited service provided by major airlines; charters and air taxis).
R	European Distribution System or Pacific Distribution System.
S	Scheduled Truck Service (STS) (applies to contract carriage, guaranteed traffic routings and/or scheduled service).
T	Air freight forwarder.
U	QUICKTRANS.
V	SEAVAN.
W	Water, river, lake, coastal (commercial).
X	Bearer, walk-thru (customer pickup of material).
Y	Military Intratheater Airlift Service.
Z	Military Sealift Command (MSC) (controlled contract or arranged space).
2	Government watercraft, barge, lighter.
3	Roll-on Roll-off (RORO) service.
4	Armed Forces Courier Service (ARFCOS).
5	Surface, small package carrier.
6	Military official mail (MOM).
7	Express mail.
8	Pipeline.
9	Local delivery by Government or commercial truck (includes on base transfers; deliveries between air, water, or motor terminals; and adjacent activities). Local delivery areas are identified in commercial carriers' tariffs which are filed and approved by regulatory authorities.

[1] Includes trailer/container-on-flat-car (excluding SEAVAN).

F–303 Consolidated shipments.

When individual shipments are held at the contractor's plant for authorized transportation consolidation to a single bill of lading, the contractor may prepare the DD Forms 250 at the time of CQA or acceptance prior to the time of actual shipment (see Block 3).

F–304 Multiple consignee instructions.

The contractor may prepare one MIRR when the identical line item(s) of a contract are to be shipped to more than one consignee, with the same or varying quantities, and the shipment requires origin acceptance. Prepare the MIRR using the procedures in this appendix with the following changes—

(a) Blocks 2, 4, 13, and, if applicable, 14—Enter ''See Attached Distribution List.''

(b) Block 15—The contractor may group item numbers for identical stock/part number and description.

(c) Block 17—Enter the ''total'' quantity shipped by line item or, if applicable, grouped identical line items.

(d) Use the DD Form 250c to list each individual ''Shipped To'' and ''Marked For'' with—

(1) Code(s) and complete shipping address and a sequential shipment number for each;

(2) Line item number(s);

(3) Quantity;

(4) MIPR number(s), preceded by ''MIPR,'' or the MILSTRIP requisition number, and quantity for each when provided in the contract or shipping instructions; and

(5) If applicable, bill of lading number, TCN, and mode of shipment code.

(e) The contractor may omit those distribution list pages of the DD Form 250c that are not applicable to the consignee. Provide a complete MIRR for all other distribution.

F–305 Correction instructions.

Make a new revised MIRR or correct the original when, because of errors or omissions, it is necessary to correct the MIRR after distribution has been made. Use data identical to that of the original MIRR. Do not correct MIRRs for Blocks 19 and 20 entries. Make the corrections as follows—

(a) Circle the error and place the corrected information in the same block; if space is limited, enter the corrected information in Block 16 referencing the error page and block. Enter omissions in Block 16 referencing omission page and block. For example—

2. SHIPMENT NO.
(AAA0001)
See Block 16

17. QUANTITY
SHIP/REC'D
19
(17)

16. STOCK/PART NO. DESCRIPTION CORRECTIONS:

Refer Block 2: Change shipment No. AAA001 to AAA0010 on all pages of the MIRR.

Refer Blocks 15, 16, 17, and 18, page 2: Delete in entirety Line Item No. 0006. This item was not shipped.

(b) When corrections have been made to entries for line items (Block 15) or quantity (Block 17) enter the words ''CORRECTIONS HAVE BEEN VERIFIED'' on page 1. The authorized Government representative will date and sign immediately below the statement. This verification statement and signature are not required for other corrections.

(c) Clearly mark the pages of the MIRR requiring correction with the words ''CORRECTED COPY.'' Avoid obliterating any other entries. Where corrections are made only on continuation sheets, also mark page number 1 with the words ''CORRECTED COPY.''

(d) Page 1 and only those continuation pages marked ''CORRECTED COPY'' shall be distributed to the initial distribution. A complete MIRR with corrections shall be distributed to new addressee(s) created by error corrections.

F–306 Invoice instructions.

(a) Contractors shall submit payment requests and receiving reports in electronic form, unless an exception in 232.7002 applies. Contractor submission of the material inspection and receiving information required by this appendix by using the Wide Area WorkFlow electronic form (see paragraph (b) of the clause at 252.232–7003) fulfills the requirement for an MIRR.

(b) If the contracting officer authorizes the contractor to submit an invoice in paper form, the Government encourages, but does not require, the contractor to use the MIRR as an invoice, in lieu of a commercial form. If commercial forms are used, identify the related MIRR shipment number(s) on the form. If using the MIRR as an invoice, prepare the MIRR and forward the required number of copies to the payment office as follows:

(1) Complete Blocks 5, 6, 19, and 20. Block 6 shall contain the invoice number and date. Column 20 shall be totaled.

(2) Mark in letters approximately one inch high, first copy: ''ORIGINAL INVOICE, for all invoice submissions; and three copies: ''INVOICE COPY,'' when the payment office requires four copies. Questions regarding the appropriate number of copies (*i.e.*, one or four) should be directed to the applicable payment office.

(3) Forward the appropriate number of copies to the payment office (Block 12 address), except when acceptance is at destination and a Navy finance office will make payment, forward to destination.

(4) Be sure to separate the copies of the MIRR used as an invoice from the copies of the MIRR used as a receiving report.

F–307 Packing list instructions.

Contractors may use copies of the MIRR as a packing list. The packing list copies are in addition to the copies of the MIRR required for standard distribution (see F–401). Mark them ''PACKING LIST.''

F–308 Receiving instructions.

When the MIRR is used for receiving purposes, local directives shall prescribe procedures. If CQA and acceptance or acceptance of supplies is required upon arrival at destination, see F–301(b)(21)(v) for instructions.

Part 4—Distribution of DD Form 250 and DD Form 250c

F–401 Distribution.

(a) The contractor is responsible for distributing the DD Form 250, including mailing and payment of postage. Use of the Wide Area WorkFlow electronic form satisfies the distribution requirements of this section, except for the copies required to accompany shipment.

(b) Contractors shall distribute MIRRs using the instructions in Tables 1 and 2.

(c) Contractors shall distribute MIRRs on non-DoD contracts using this appendix as amended by the contract.

(d) Contractors shall make distribution promptly, but no later than the close of business of the work day following—

(1) Signing of the DD Form 250 (Block 21a) by the authorized Government representative; or

(2) Shipment when authorized under terms of alternative release, certificate of conformance, or fast pay procedures; or

(3) Shipment when CQA and acceptance are to be performed at destination.

(e) Do not send the consignee copies (via mail) on overseas shipments to port of embarkation (POE). Send them to consignee at APO/FPO address.

(f) Copies of the MIRR forwarded to a location for more than one recipient shall clearly identify each recipient.

