

## SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

### PART 234—MAJOR SYSTEM ACQUISITION

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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]

#### 234.005-1 Competition.

(1) A contract that is initially awarded from the competitive selection of a proposal resulting from a general solicitation may contain a contract line item or contract option for the provision of advanced component development or prototype of technology developed under the contract or the delivery of initial or additional prototype items if the item or a prototype thereof is created as the result of work performed under the contract only when it adheres to the following limitations:

(i) The contract line item or contract option shall be limited to the minimal amount of initial or additional prototype items that will allow for timely competitive solicitation and award of a follow-on development or production contract for those items.

(ii) The term of the contract line item or contract option shall be for not more than 12 months.

(iii) The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed the lesser of—

(A) The amount that is three times the dollar value of the work previously performed under the contract; or

(B) \$20 million.

(2) A contract line item or contract option may not be exercised under this authority after September 30, 2014.

[75 FR 32639, June 8, 2010]

**§ 234.201**

**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.

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**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) *Major weapon systems.* (1) 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—

(i) The Secretary of Defense determines that—

(A) The major weapon system is a commercial item as defined in FAR 2.101; and

(B) Such treatment is necessary to meet national security objectives;

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such a system; and

(iii) The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs. Follow the procedures at PGI 234.7002.

(2) 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 the Deputy Secretary of Defense.

(b) *Subsystems.* A subsystem of a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item and acquired under procedures established for the acquisition of commercial items only if—

(1) The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(2) The contracting officer determines in writing that—

(i) The subsystem is a commercial item; and

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the subsystem.

(c) *Components and spare parts.* (1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item only if—

(i) The component or spare part is intended for—

(A) A major weapon system that is being acquired, or has been acquired,

under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(B) A subsystem of a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (b) of this section; or

(ii) The contracting officer determines in writing that—

(A) The component or spare part is a commercial item; and

(B) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the component or spare part.

(2) This paragraph (c) shall apply only to components and spare parts that are acquired by DoD through a prime contract or a modification to a prime contract, or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value.

(d) *Relevant information.* To the extent necessary to make a determination under paragraph (a)(1)(ii), (b)(2), or (c)(1)(ii) of this section, the contracting officer may request the offeror to submit—

(1) Prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; and

(2) Other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates, if the contracting officer determines that the information described in paragraph (d)(1) of this section is not sufficient to determine price reasonableness.

[74 FR 34264, July 15, 2009]

**PART 235—RESEARCH AND DEVELOPMENT CONTRACTING**

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## 235.001

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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

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(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.

## 235.016

(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]

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### 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.

(e) Use the clause at 252.235-7004, Protection of Human Subjects, in solicitations and contracts that include or may include research involving human subjects in accordance with 32 CFR Part 219, DoD Directive 3216.02, and 10 U.S.C. 980, including research that meets exemption criteria under 32 CFR 219.101(b). The clause—

(1) Applies to solicitations and contracts awarded by any DoD component, regardless of mission or funding Program Element Code; and

(2) Does not apply to use of cadaver materials alone, which are not directly regulated by 32 CFR Part 219 or DoD Directive 3216.02, and which are governed by other DoD policies and applicable State and local laws.

[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; 74 FR 37645, 37648, July 29, 2009]

**PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

**Subpart 236.1—General**

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**Subpart 236.2—Special Aspects of Contracting for Construction**

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**236.102**

236.602 Selection of firms for architect-engineer contracts.

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236.604 Performance evaluation.

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**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 re-delegated. 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]

**236.274 Restriction on acquisition of steel for use in military construction projects.**

In accordance with section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E), do not acquire, or allow a contractor to acquire, steel for any construction project or activity for which American steel producers, fabricators, or manufacturers have been denied the opportunity to compete for such acquisition of steel.

[74 FR 2418, Jan. 15, 2009]

**236.275 Construction of industrial resources.**

See Subpart 237.75 for policy relating to facilities projects.

[74 FR 37646, July 29, 2009]

**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) Use the clause at 252.236-7013, Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers, in solicitations and contracts that—

(1) Use funds appropriated by Title I of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E); and

(2) May require the acquisition of steel as a construction material.

(e) 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; 74 FR 2418, Jan. 15, 2009]

**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

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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]

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### 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

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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.

(e) Program officials shall obtain assistance from contracting officials through the Peer Review process at 201.170.

[73 FR 1826, Jan. 10, 2008, as amended at 74 FR 37626, July 29, 2009]

#### 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]

**237.102-72 Contracts for management services.**

In accordance with Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), DoD may award a contract for the acquisition of services the primary purpose of which is to perform acquisition support functions with respect to the develop-

ment or production of a major system, only if—

(a) The contract prohibits the contractor from performing inherently governmental functions;

(b) The DoD organization responsible for the development or production of the major system ensures that Federal employees are responsible for determining—

(1) Courses of action to be taken in the best interest of the Government; and

(2) Best technical performance for the warfighter; and

(c) The contract requires that the prime contractor for the contract may not advise or recommend the award of a contract or subcontract for the development or production of the major system to an entity owned in whole or in part by the prime contractor.

[74 FR 34269, July 15, 2009]

**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 statutes 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 trav-

el 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 \$85.5 million, obtain the approval

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of the official designated by the department or agency.

