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48

Chapters 3 to 6

Revised as of October 1, 2010

Federal Acquisition Regulations System

Containing a codification of documents of general applicability and future effect

As of October 1, 2010

With Ancillaries

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 48 CFR 301.101 *refers to title 48, part 301, section 101.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96–511) requires Federal agencies to display an OMB control number with their information collection request.

Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 2001, consult either the List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, or 1986–2000, published in eleven separate volumes. For the period beginning January 1, 2001, a ''List of CFR Sections Affected'' is published at the end of each CFR volume.

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The term ''[Reserved]'' is used as a place holder within the Code of Federal Regulations. An agency may add regulatory information at a ''[Reserved]'' location at any time. Occasionally ''[Reserved]'' is used editorially to indicate that a portion of the CFR was left vacant and not accidentally dropped due to a printing or computer error.

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(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Authorities and Rules. A list of CFR titles, chapters, subchapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of ''Title 3—The President'' is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the ''Contents'' entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

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For a legal interpretation or explanation of any regulation in this volume, contact the issuing agency. The issuing agency's name appears at the top of odd-numbered pages.

For inquiries concerning CFR reference assistance, call 202–741–6000 or write to the Director, Office of the Federal Register, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001 or e-mail fedreg.info@nara.gov.

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.
October 1, 2010.

THIS TITLE

Title 48—FEDERAL ACQUISITION REGULATIONS SYSTEM is composed of seven volumes. The chapters in these volumes are arranged as follows: Chapter 1 (parts 1 to 51), chapter 1 (parts 52 to 99), chapter 2 (parts 201 to 299), chapters 3 to 6, chapters 7 to 14, chapters 15 to 28 and chapter 29 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 2010.

The Federal acquisition regulations in chapter 1 are those government-wide acquisition regulations jointly issued by the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration. Chapters 2 through 99 are acquisition regulations issued by individual government agencies. Parts 1 to 69 in each of chapters 2 through 99 are reserved for agency regulations *implementing* the Federal acquisition regulations in chapter 1 and are numerically keyed to them. Parts 70 to 99 in chapters 2 through 99 contain agency regulations *supplementing* the Federal acquisition regulations.

The OMB control numbers for the Federal Acquisition Regulations System appear in section 1.106 of chapter 1. For the convenience of the user section 1.106 is reprinted in the Finding Aids section of the second volume containing chapter 1 (parts 52 to 99).

The first volume, containing chapter 1 (parts 1 to 51), includes an index to the Federal acquisition regulations.

For this volume, Cheryl E. Sirofchuck was Chief Editor. The Code of Federal Regulations publication program is under the direction of Michael L. White, assisted by Ann Worley.

Title 48—Federal Acquisition Regulations System

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SUBCHAPTER A—GENERAL

PART 301—HHS ACQUISITION REGULATION SYSTEM

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 301.1—Purpose, Authority, and Issuance

301.101 Purpose.

(a) The Department of Health and Human Services (HHS) Acquisition Regulation (HHSAR) establishes uniform HHS acquisition policies and procedures that conform to the Federal Acquisition Regulations (FAR) System.

(b) The HHSAR implements *FAR* policies and procedures and provides additional policies and procedures that supplement the *FAR*.

(c) The HHSAR contains HHS policies and procedures that govern the acquisition process or otherwise control acquisition relationships between HHS' contracting activities and contractors.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21509, Apr. 26, 2010]

301.103 Authority.

(b) The Assistant Secretary for Financial Resources (ASFR) prescribes the HHSAR under the authority of 5

U.S.C. 301 and section *205(c) of the Federal Property and Administrative Services Act of 1949*, as amended (40 U.S.C. 486(c), as delegated by the Secretary.

(c) The HHSAR is issued in the Code of Federal Regulations (CFR) as *Chapter 3 of Title 48, Department of Health and Human Services Acquisition Regulation*. It may be referenced as ''48 CFR Chapter 3.''

301.106 Office of Management and Budget approval under the Paperwork Reduction Act.

(a) The Paperwork Reduction Act of 1980 (44 U.S.C 3501 *et seq.*) imposes a requirement on Federal agencies to obtain approval from the Office of Management and Budget (OMB) before collecting the same information from 10 or more members of the public.