Material Inspection and Receiving Report

Table 1—Standard Distribution

With Shipment* 2

Consignee (via mail).....1

(For Navy procurement, include unit price)

(For foreign military sales, consignee copies are not required)

Contract Administration Office 1

(Forward direct to address in Block 10 except when addressee is a Defense Contract Management Agency (DCMA) office and a certificate of conformance or the alternate release procedures (see F–301,

Block 21) is involved, and acceptance is at origin; then, forward through the authorized Government representative.)

Purchasing Office.....1

Payment Office** 2

(Forward direct to address in Block 12 except—

(i) When address in Block 10 is a DCMA office and payment office in Block 12 is the Defense Finance and Accounting Service, Columbus Center, do not make distribution to the Block 12 addressee;

(ii) When address in Block 12 is the Defense Finance and Accounting Service, Columbus Center/Albuquerque Office (DFAS-CO/ALQ), Kirtland AFB, NM, attach only one copy to the required number of copies of the contractor's invoice;

(iii) When acceptance is at destination and a Navy finance office will make payment, forward to destination; and

(iv) When a certificate of conformance or the alternative release procedures (see F–301, Block 21) are involved and acceptance is at origin, forward the copies through the authorized Government representative.

ADP Point for CAO (applicable to Air Force only).....1

(When DFAS-CO/ALQ is the payment office in Block 12, send one copy to DFAS-CO/ALQ immediately after signature. If submission of delivery data is made electronically, distribution of this hard copy need not be made to DFAS-CO/ALQ.)

CAO of Contractor Receiving GFP.....1

(For items fabricated or acquired for the Government and shipped to a contractor as Government furnished property, send one copy directly to the CAO cognizant of the receiving contractor, ATTN: Property Administrator (see DoD 4105.59–H).)

*Attached as follows:

Type of shipment	Location
Carload or truckload.	Affix to the shipment where it will be readily visible and available upon receipt.
Less than carload or truckload.	Affix to container number one or container bearing lowest number.
Mail, including parcel post.	Attach to outside or include in the package. Include a copy in each additional package of multi-package shipments.
Pipeline, tank car, or railroad cars for coal movements.	Forward with consignee copies.

**Payment by Defense Finance and Accounting Service, Columbus Center will be based on the source acceptance copies of DD Forms 250 forwarded to the contract administration office.

MATERIAL INSPECTION AND RECEIVING REPORT

TABLE 2—SPECIAL DISTRIBUTION

As required	Address	Number of copies
Each: Navy Status Control Activity, Army, Air Force, DLA Inventory Control Manager.	Address specified in contract	1 Each addressee.
Quality Assurance Representative	Address specified by the assigned quality assurance representative.	1
Transportation Office issuing GBL (attach to GBL memorandum copy).	CAO address unless otherwise specified in the contract.	1
Purchasing Office other than office issuing contract.	Address specified in the contract	1
Foreign Military Sales Representative	Address specified in the contract	8
Military Assistance Advisory Group (Grant Aid shipments).	U.S. Military Advisory Group, Military Attache, Mission, or other designated agency address as specified in the contract.	1
Army Foreign Military Sales	Commander, U.S. Army Security Assistance Command, ATTN: AMSAC-OL, 54 ''M'' Avenue, Suite 1, New Cumberland, PA 17070–5096.	1
Air Force: On shipments of new production of aircraft and missiles, class 1410 missiles, 1510 aircraft (fixed wing, all types), 1520 aircraft (rotary wing), 1540 gliders, 1550 target drones.	HQ Air Force Materiel Command, LGX-AVDO, Area A, Building 262, Room N142, 4375 Chidlaw Road, Wright-Patterson AFB, OH 45433–5006.	1
When above items are delivered to aircraft modification centers.	DCMA	1
Foreign Military Sales/Military Assistance Program (Grant Aid) shipments to Canada.	National Defence Headquarters, Ottawa, Ontario, Canada, K1A OK4, ATTN: DPSUPS3.	1
Other than Canada	Address in the contract	1
When consignee is an Air National Guard Activity.	Consignee address (Block 13), ATTN: Property Officer.	3
Navy: Navy Foreign Military Sales	Naval Inventory Control Point, Deputy Commander for International Programs (NAVICP Code P761), 700 Robbins Avenue, Philadelphia, PA 19111–5095.	2

TABLE 2—SPECIAL DISTRIBUTION—Continued

As required	Address	Number of copies
When typed code (TC) 2T or 7T is shown in Block 16, or when shipment is consigned to another contractor's plant for a Government representative or when Block 16 indicates shipment includes GFP.	Naval Inventory Control Point (Code 0142) for aviation type material, 700 Robbins Avenue, Philadelphia, PA 19111–5098, and	2
	Naval Inventory Control Point (Code 0143) for all other material, 5450 Carlisle Pike, PO Box 2020, Mechanicsburg, PA 17055–0788.	2
Bulk Petroleum Shipments	Cognizant Defense Fuel Region (see Table 4)	1

Part 5—Preparation of the DD Form 250–1 (Loading Report)

F–501 Instructions.

Prepare the DD Form 250–1 using the following instructions when applied to a tanker or barge cargo lifting. If space is limited, use abbreviations. The block numbers correspond to those on the form.

(a) Block 1—Tanker/Barge. Line out ''TANKER'' or ''BARGE'' as appropriate and place an ''X'' to indicate loading report.

(b) Block 2—Inspection Office. Enter the name and location of the Government office conducting the inspection.

(c) Block 3—Report No. Number each form consecutively, starting with number 1, to correspond to the number of shipments made against the contract. If shipment is made from more than one location against the same contract, use this numbering system at each location.

(d) Block 4—Agency Placing Order on shipper, city, State and/or local address (loading). Enter the applicable Government activity.

(e) Block 5—Department. Enter military department owning product being shipped.

(f) Block 6—Prime contract or P.O. No. Enter the contract or purchase order number.

(g) Block 7—Name of prime contractor, city, State and/or local address (loading). Enter the name and address of the contractor as shown in the contract.

(h) Block 8—Storage contract. Enter storage contract number if applicable.

(i) Block 9—Terminal or refinery shipped from, city, State and/or local address. Enter the name and location of the contractor facility from which shipment is made. Also enter delivery point in this space as either ''FOB Origin'' or ''FOB Destination.''

(j) Block 10—Order No. on supplier. Enter number of the delivery order, purchase order, subcontract or suborder placed on the supplier.

(k) Block 11—Shipped to: (receiving activity, city, State and/or local address. Enter the name and geographical address of the consignee as shown on the shipping order.

(l) Block 12—B/L Number. If applicable, enter the initials and number of the bill of lading. If a commercial bill of lading is later authorized to be converted to a Government bill of lading, show ''Com. B/L to GB/L.''

(m) Block 13—Reqn. or request No. Enter number and date from the shipping instructions.

(n) Block 14—Cargo No. Enter the cargo number furnished by the ordering office.

(o) Block 15—Vessel. Enter the name of tanker or barge.

(p) Block 16—Draft arrival. Enter the vessel's draft on arrival.