(2) For acquisitions exceeding \$85.5 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; 75 FR 45074, Aug. 2, 2010]

### **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

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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]

### **237.172 Service Contracts Surveillance.**

Ensure that quality assurance surveillance plans are prepared in conjunction with the preparation of the statement of work or statement of objectives for solicitations and contracts for services. These plans should be tailored to address the performance risks inherent in the specific contract type and the work effort addressed by the contract. (See FAR Subpart 46.4.) Retain quality assurance surveillance plans in the official contract file. See <https://sam.dau.mil>, Step Four—Requirements Definition, for examples of quality assurance surveillance plans.

[75 FR 22706, Apr. 30, 2010]

## **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 237.5—Management Oversight of Service Contracts**

SOURCE: 75 FR 54525, Sept. 8, 2010, unless otherwise noted.

**237.503 Agency-head responsibilities.**

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI 237.503, include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification.

**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.

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(6) 252.237-7008, Group Interment.

(7) 252.237-7009, Permits.

(8) 252.237-7011, Preparation History.

(c) Use the clause at FAR 52.245-1, Government Property, with its Alternate I, in solicitations and contracts that include port of entry requirements.

[71 FR 3416, Jan. 23, 2006, as amended at 74 FR 37646, July 29, 2009]

### 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.

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(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 \_\_\_\_\_, 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

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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; 74 FR 42780, Aug. 25, 2009]

**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

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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]

**Subpart 237.75—Acquisition and Management of Industrial Resources**

SOURCE: 74 FR 37646, July 29, 2009, unless otherwise noted.

**237.7501 Definition.**

*Facilities project*, as used in this subpart, means a Government project to provide, modernize, or replace real property for use by a contractor in performing a Government contract or sub-contract.

**237.7502 Policy.**

(a) Comply with DoD Directive 4275.5, Acquisition and Management of Industrial Resources, in processing requests for facilities projects.

(b) Departments and agencies shall 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.

**SUBPART 237.76—CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES**

SOURCE: 75 FR 10193, Mar. 5, 2010, unless otherwise noted.

**237.7600 Scope.**

This subpart prescribes procedures for the acquisition of essential contractor services, which support mission-essential functions.

**237.7601 Definitions.**

As used in this subpart—

*Essential contractor service* means a service provided by a firm or individual under contract to DoD to support mission-essential functions, such as support of vital systems, including ships owned, leased, or operated in support of military missions or roles at sea; associated support activities, including installation, garrison, and base support services; and similar services provided to foreign military sales customers under the Security Assistance Program, that are essential if the effectiveness of defense systems or operations has the potential to be seriously impaired by the interruption of these services, as determined by the appropriate functional commander or equivalent.

*Mission-essential functions* means those organizational activities that must be performed under all circumstances to achieve DoD component

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missions or responsibilities, the failure of which would significantly affect DoD's ability to provide vital services or exercise authority, direction, and control.

### 237.7602 Policy.

(a) Contractors providing services designated as essential contractor services by a requiring activity shall be prepared to continue providing such services, in accordance with the terms and conditions of their contracts, during periods of crisis. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or equivalent.

(b) Contractors who provide Government-determined essential contractor services shall have a written plan to ensure the continuation of these services in crisis situations. Contracting officers shall consult with a functional manager to assess the sufficiency of the contractor-provided written plan. Contractors will activate such plans only during periods of crisis, as directed by the appropriate functional commander or equivalent.

(c) The contracting officer shall follow the procedures at PGI 207.105(b)(20)(C) in preparing an acquisition plan.

### 237.7603 Contract clause.

Use the clause at 252.237-7023, Continuation of Essential Contractor Services, in solicitations and contracts for services that are in support of mission-essential functions.

## 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.

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### Subpart 239.71—Security and Privacy for Computer Systems

- 239.7100 Scope of subpart.
- 239.7101 Definition.
- 239.7102 Policy and responsibilities.
- 239.7102-1 General.
- 239.7102-2 Compromising emanations—TEMPEST or other standard.
- 239.7102-3 Information assurance contractor training and certification.
- 239.7103 Contract clauses.

### Subpart 239.72—Standards

- 239.7201 Solicitation requirements.

### 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.
- 239.7407 Type of contract.
- 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. See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

[67 FR 65512, Oct. 25, 2002, as amended at 74 FR 34270, July 15, 2009]

**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 8570.01, 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; 75 FR 34946, June 21, 2010]

**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

## 239.7103

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 inter-agency 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]

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### 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 section, contractors and subcontractors shall normally provide all required property, to include telecommunications security equipment or related devices, in accordance with FAR 45.102. 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) The head of the agency may authorize provision of the necessary property as Government-furnished property or acquisition as contractor-acquired property, as long as conditions of FAR 45.102(b) are met.

[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; 74 FR 37647, July 29, 2009]

**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

## 239.7406

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;

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(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;

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(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(d)(2)).

(2) See 217.175 for authority to enter into multiyear contracts for electricity from renewable energy sources.

(3) See PGI 241.103 for statutory authorities and maximum contract periods for utility and energy contracts.

[71 FR 3417, Jan. 23, 2006, as amended at 74 FR 52896, Oct. 15, 2009; 75 FR 34943, June 21, 2010]

### 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, non-recurring 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 non-independent 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.