(b) The following OMB control numbers apply to the information collection and recordkeeping requirements contained in this chapter:

HHSAR segment No.	OMB control No.
315.4	0990–0139
342.7101	0990–0131
352.233–70	0990–0133
352.270–1	0990–0129
352.270–2	0990–0129
352.270–3	0990–0129
352.270–5	0990–0130
352.270–8	0990–0128
352.270–9	0990–0128
370.1	0990–0129
370.2	0990–0129

(c) The Contracting Officer shall insert the clause in *352.201–70,* Paperwork Reduction Act, in solicitations, contracts, and orders that include a requirement to collect the same information from 10 or more persons.

Subpart 301.2—Administration

301.270 Executive Committee for Acquisition.

(a) The Associate Deputy Assistant Secretary for Acquisition (Associate DAS for Acquisition) has established the Executive Committee for Acquisition (ECA) to facilitate the planning, development, and implementation of HHS acquisition policies and procedures and to share successful acquisition practices.

(b) The ECA consists of members and alternates from the following organizations:

(1) ASFR/Office of Grants and Acquisition Policy and Accountability (OGAPA)/Division of Acquisition (DA).

(2) Agency for Healthcare Research and Quality (AHRQ).

(3) Assistant Secretary for Preparedness and Response/Office of Acquisitions Management, Contracts and Grants (ASPR/OAMCG).

(4) Centers for Disease Control and Prevention (CDC).

(5) Centers for Medicare and Medicaid Services (CMS).

(6) Food and Drug Administration (FDA).

(7) Health Resources and Services Administration (HRSA).

(8) Indian Health Service (IHS).

(9) National Institutes of Health (NIH).

(10) Program Support Center (PSC).

(11) Substance Abuse and Mental Health Services Administration (SAMHSA).

(c) The Associate DAS for Acquisition is the Chair of the ECA. The Chair will call all meetings and direct all ECA activities.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21509, Apr. 26, 2010]

Subpart 301.4—Deviations From the FAR

301.403 Individual deviations.

Contracting activities shall prepare requests for individual deviations to either the *FAR* or HHSAR in accordance with *301.470*.

301.404 Class deviations.

Contracting activities shall prepare requests for class deviations to either the *FAR* or HHSAR in accordance with *301.470*.

301.470 Procedure.

(a) Contracting activities shall prepare deviation requests in memorandum form and forward them through the Head of the Contracting Activity (HCA) to the Associate DAS for Acquisition. The Associate DAS for

Acquisition (non-delegable) is the official authorized to approve all deviation requests. Contracting activities may request a deviation telephonically or by e-mail in an exigent situation, but shall confirm the request by memorandum as soon as possible.

(b) A deviation request shall clearly set forth the—

(1) Nature of the deviation, including what contract(s)/contractor(s) is involved;

(2) Identification of the *FAR* or HHSAR citation from which the deviation is needed;

(3) Circumstances under which the deviation will be used;

(4) Intended effect of the deviation;

(5) Period of applicability;

(6) Rationale for the deviation (NOTE: The Contracting Officer shall include a copy of pertinent background papers, such as a contractor's request, as part of the deviation request.); and

(7) Suggested wording for the deviation, if applicable.

Subpart 301.6—Career Development, Contracting Authority, and Responsibilities

301.602 Contracting Officers.

301.602–3 Ratification of unauthorized commitments.

(b) *Policy*.

(1) The Government is not bound by agreements with, or contractual commitments made to, prospective contractors by individuals who do not have delegated contracting authority. However, an authorized official may later ratify and execute otherwise proper contracts that were made by individuals without contracting authority or by Contracting Officers in excess of their delegated authority. The ratification shall be in the form of a written document that clearly states that ratification of a previously unauthorized act is intended.

(2) The HCA is the official authorized to ratify an unauthorized commitment—but *see* paragraph (b)(3) of this section.

(3) The HCA may redelegate ratification authority for actions up to $100,000 to the Chief of the Contracting Office (CCO). No other redelegations are authorized.

(c) *Limitations*.

(5) The concurrence of legal counsel concerning an unauthorized commitment is optional. If a contracting activity determines that a legal review is necessary, the HCA or CCO shall coordinate the request for ratification with the Office of General Counsel (OGC), General Law Division (GLD).

(e) *Procedures*.