(q) Block 17—Draft sailing. Enter the vessel's draft on completion of loading.

(r) Block 18—Previous two cargoes. Enter the type of product constituting previous two cargoes.

(s) Block 19—Prior inspection. Leave blank.

(t) Block 20—Condition of shore pipeline. Enter condition of line (full or empty) before and after loading.

(u) Block 21—Appropriation (loading). Enter the appropriation number shown on the contract, purchase order or distribution plan. If the shipment is made from departmentally owned stock, show ''Army, Navy, or Air Force (as appropriate) owned stock.''

(v) Block 22—Contract item No. Enter the contract item number applicable to the shipment.

(w) Block 23—Product. Enter the product nomenclature and grade as shown in the contract or specification, the stock or class number, and the NATO symbol.

(x) Block 24—Specifications. Enter the specification and amendment number shown in the contract.

(y) Block 25—Statement of quantity. Enter in the ''LOADED'' column, the net barrels, net gallons, and long tons for the cargo loaded. NOTE: If more than ½ of 1 percent difference exists between the ship and shore quantity figures, the contractor shall immediately investigate to determine the cause of the difference. If necessary, prepare corrected documents; otherwise, put a statement in Block 28 as to the probable or actual cause of the difference.

(z) Block 26—Statement of quality. (1) Under the heading ''TESTS'' list all inspection acceptance tests of the specification and any other quality requirements of the contract.

(2) Under the heading ''SPECIFICATION LIMITS'' list the limits or requirements as stated in the specification or contract directly opposite each entry in the ''TESTS'' column. List waivers to technical requirements.

(3) Under the heading ''TEST RESULTS'' list the test results applicable to the storage tank or tanks from which the cargo was lifted. If more than one storage tank is involved, list the tests applicable to each tank in separate columns headed by the tank number, the date the product in the tank was approved, and the quantity loaded from the tank. Each column shall also list such product characteristics as amount and type of corrosion inhibitor, etc.

(aa) Block 27—Time statement. Line out ''DISCHARGE'' and ''DISCHARGING.'' Complete all applicable entries of the time statement using local time. Take these dates and times from either the vessel or shore facility log. The Government representative shall ensure that the logs are in agreement on those entries used. If the vessel and shore facility logs are not in agreement, the Government representative will explain the reasons in Block 28—REMARKS. Do not enter the date and time the vessel left berth on documents placed aboard the vessel. The date and time shall appear on all other copies. Express all dates in sequence of day, month, and year with the month spelled out or abbreviated (e.g., 10 Sept. 67). The term FINISHED BALLAST DISCHARGE is meant to include all times needed to complete deballasting and mopping/drying of ship's tanks. The inspection of ship's tanks for loading is normally performed immediately upon completion of drying tanks.

(bb) Block 28—Remarks. Use this space for reporting—(1) All delays, their cause and responsible party (vessel, shore facility, Government representative, or other).

(2) Details of loading abnormalities such as product losses due to overflow, leaks, delivery of product from low level in shore tanks, etc.

(3) In the case of multiple consignees, enter each consignee, the amount consigned to each, and if applicable, the storage contract numbers appearing on the delivery order.

(4) When product title is vested in the U.S. Government, insert in capital letters ''U.S. GOVERNMENT OWNED CARGO.'' If title to the product remains with the contractor and inspection is performed at source with acceptance at destination, insert in capital letters ''CONTRACTOR OWNED CARGO.''

(5) Seal numbers and location of seals. If space is not adequate, place this information on the ullage report or an attached supplemental sheet.

(cc) Block 29—Company or receiving terminal. Line out ''OR RECEIVING TERMINAL'' and get the signature of the supplier's representative.

(dd) Block 30—Certification by government representative. Line out ''DISCHARGED.'' The Government representative shall date and sign the form to certify inspection and acceptance, as applicable, by the Government. The name of the individual signing this certification, as well as the names applied in Blocks 29 and 31, shall be typed or hand lettered. The signature in Block 30 must agree with the typed or lettered name to be acceptable to the paying office.

(ee) Block 31—Certification by master or agent. Obtain the signature of the master of the vessel or its agent.

Part 6—Preparation of the DD form 250–1 (Discharge Report)

F–601 Instructions.

Prepare the DD Form 250–1 using the following instructions when applied to a tanker or barge discharge. If space is limited, use abbreviations. The block numbers correspond to those on the form.

(a) Block 1—Tanker/barge. Line out ''TANKER'' or ''BARGE'' as applicable and place an ''X'' to enter discharge report.

(b) Block 2—Inspection office. Enter Government activity performing inspection on the cargo received.

(c) Block 3—Report No. Leave blank.

(d) Block 4—Agency placing order on shipper, city, state and/or local address (loading). Enter Government agency shown on loading report.

(e) Block 5—Department. Enter Department owning product being received.

(f) Block 6—Prime contract or P.O. No. Enter the contract or purchase order number shown on the loading report.

(g) Block 7—Name of prime contractor, city, state and/or local address (loading). Enter the name and location of contractor who loaded the cargo.

(h) Block 8—Storage contract. Enter the number of the contract under which material is placed in commercial storage where applicable.

(i) Block 9—Terminal or refinery shipped from, city, state and/or local address. Enter source of cargo.

(j) Block 10—Order no. on supplier. Make same entry appearing on loading report.

(k) Block 11—Shipped to: (receiving activity, city, state and/or local address). Enter receiving activity's name and location.

(l) Block 12—B/L Number. Enter as appears on loading report.

(m) Block 13—Reqn. or Request No. Leave blank.

(n) Block 14—Cargo No. Enter cargo number shown on loading report.

(o) Block 15—Vessel. Enter name of tanker or barge discharging cargo.

(p) Block 16—Draft arrival. Enter draft of vessel upon arrival at dock.

(q) Block 17—Draft sailing. Enter draft of vessel after discharging.

(r) Block 18—Previous two cargoes. Leave blank.

(s) Block 19—Prior inspection. Enter the name and location of the Government office which inspected the cargo loading.

(t) Block 20—Condition of shore pipeline. Enter condition of line (full or empty) before and after discharging.

(u) Block 21—Appropriation (loading). Leave blank.

(v) Block 22—Contract item no. Enter the item number shown on the loading report.

(w) Block 23—Product. Enter information appearing in Block 23 of the loading report.

(x) Block 24—Specifications. Enter information appearing in Block 24 of the loading report.

(y) Block 25—Statement of quantity. Enter applicable data in proper columns.

(1) Take ''LOADED'' figures from the loading report.

(2) Determine quantities discharged from shore tank gauges at destination.

(3) If a grade of product is discharged at more than one point, calculate the loss or gain for that product by the final discharge point. Report amounts previously discharged on discharge reports prepared by the previous discharge points. Transmit volume figures by routine message to the final discharge point in advance of mailed documents to expedite the loss or gain calculation and provide proration data when more than one department is involved.

(4) The loss or gain percentage shall be entered in the ''PERCENT'' column followed by ''LOSS'' or ''GAIN,'' as applicable.

(5) On destination acceptance shipments, accomplish the ''DISCHARGED'' column only, unless instructed to the contrary.

(z) Block 26—Statement of quality. (1) Under the heading ''TESTS'' enter the verification tests performed on the cargo preparatory to discharge.

(2) Under ''SPECIFICATION LIMITS'' enter the limits, including authorized departures (if any) appearing on the loading report, for the tests performed.

(3) Enter the results of tests performed under the heading ''TEST RESULTS.''

(aa) Block 27—Time statement. Line out ''LOAD'' and ''LOADING.'' Complete all applicable entries of the time statement using local time. Take the dates and times from either the vessel or shore facility log. The Government representative shall ensure that these logs are in agreement with entries used. If the vessel and shore facility logs are not in agreement, the Government representative will explain the reason(s) in Block 28—REMARKS. Do not enter the date and time the vessel left berth on documents placed aboard the vessel. The date and time shall appear on all other copies. Express all dates in sequence of day, month, and year with the month spelled out or abbreviated (e.g., 10 Sept. 67).

(bb) Block 28—Remarks. Use this space for reporting important facts such as—

(1) Delays, their cause, and responsible party (vessel, shore facility, Government representative, or others).

(2) Abnormal individual losses contributing to the total loss. Enter the cause of such losses as well as actual or estimated volumes involved. Such losses shall include, but not be restricted to, product remaining aboard (enter tanks in which contained), spillages, line breaks, etc. Note where gravity group change of receiving tank contents results in a fictitious loss or gain. Note irregularities observed on comparing vessel ullages obtained at loading point with those at the discharge point if they indicate an abnormal transportation loss or contamination.

(cc) Block 29—Company or receiving terminal. Line out ''COMPANY OR.'' Secure the signature of a representative of the receiving terminal.

(dd) Block 30—Certification by government representative. Line out ''LOADED.'' The Government representative shall date and sign the form to certify inspection and acceptance, as applicable, by the Government. The name of the individual signing the certification as well as the names applied in Blocks 29 and 31, shall be typed or hand lettered on the master or all copies of the form. The signature in Block 30 must agree with the typed or lettered name to be acceptable to the paying office.

(ee) Block 31—Certification by master or agent. Obtain the signature of the master of the vessel or the vessel's agent.

Part 7—Distribution of the DD Form 250–1

F–701 Distribution.

Follow the procedures at PGI F–701 for distribution of DD Form 250–1.

F–702 Corrected DD Form 250–1.

Follow the procedures at PGI F–702 when corrections to DD Form 250–1 are needed.

[56 FR 36610, July 31, 1991, as amended at 57 FR 53602, Nov. 12, 1992; 58 FR 37868, July 14, 1993; 59 FR 27678, May 27, 1994; 60 FR 61615, Nov. 30, 1995; 65 FR 14398, Mar. 16, 2000; 65 FR 52953, 52954, Aug. 31, 2000; 65 FR 63803, 63804, 63805, Oct. 25, 2000; 65 FR 69376, Nov. 16, 2000; 66 FR 49861, Oct. 1, 2001; 70 FR 35549, June 21, 2005; 70 FR 58983, Oct. 11, 2005; 71 FR 75891, Dec. 19, 2006; 73 FR 1831, Jan. 10, 2008; 73 FR 11459, Mar. 3, 2008]

APPENDIX G TO CHAPTER 2 [RESERVED]

APPENDIX H TO CHAPTER 2—DEBARMENT AND SUSPENSION PROCEDURES

Sec.
H–100 Scope.
H–101 Notification.
H–102 Nature of proceeding.
H–103 Presentation of matters in opposition.
H–104 Fact-finding.
H–105 Timing requirements.
H–106 Subsequent to fact-finding.

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

H–100 Scope.

This appendix provides uniform debarment and suspension procedures to be followed by all debarring and suspending officials.

H–101 Notification.

Contractors will be notified of the proposed debarment or suspension in accordance with FAR 9.406–3 or 9.407–3. A copy of the record which formed the basis for the decision by the debarring and suspending official will be made available to the contractor. If there is a reason to withhold from the contractor any portion of the record, the contractor will be informed of what is withheld and the reasons for such withholding.

H–102 Nature of proceeding.

There are two distinct proceedings which may be involved in the suspension or debarment process. The first is the presentation of matters in opposition to the suspension or proposed debarment by the contractor.

The second is fact-finding which occurs only in cases in which the contractor's presentation of matters in opposition raises a genuine dispute over one or more material facts. In a suspension action based upon an indictment or in a proposed debarment action based upon a conviction or civil judgment, there will be no fact-filling proceeding concerning the matters alleged in the indictment, or the facts underlying the convictions or civil judgment. However, to the extent that the proposed action stems from the contractor's affiliation with an individual or firm indicted or convicted, or the subject of a civil judgment, fact-finding is permitted if a genuine dispute of fact is raised as to the question of affiliation as defined in FAR 9.403.

H–103 Presentation of matters in opposition.

(a) In accordance with FAR 9.406–3(c) and 9.407–3(c), matters in opposition may be presented in person, in writing, or through a representative. Matters in opposition may be presented through any combination of the foregoing methods, but if a contractor desires to present matters in person or through a representative, any written material should be delivered at least 5 working days in advance of the presentation. Usually, all matters in opposition are presented in a single proceeding. A contractor who becomes aware of a pending indictment or allegations of wrongdoing that the contractor believes may lead to suspension or debarment action may contact the debarring and suspending official or designee to provide information as to the contractor's present responsibility.

(b) An in-person presentation is an informal meeting, nonadversarial in nature. The debarring and suspending official and/or other agency representatives may ask questions of the contractor or its representative making the presentation. The contractor may select the individuals who will attend the meeting on the contractor's behalf; individual respondents or principals of a business firm respondent may attend and speak for themselves.

(c) In accordance with FAR 9.406–3(c) and 9.407–3(c), the contractor may submit matters in opposition within 30 days from receipt of the notice of suspension or proposed debarment.

(d) The opportunity to present matters in opposition to debarment includes the opportunity to present matters concerning the duration of the debarment.

H–104 Fact-finding.

(a) The debarring and suspending official will determine whether the contractor's presentation has raised a genuine dispute of material fact(s). If the debarring and suspending official has decided against debarment or continued suspension, or the provisions of FAR 9.4 preclude fact-finding, no fact-finding will be conducted. If the debarring and suspending official has determined a genuine dispute of material fact(s) exists, a designated fact-finder will conduct the fact-finding proceeding. The proceeding before the fact-finder will be limited to a finding of the facts in dispute as determined by the debarring and suspending official.

(b) The designated fact-finder will establish the date for a fact-finding proceeding, normally to be held within 45 working days of the contractor's presentation of matters in opposition. An official record will be made of the fact-finding proceeding.