(1) The individual who is responsible for the unauthorized commitment shall provide the reviewing Contracting Officer all records and documents concerning the commitment and a complete written statement of facts, including a description of the requirement; the estimated or agreed upon price; the funds citation; an explanation of why the contracting office was not used and why the proposed contractor was selected; a list of other sources considered; and a statement as to whether the contractor has commenced work or an item has been delivered.

(2) The Contracting Officer shall review the submitted material and, if the Contracting Officer determines that the ratification request has merit, prepare it for ratification. The Contracting Officer shall forward the ratification document and related materials to the HCA or CCO, as appropriate, with any comments or information which the approving official should consider in evaluating the ratification request.

(3) If the HCA or CCO approves the ratification request, the Contracting Officer shall issue a purchase order or contract, as appropriate, upon return of the approved ratification document and file.

301.603 Selection, appointment, and termination of appointment of Contracting Officers.

301.603–1 General.

(a) The HCA (non-delegable) shall select, appoint, and terminate the appointment of Contracting Officers—*i.e.*, those individuals who are authorized to obligate the Government to the expenditure of funds for contracts and orders with dollar values that exceed (or

are expected to exceed) the micro-purchase threshold. The procedures for selecting and appointing Contracting Officers apply to HHS employees. HCAs may not issue HHS Contracting Officer warrants to contractor personnel. OPDIVs shall follow local procedures in the event that the signature of another authorized official, in addition to that of the HCA, is required to appoint or terminate the appointment of Contracting Officers.

(b) The HCA shall use *Standard Form (SF) 1402*, ''Certificate of Appointment,'' (also known as a warrant) to appoint personnel, whether in the General Schedule (GS) 1102 series or other series, as Contracting Officers. The SF 1402 shall indicate the Contracting Officer's warrant level—*i.e.*, maximum dollar signature authority (e.g., $1 million or ''unlimited'') and any other limitations or restrictions. The HCA shall make changes to a Contracting Officer appointment (other than a termination of an appointment as provided in *301.603–4*) by issuing a revised SF 1402. *FAR 1.603–1* prescribes the requirements for preparing and maintaining Contracting Officer warrants.

(c) Before an HCA may appoint an individual as a Contracting Officer, the individual must be certified in accordance with either the Federal Acquisition Certification in Contracting (FAC–C) program or the HHS Simplified Acquisition Certification (SAC) program, as appropriate, at the level required for the warrant authority requested. *See 301.603–72* and the HHS Contracting Workforce Training and Certification Handbook.

(d) The dollar amount of an individual transaction determines whether a Contracting Officer has the authority to sign it in accordance with the delegated authority specified on the SF 1402. For new or follow-on awards, the dollar amount of an individual transaction is the amount obligated at the time of contract or order award plus any potential option amounts or future funding amounts established by the transaction. However, under an existing contract or order, when an option is subsequently exercised or a contact or order is otherwise modified to add funding, the dollar amount of the modification (individual transaction) determines whether a Contracting Officer has the necessary delegated authority to sign it.

(e) For individuals that will exercise acquisition authorities (other than solely purchase card authorities) at or below the micro-purchase threshold, the HCA may—

(1) Use a document other than the SF 1402, such as a memorandum, that indicates a maximum dollar signature authority for individual transactions; and

(2) Determine training requirements for individuals who will exercise acquisition authorities at dollar levels below the micro-purchase threshold level.

301.603–2 Selection and appointment.

Contracting activities shall provide nominations for appointment of Contracting Officers through appropriate acquisition channels to the HCA for review. The HCA shall appoint an individual as a Contracting Officer only when a valid organizational need is demonstrated and after considering such factors as volume of actions, complexity of work, and structure of the requesting organization. The HCA shall also ensure that a Contracting Officer candidate meets the FAC–C or HHS SAC certification requirements, as appropriate. Consistent with *FAR 1.603–2,* the HCA shall determine the documentation required when the requested appointment and authority will not exceed the micro-purchase threshold.

301.603–3 Interim appointments.

If it is essential to appoint an individual as a Contracting Officer who does not yet fully meet the FAC–C or HHS SAC certification requirements for the signature authority sought, the HCA (non-delegable) may make an interim appointment for up to 2 years. If an extension of time has been granted, but the individual does not complete the certification requirements by the extended date, the HCA's approval for the interim appointment will automatically terminate on that date.