(c) The Government's representative and the contractor will have an opportunity to present evidence relevant to the facts at issues. The contractor may appear in person or through a representative in the fact-finding proceeding.

(d) Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact-finding. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(e) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceeding and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination.

H–105 Timing requirements.

All timing requirements set forth in these procedures may be extended by the debarring and suspending official for good cause.

H–106 Subsequent to fact-finding.

(a) Written findings of fact will be prepared by the fact-finder as mandated by FAR 9.406–3(d)(2)(i) and 9.407–3(d)(2)(i).

(b) The fact-finder will determine the disputed fact(s) by a preponderance of the evidence. A copy of the findings of fact will be provided to the debarring and suspending official, the Government's representative, and the contractor.

(c) The debarring and suspending official will determine whether to continue the suspension or to debar the contractor based upon the entire administrative record, including the findings of fact.

(d) Prompt written notice of the debarring and suspending official's decision will be sent to the contractor and any affiliates involved, in compliance with FAR 9.406–3(e) and 9.407–3(d)(4).

[59 FR 27700, May 27, 1994]

APPENDIX I TO CHAPTER 2—POLICY AND PROCEDURES FOR THE DOD PILOT MENTOR-PROTEGE PROGRAM

I–100 Purpose.

(a) This Appendix I to 48 CFR Chapter 2 implements the Pilot Mentor-Protégé Program (hereafter referred to as the ''Program'') established under Section 831 of Public Law 101–510, the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2302 note). The purpose of the Program is to—

(1) Provide incentives to major DoD contractors, performing under at least one active approved subcontracting plan negotiated with DoD or another Federal agency, to assist protégé firms in enhancing their capabilities to satisfy DoD and other contract and subcontract requirements;

(2) Increase the overall participation of protégé firms as subcontractors and suppliers under DoD contracts, other Federal agency contracts, and commercial contracts; and

(3) Foster the establishment of long-term business relationships between protégé firms and such contractors.

(b) Under the Program, eligible companies approved as mentor firms will enter into mentor-protégé agreements with eligible protégé firms to provide appropriate developmental assistance to enhance the capabilities of the protégé firms to perform as subcontractors and suppliers. DoD may provide the mentor firm with either cost reimbursement or credit against applicable subcontracting goals established under contracts with DoD or other Federal agencies.

(c) DoD will measure the overall success of the Program by the extent to which the Program results in—

(1) An increase in the dollar value of contract and subcontract awards to protégé firms (under DoD contracts, contracts awarded by other Federal agencies, and commercial contracts) from the date of their entry into the Program until 2 years after the conclusion of the agreement;

(2) An increase in the number and dollar value of subcontracts awarded to a protégé firm (or former protégé firm) by its mentor firm (or former mentor firm);

(3) An increase in the employment level of protégé firms from the date of entry into the Program until 2 years after the completion of the agreement.

(d) This policy sets forth the procedures for participation in the Program applicable to companies that are interested in receiving—

(1) Reimbursement through a separate contract line item in a DoD contract or a separate contract with DoD; or

(2) Credit toward applicable subcontracting goals for costs incurred under the Program.

I–101 Definitions.

I–101.1 Historically Black college or university.

An institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. The term also means any nonprofit research institution that was an integral part of such a college or university before November 14, 1986.

I–101.2 Minority institution of higher education.

An institution of higher education with a student body that reflects the composition specified in section 312(b)(3), (4), and (5) of the Higher Education Act of 1965 (20 U.S.C. 1058(b)(3), (4), and (5)).

I–101.3 Eligible entity employing the severely disabled.

A business entity operated on a for-profit or nonprofit basis that—

(a) Uses rehabilitative engineering to provide employment opportunities for severely disabled individuals and integrates severely disabled individuals into its workforce;

(b) Employs severely disabled individuals at a rate that averages not less than 20 percent of its total workforce;

(c) Employs each severely disabled individual in its workforce generally on the basis of 40 hours per week; and

(d) Pays not less than the minimum wage prescribed pursuant to section 6 of the Fair Labor Standards Act (29 U.S.C. 206) to those employees who are severely disabled individuals.

I–101.4 Severely disabled individual.

An individual who has a physical or mental disability which constitutes a substantial handicap to employment and which, in accordance with criteria prescribed by the Committee for the Purchase from the Blind and Other Severely Handicapped established by the first section of the Act of June 25, 1938 (41 U.S.C. 46; popularly known as the ''Javits-Wagner-O'Day Act'') is of such a nature that the individual is otherwise prevented from engaging in normal competitive employment.

I–101.5 Small disadvantaged business (SDB).

A small business concern that is—

(a) An SDB concern as defined at 219.001, paragraph (1) of the definition of ''small disadvantaged business concern'';

(b) A business entity owned and controlled by an Indian tribe as defined in Section 8(a)(13) of the Small Business Act (15 U.S.C. 637(a)(13)); or

(c) A business entity owned and controlled by a Native Hawaiian Organization as defined in Section 8(a)(15) of the Small Business Act.

I–101.6 Women-owned small business.

A small business concern owned and controlled by women as defined in Section 8(d)(3)(D) of the Small Business Act (15 U.S.C. 637(d)(3)(D)).

I–101.7 HUBZone small business.

A qualified HUBZone small business concern as determined by the Small Business Administration in accordance with 13 CFR part 126.

I–101.8 Service-disabled veteran-owned small business.

A small business concern owned and controlled by service-disabled veterans as defined in Section 8(d)(3) of the Small Business Act (15 U.S.C. 637(d)(3)).

I–102 Participant eligibility.

(a) To be eligible to participate as a mentor, an entity must be—

(1) An entity other than small business, unless a waiver to the small business exception has been obtained from the Director, Small Business Programs (SBP), OUSD (AT&L), that is a prime contractor to DoD with an active subcontracting plan; or

(2) A graduated 8(a) firm that provides documentation of its ability to serve as a mentor; and

(3) Approved to participate as a mentor in accordance with I–105.

(b) To be eligible to participate as a proteégé, an entity must be—

(1) An SDB, a women-owned small business, a HUBZone small business, a service-disabled veteran-owned small business, or an eligible entity employing the severely disabled;

(2) Eligible for the award of Federal contracts; and

(3) A small business according to the Small Business Administration (SBA) size standard for the North American Industry Classification System (NAICS) code that represents the contemplated supplies or services to be provided by the protégé firm to the mentor firm if the firm is representing itself as a qualifying entity under the definition at I–101.5(a) or I–101.6.

(c) Mentor firms may rely in good faith on a written representation that the entity meets the requirements of paragraph (a) of this section, except for a protégé's status as a small disadvantaged business concern (see FAR 19.703(b)).

(d) If at any time the SBA (or DoD in the case of entities employing the severely disabled) determines that a protégé is ineligible, assistance that the mentor firm furnishes to the protégé after the date of the determination may not be considered assistance furnished under the Program.

(e) A company may not be approved for participation in the Program as a mentor firm if, at the time of requesting participation in the Program, it is currently debarred or suspended from contracting with the Federal Government pursuant to FAR Subpart 9.4.

(f) If the mentor firm is suspended or debarred while performing under an approved mentor-protégé agreement, the mentor firm—

(1) May continue to provide assistance to its protégé firms pursuant to approved mentor-protégé agreements entered into prior to the imposition of such suspension or debarment;

(2) May not be reimbursed or take credit for any costs of providing developmental assistance to its protégé firm, incurred more than 30 days after the imposition of such suspension or debarment; and

(3) Must promptly give notice of its suspension or debarment to its protégé firm and the cognizant Component Director, SBP.

I–103 Program duration.

(a) New mentor-protege agreements may be submitted and approved through September 30, 2010.

(b) Mentors incurring costs prior to September 30, 2013, pursuant to an approved mentor-protege agreement may be eligible for—

(1) Credit toward the attainment of its applicable subcontracting goals for unreimbursed costs incurred in providing developmental assistance to its protégé firm(s);

(2) Reimbursement pursuant to the execution of a separately priced contract line item added to a DoD contract; or

(3) Reimbursement pursuant to entering into a separate DoD contract upon determination by the cognizant Component Director, SBP, that unusual circumstances justify using a separate contract.

I–104 Selection of protégé firms.

(a) Mentor firms will be solely responsible for selecting protege firms. Mentor firms are encouraged to identify and select concerns that are defined as emerging SDB, women-owned small business, HUBZone small business, service-disabled veteran-owned small business, or an eligible entity employing the severely disabled.

(b) The selection of protégé firms by mentor firms may not be protested, except as in paragraph (c) of this section.

(c) In the event of a protest regarding the size or disadvantaged status of an entity selected to be a protégé firm as defined in I–101.5, the mentor firm must refer the protest to the SBA to resolve in accordance with 13 CFR part 121 (with respect to size) or 13 CFR part 124 (with respect to disadvantaged status).

(d) For purposes of the Small Business Act, no determination of affiliation or control (either direct or indirect) may be found between a protégé firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm, pursuant to a mentor-protégé agreement, any form of developmental assistance described in I–107(f).

(e) A protégé firm may have only one active DoD mentor-protégé agreement.

I–105 Mentor approval process.

(a) An entity seeking to participate as a mentor must apply to the cognizant Component Director, SBP, to establish its initial eligibility as a mentor. This application may accompany its initial mentor-protégé agreement.

(b) The application must provide the following information:

(1) A statement that the company is currently performing under at least one active approved subcontracting plan negotiated with DoD or another Federal agency pursuant to FAR 19.702, and that the company is currently eligible for the award of Federal contracts or a statement that the entity is a graduated 8(a) firm.

(2) A summary of the company's historical and recent activities and accomplishments under its small and disadvantaged business utilization program.

(3) The total dollar amount of DoD contracts and subcontracts that the company received during the 2 preceding fiscal years. (Show prime contracts and subcontracts separately per year.)

(4) The total dollar amount of all other Federal agency contracts and subcontracts that the company received during the 2 preceding fiscal years. (Show prime contracts and subcontracts separately per year.)

(5) The total dollar amount of subcontracts that the company awarded under DoD contracts during the 2 preceding fiscal years.

(6) The total dollar amount of subcontracts that the company awarded under all other Federal agency contracts during the 2 preceding fiscal years.

(7) The total dollar amount and percentage of subcontracts that the company awarded to all SDB, women-owned small business, HUBZone small business, and service-disabled veteran-owned small business firms under DoD contracts and other Federal agency contracts during the 2 preceding fiscal years. (Show DoD subcontract awards separately.) If the company presently is required to submit a Standard Form (SF) 295, Summary Subcontract Report, the request must include copies of the final reports for the 2 preceding fiscal years.

(8) Information on the company's ability to provide developmental assistance to eligible protégés.

(c) A template of the mentor application is available at: *http://www.acq.osd.mil/osbp/mentor_protege/*.

(d) Companies that apply for participation and are not approved will be provided the reasons and an opportunity to submit additional information for reconsideration.

I–106 Development of mentor-protégé agreements.

(a) Prospective mentors and their protégés may choose to execute letters of intent prior to negotiation of mentor-protégé agreements.

(b) The agreements should be structured after completion of a preliminary assessment of the developmental needs of the protégé firm and mutual agreement regarding the developmental assistance to be provided to address those needs and enhance the protégé's ability to perform successfully under contracts or subcontracts.

(c) A mentor firm may not require a protégé firm to enter into a mentor-protégé agreement as a condition for award of a contract by the mentor firm, including a subcontract under a DoD contract awarded to the mentor firm.

(d) The mentor-protégé agreement may provide for the mentor firm to furnish any or all of the following types of developmental assistance:

(1) Assistance by mentor firm personnel in—

(i) General business management, including organizational management, financial management, and personnel management, marketing, business development, and overall business planning;

(ii) Engineering and technical matters such as production inventory control and quality assurance; and

(iii) Any other assistance designed to develop the capabilities of the protégé firm under the developmental program.

(2) Award of subcontracts under DoD contracts or other contracts on a noncompetitive basis.

(3) Payment of progress payments for the performance of subcontracts by a protégé firm in amounts as provided for in the subcontract; but in no event may any such progress payment exceed 100 percent of the costs incurred by the protégé firm for the performance of the subcontract. Provision of progress payments by a mentor firm to a protégé firm at a rate other than the customary rate for the firm must be implemented in accordance with FAR 32.504(c).

(4) Advance payments under such subcontracts. The mentor firm must administer advance payments in accordance with FAR Subpart 32.4.

(5) Loans.

(6) Investment(s) in the protégé firm in exchange for an ownership interest in the protégé firm, not to exceed 10 percent of the total ownership interest. Investments may include, but are not limited to, cash, stock, and contributions in kind.

(7) Assistance that the mentor firm obtains for the protégé firm from one or more of the following:

(i) Small Business Development Centers established pursuant to Section 21 of the Small Business Act (15 U.S.C. 648).

(ii) Entities providing procurement technical assistance pursuant to 10 U.S.C. Chapter 142 (Procurement Technical Assistance Centers).

(iii) Historically Black colleges and universities.

(iv) Minority institutions of higher education.

(e) Pursuant to FAR 31.109, approved mentor firms seeking either reimbursement or credit are strongly encouraged to enter into an advance agreement with the contracting officer responsible for determining final indirect cost rates under FAR 42.705. The purpose of the advance agreement is to establish the accounting treatment of the costs of the developmental assistance pursuant to the mentor-protégé agreement prior to the incurring of any costs by the mentor firm. An advance agreement is an attempt by both the Government and the mentor firm to avoid possible subsequent dispute based on questions related to reasonableness, allocability, or allowability of the costs of developmental assistance under the Program. Absent an advance agreement, mentor firms are advised to establish the accounting treatment of such costs and to address the need for any changes to their cost accounting practices that may result from the implementation of a mentor-protégé agreement, prior to incurring any costs, and irrespective of whether costs will be reimbursed or credited.