301.603–4 Termination of appointments.

The HCA shall terminate or revoke Contracting Officer appointments in accordance with *FAR 1.603–4*.

301.603–70 Delegation of Contracting Officer responsibilities.

(a) Contracting Officers may re-delegate their acquisition responsibilities that do not involve the obligation or deobligation of funds, but involve the expenditure of previously obligated funds (such as approval of contractor scientific meeting travel and subcontract consent) to acquisition staff (for example, those in the GS–1100 series) by means of a written memorandum that clearly delineates the delegation and its limits. *See 301.604* for responsibilities that Contracting Officers may delegate to technical personnel.

(b) Contracting Officers may designate individuals as ordering or approving officials to make purchases or place/approve orders under blanket purchase agreements (BPAs), indefinite-delivery, indefinite quantity (IDIQ) contracts, or other pre-established mechanisms. Ordering officials are not Contracting Officers.

301.603–71 Waivers to warrant standards.

There may be an unusual circumstance that requires issuance of a warrant to an individual who does not fully meet the FAC–C or HHS SAC certification program requirements. Contracting activities shall provide any request for a waiver of the FAC–C program requirements and policies in writing to the Senior Procurement Executive (SPE), through the HCA, for review and approval. The SPE (non-delegable) will either approve or disapprove in writing the request for waiver. The HCA (non-delegable) may approve or disapprove a waiver of the HHS SAC program requirements.

301.603–72 FAC–C and HHS SAC certification requirements.

(a) The FAC–C certification program is available to all acquisition staff who are/will be involved as Contracting Officers or Contract Specialists in acquisitions exceeding the simplified acquisition threshold. Personnel who, as part of prior certification programs, have completed some or all of the required training or have attained certification thereunder are not required to re-take training courses, but shall follow FAC–C training requirements when considering additional or required core training, if needed. *See 301.603–74* for information regarding retention of certification, including the requirement to earn continuous learning points (CLPs). FAC–C certification also does not apply to—

(1) The SPE;

(2) Senior level officials responsible for delegating acquisition authority;

(3) Personnel who are not in the GS–1102 series whose warrants are used to acquire emergency goods and services; or

(4) Personnel who are not in the GS–1102 series whose warrants are so limited as to be outside the scope of this program, as determined by the Chief Acquisition Officer (CAO). (NOTE: The HHS CAO has determined that individuals with warrants which are limited to simplified acquisitions are deemed to be outside the scope of the FAC–C program.)

(b) HHS does not require personnel with Contracting Officer warrants issued prior to January 1, 2007 to be FAC–C certified unless they are seeking a change in authority on or after that date. Individuals applying for a new Contracting Officer warrant or an increase in warrant authority on or after January 1, 2007, regardless of GS series, *must* be FAC–C certified at the level appropriate for the warrant authority sought. To obtain an unlimited warrant, FAC–C Level III certification is required. (*Note:* New Contracting Officer warrants are defined in the Office of Federal Procurement Policy's (OFPP's) FAC–C memorandum, dated January 20, 2006, as warrants issued to employees for the *first time* at a department or agency.)

(c) The FAC–C certification is based on three sets of requirements: Education, training, and experience, and the requirements are cumulative—*i.e.*, an individual must meet the requirements of each previous certification level before attaining a higher level certification. The FAC–C certification requirements, including additional HHS-specific training requirements for certain types of acquisitions, are specified in the HHS Contracting Workforce Training and Certification Handbook.

(d) HHS SAC certification is based on three sets of requirements: Training, experience, and satisfactory performance rating. Personnel who are involved in the award of simplified acquisitions must meet the appropriate HHS SAC certification requirements. (NOTE: While personnel who are FAC–C certified are not required to obtain HHS SAC certification in order to award simplified acquisitions, they should obtain appropriate training before doing so.) The HHS SAC certification requirements, including additional HHS-specific training requirements for certain types of acquisitions, are specified in the HHS Contracting Workforce Training and Certification Handbook.

301.603–73 Additional HHS training requirements.

HHS acquisition personnel are required to complete, as applicable, the additional training requirements specified below. These courses may be used as electives for the purpose of satisfying FAC–C requirements or as continuous learning for maintenance of FAC–C or SAC certifications.