(f) Developmental assistance provided under an approved mentor-protégé agreement is distinct from, and must 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 must be accumulated and charged in accordance with the contractor's approved accounting practices; they are not considered developmental assistance costs eligible for either credit or reimbursement under the Program.

I–107 Elements of a mentor-protégé agreement.

Each mentor-protégé agreement will contain the following elements:

(a) The name, address, e-mail address, and telephone number of the mentor and protégé points of contact;

(b) The NAICS code(s) that represent the contemplated supplies or services to be provided by the protege firm to the mentor firm and a statement that, at the time the agreement is submitted for approval, the protege firm, if an SDB, a women-owned small business, a HUBZone small business, or a service-disabled veteran-owned small business concern, does not exceed the size standard for the appropriate NAICS code;

(c) A statement that the protégé firm is eligible to participate in accordance with I–102(b);

(d) A statement that the mentor is eligible to participate in accordance with I–102;

(e) A preliminary assessment of the developmental needs of the protégé firm;

(f) A developmental program for the protégé firm specifying the type of assistance the mentor will provide to the protégé and how that assistance will—

(1) Increase the protégé's ability to participate in DoD, Federal, and/or commercial contracts and subcontracts; and

(2) Increase small business subcontracting opportunities in industry categories where eligible protégés or other small business firms are not dominant in the company's vendor base;

(g) Factors to assess the protégé firm's developmental progress under the Program, including specific milestones for providing each element of the identified assistance;

(h) An estimate of the dollar value and type of subcontracts that the mentor firm will award to the protégé firm, and the period of time over which the subcontracts will be awarded;

(i) A statement from the protégé firm indicating its commitment to comply with the requirements for reporting and for review of the agreement during the duration of the agreement and for 2 years thereafter;

(j) A program participation term for the agreement that does not exceed 3 years. Requests for an extension of the agreement for a period not to exceed an additional 2 years are subject to the approval of the cognizant Component Director, SBP. The justification must detail the unusual circumstances that warrant a term in excess of 3 years;

(k) Procedures for the mentor firm to notify the protégé firm in writing at least 30 days in advance of the mentor firm's intent to voluntarily withdraw its participation in the Program. A mentor firm may voluntarily terminate its mentor-protégé agreement(s) only if it no longer wants to be a participant in the Program as a mentor firm. Otherwise, a mentor firm must terminate a mentor-protégé agreement for cause;

(l) Procedures for the mentor firm to terminate the mentor-protégé agreement for cause which provide that—

(1) The mentor firm must furnish the protégé firm a written notice of the proposed termination, stating the specific reasons for such action, at least 30 days in advance of the effective date of such proposed termination;

(2) The protégé firm must have 30 days to respond to such notice of proposed termination, and may rebut any findings believed to be erroneous and offer a remedial program;

(3) Upon prompt consideration of the protégé firm's response, the mentor firm must either withdraw the notice of proposed termination and continue the protégé firm's participation, or issue the notice of termination; and

(4) The decision of the mentor firm regarding termination for cause, conforming with the requirements of this section, will be final and is not reviewable by DoD;

(m) Procedures for a protégé firm to notify the mentor firm in writing at least 30 days in advance of the protégé firm's intent to voluntarily terminate the mentor-protégé agreement;

(n) Additional terms and conditions as may be agreed upon by both parties; and

(o) Signatures and dates for both parties to the mentor-protégé agreement.

I–108 Submission and approval of mentor-protégé agreements.

(a) Upon solicitation or as determined by the cognizant DoD component, mentors will submit—

(1) A mentor application pursuant to I–105, if the mentor has not been previously approved to participate;

(2) A signed mentor-protégé agreement pursuant to I–107;

(3) A statement as to whether the mentor is seeking credit or reimbursement of costs incurred;

(4) The estimated cost of the technical assistance to be provided, broken out per year;

(5) A justification if program participation term is greater than 3 years (Term of agreements may not exceed 5 years); and

(6) For reimbursable agreements, a specific justification for developmental costs in excess of $1,000,000 per year.

(b) When seeking reimbursement of costs, cognizant DoD components may require additional information.

(c) The mentor-protégé agreement must be approved by the cognizant Component Director, SBP, prior to incurring costs eligible for credit.

(d) The cognizant DoD component will execute a contract modification or a separate contract, if justified pursuant to I–103(b)(3), prior to the mentor's incurring costs eligible for reimbursement.

(e) Credit agreements that are not associated with an existing DoD program and/or component will be submitted for approval to Director, SBP, Defense Contract Management Agency (DCMA), via the mentor's cognizant administrative contracting officer.

(f) A prospective mentor that has identified Program funds to be made available from a DoD program manager must provide the information in paragraph (a) of this section through the program manager to the cognizant Component Director, SBP, with a letter signed by the program manager indicating the amount of funding that has been identified for the developmental assistance program.

I–109 Reimbursable agreements.

The following program provisions apply to all reimbursable mentor-protégé agreements:

(a) Assistance provided in the form of progress payments to a protégé firm in excess of the customary progress payment rate for the firm will be reimbursed only if implemented in accordance with FAR 32.504(c).

(b) Assistance provided in the form of advance payments will be reimbursed only if the payments have been provided to a protégé firm under subcontract terms and conditions similar to those in the clause at FAR 52.232–12, Advance Payments. Reimbursement of any advance payments will be made pursuant to the inclusion of the clause at DFARS 252.232–7005, Reimbursement of Subcontractor Advance Payments—DoD Pilot Mentor-Protégé Program, in appropriate contracts. In requesting reimbursement, the mentor firm agrees that the risk of any financial loss due to the failure or inability of a protégé firm to repay any unliquidated advance payments will be the sole responsibility of the mentor firm.

(c) The primary forms of developmental assistance authorized for reimbursement under

the Program are identified in I–106(d). On a case-by-case basis, Component Directors, SBP, at their discretion, may approve additional incidental expenses for reimbursement, provided these expenses do not exceed 10 percent of the total estimated cost of the agreement.

(d) The total amount reimbursed to a mentor firm for costs of assistance furnished to a protégé firm in a fiscal year may not exceed $1,000,000 unless the cognizant Component Director, SBP, determines in writing that unusual circumstances justify reimbursement at a higher amount. Request for authority to reimburse in excess of $1,000,000 must detail the unusual circumstances and must be endorsed and submitted by the program manager to the cognizant Component Director, SBP.

(e) Developmental assistance costs that are incurred pursuant to an approved reimbursable mentor-protégé agreement, and have been charged to, but not reimbursed through, a separate contract, or through a separately priced contract line item added to a DoD contract, will not be otherwise reimbursed, as either a direct or indirect cost, under any other DoD contract, irrespective of whether the costs have been recognized for credit against applicable subcontracting goals.

I–110 Credit agreements.

I–110.1 Program provisions applicable to credit agreements.

(a) Developmental assistance costs incurred by a mentor firm for providing assistance to a protégé firm pursuant to an approved credit mentor-protégé agreement may be credited as if the costs were incurred under a subcontract award to that protégé, for the purpose of determining the performance of the mentor firm in attaining an applicable subcontracting goal established under any contract containing a subcontracting plan pursuant to the clause at FAR 52.219–9, Small Business Subcontracting Plan, or the provisions of the DoD Comprehensive Subcontracting Plan Test Program. Unreimbursed developmental assistance costs incurred for a protégé firm that is an eligible entity employing the severely disabled may be credited toward the mentor firm's small disadvantaged business subcontracting goal, even if the protégé firm is not a small disadvantaged business concern.

(b) Costs that have been reimbursed through inclusion in indirect expense pools may also be credited as subcontract awards for determining the performance of the mentor firm in attaining an applicable subcontracting goal established under any contract containing a subcontracting plan. However, costs that have not been reimbursed because they are not reasonable, allocable, or allowable will not be recognized for crediting purposes.

(c) Other costs that are not eligible for reimbursement pursuant to I–106(d) may be recognized for credit only if requested, identified, and incorporated in an approved mentor-protégé agreement.

(d) The amount of credit a mentor firm may receive for any such unreimbursed developmental assistance costs must be equal to—

(1) Four times the total amount of such costs attributable to assistance provided by small business development centers, historically Black colleges and universities, minority institutions, and procurement technical assistance centers.

(2) Three times the total amount of such costs attributable to assistance furnished by the mentor's employees.

(3) Two times the total amount of other such costs incurred by the mentor in carrying out the developmental assistance program.

I–110.2 Credit adjustments.

(a) Adjustments may be made to the amount of credit claimed if the Director, SBP, OUSD(AT&L), determines that—

(1) A mentor firm's performance in the attainment of its subcontracting goals through actual subcontract awards declined from the prior fiscal year without justifiable cause; and

(2) Imposition of such a limitation on credit appears to be warranted to prevent abuse of this incentive for the mentor firm's participation in the Program.

(b) The mentor firm must be afforded the opportunity to explain the decline in small business subcontract awards before imposition of any such limitation on credit. In making the final decision to impose a limitation on credit, the Director, SBP, OUSD(AT&L), must consider—

(1) The mentor firm's overall small business participation rates (in terms of percentages of subcontract awards and dollars awarded) as compared to the participation rates existing during the 2 fiscal years prior to the firm's admission to the Program;

(2) The mentor firm's aggregate prime contract awards during the prior 2 fiscal years and the total amount of subcontract awards under such contracts; and

(3) Such other information the mentor firm may wish to submit.

(c) The decision of the Director, SBP, OUSD(AT&L), regarding the imposition of a limitation on credit will be final.

I–111 Agreement terminations.

(a) Mentors and/or protégés must send a copy of any termination notices to the cognizant Component Director, SBP, that approved the agreement, and the DCMA administrative contracting officer responsible for conducting the annual review pursuant to I–113.

(b) For reimbursable agreements, mentors must also send copies of any termination to the program manager and to the contracting officer.

(c) Termination of a mentor-protégé agreement will not impair the obligations of the mentor firm to perform pursuant to its contractual obligations under Government contracts and subcontracts.

(d) Termination of all or part of the mentor-protégé agreement will not impair the obligations of the protégé firm to perform pursuant to its contractual obligations under any contract awarded to the protégé firm by the mentor firm.

(e) Mentors and protégés will follow provisions of the mentor-protégé agreement developed in compliance with I–107(k) through (m).

I–112 Reporting requirements.

I–112.1 Reporting requirements applicable to SF294/SF295 reports.

(a) Amounts credited toward applicable subcontracting goal(s) for unreimbursed costs under the Program must be separately identified on the appropriate SF294/SF295 reports from the amounts credited toward the goal(s) resulting from the award of actual subcontracts to protégé firms. The combination of the two must equal the mentor firm's overall accomplishment toward the applicable goal(s).

(b) A mentor firm may receive credit toward the attainment of an SDB subcontracting goal for each subcontract awarded by the mentor firm to an entity that qualifies as a protégé firm pursuant to I–101.3 or I–101.5.

(c) For purposes of calculating any incentives to be paid to a mentor firm for exceeding an SDB subcontracting goal pursuant to the clause at FAR 52.219–26, Small Disadvantaged Business Participation Program—Incentive Subcontracting, incentives will be paid only if an SDB subcontracting goal has been exceeded as a result of actual subcontract awards to SDBs (*i.e.*, excluding credit).

I–112.2 Program specific reporting requirements.

(a) Mentors must report on the progress made under active mentor-protégé agreements semiannually for the periods ending March 31st and September 30th throughout the Program participation term of the agreement. The September 30th report must address the entire fiscal year.

(b) Reports are due 30 days after the close of each reporting period.

(c) Each report must include the following data on performance under the mentor-protégé agreement:

(1) Dollars obligated (for reimbursable agreements).

(2) Expenditures.

(3) Dollars credited, if any, toward applicable subcontracting goals as a result of developmental assistance provided to the protégé and a copy of the SF294 and/or SF295 for each contract where developmental assistance was credited.

(4) The number and dollar value of subcontracts awarded to the protégé firm.

(5) Description of developmental assistance provided, including milestones achieved.

(6) Impact of the agreement in terms of capabilities enhanced, certifications received, and/or technology transferred.

(d) A recommended reporting format and guidance for its submission are available at: *http://www.acq.osd.mil/sadbu/mentor__protege*.

(e) The protégé must provide data, annually by October 31st, on the progress made during the prior fiscal year by the protégé in employment, revenues, and participation in DoD contracts during—

(1) Each fiscal year of the Program participation term; and

(2) Each of the 2 fiscal years following the expiration of the Program participation term.

(f) The protégé report required by paragraph (e) of this section may be provided as part of the mentor report for the period ending September 30th required by paragraph (a) of this section.

(g) Progress reports must be submitted—

(1) For credit agreements, to the cognizant Component Director, SBP, that approved the agreement, and the mentor's cognizant DCMA administrative contracting officer; and

(2) For reimbursable agreements, to the cognizant Component Director, SBP, the contracting officer, the DCMA administrative contracting officer, and the program manager.

I–113 Performance reviews.

(a) DCMA will conduct annual performance reviews of the progress and accomplishments realized under approved mentor-protégé agreements. These reviews must verify data provided on the semiannual reports and must provide information as to—

(1) Whether all costs reimbursed to the mentor firm under the agreement were reasonably incurred to furnish assistance to the protégé in accordance with the mentor-protégé agreement and applicable regulations and procedures; and

(2) Whether the mentor and protégé accurately reported progress made by the protégé in employment, revenues, and participation in DoD contracts during the Program participation term and for 2 fiscal years following the expiration of the Program participation term.

(b) A checklist for annual performance reviews is available at *http://www.acq.osd.mil/osbp/mentor__protege/*.

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