(a) *Earned value management training*. Effective January 1, 2010, all personnel in the GS–1102 series who are responsible for, or may become responsible for, the award or administration of any contract to which earned value management (EVM) is applied pursuant to *334.201(a) or (b)* must successfully complete an EVM training course before they commence administration of the contract or are authorized to award the contract. After completion of the initial course, a refresher course is required every 2 years. This course is in addition to the training requirements for FAC–C certification at the specified levels. Determination of course suitability shall be made by the Operating Division (OPDIV) HCA, in conjunction with HHS' Office of the Chief Information Officer (OCIO) or Office of Facilities Management and Policy (OFMP), as appropriate. To be eligible, the basic and refresher courses must each be 8 hours or more in length.

(b) *Performance based acquisition training*. Effective January 1, 2010, all GS–1102s, who award or administer service contracts, are required to complete a Performance-Based Acquisition (PBA) course prior to assuming such responsibilities. Refresher training in PBA is required every 4 years. To be eligible, a course must be 8 hours or more in length. Determination of course suitability shall be made by the HCA.

(c) *Federal appropriations law training*. Effective January 1, 2010, all GS–1102s and GS–1105s are required to complete both HHS University's classroom-based and on-line Federal appropriations law course, by January 1, 2011 (for current employees) and within 1 year of entering on duty (for new employees). Employees are required to take the HHS University on-line course as refresher training every year. Determination of course equivalency shall be made by the HCA.

(d) *Green purchasing training*. Effective January 1, 2010, all GS–1102s and GS–1105s are required to complete green purchasing training by January 1, 2011 (for current employees) and within 1 year of entering on duty (for new employees). Refresher training is required every 2 years. To be eligible, a course must be 4 hours or more in length. Determination of course suitability shall be made by the HCA.

(e) *Section 508 training*. When the HHS Office on Disability (OD) so requires, all GS–1102s, GS–1105s and GS–1106s who award or administer acquisitions that involve electronic information technology (EIT) products or services (subject to Section 508 of the Rehabilitation Act of 1973 and pertinent HHSAR provisions), must complete all applicable OD sponsored training. For information on frequency, timing, and duration of the training requirement, personnel shall consult with the HHS OD.

(f) *Training policy exceptions*—(1) *EVM training*. In the event that there is an urgent requirement for a Contracting Officer/Contract Specialist to award or administer a project to which EVM will be applied, and the individual has not yet met the EVM training requirement, the HCA (non-delegable) may authorize the individual to perform the position duties, provided that the individual meets the training requirement within 9 months from the date of assignment to the contract. If the individual does not complete the training requirement within 9 months, the

HCA's approval for the individual's assignment to the contract will automatically terminate on that date. The Contract Specialist is not required to take the class as long as the Contract Specialist is working under the direction of a Contracting Officer who has taken an EVM course.

(2) *Other additional HHS training*. The HCA (non-delegable) may grant a time extension of up to 9 months to an individual to complete the PBA, Federal appropriations law, green purchasing, and Section 508 training requirements, including completion of refresher training. If the individual does not complete the training requirement within the extension period, the HCA's approval will automatically terminate on that date.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21509, Apr. 26, 2010]

301.603–74 Requirement for retention of FAC–C and HHS SAC certification.

To maintain FAC–C certification, all warranted Contracting Officers, regardless of series, as well as Contract Specialists, must earn 80 CLPs every 2 years. To maintain HHS SAC certification, all individuals with delegated Contracting Officer authority, including those in the GS–1102, GS–1105, GS–1106, and non-1100 series, must earn a minimum of 40 hours (CLPs) every 2 years after completing all mandatory training requirements. FAC–C and HHS SAC certification will expire if the CLPs are not earned every 2 years (from the date of initial certification or re-certification) and, if applicable, may result in a loss of warrant authority. (NOTE: The certification programs' continuous learning requirement applies to all applicable personnel, including those who were certified under prior certification programs.)

301.604 Training and certification of Contracting Officers' Technical Representatives.

301.604–70 General.

In accordance with the Federal Acquisition Certification for Contracting Officers' Technical Representatives (FAC–COTR) program, HHS has established a training program for certification and designation of personnel as COTRs—see HHS' Federal Acquisition Certification for Contracting Officers' Technical Representatives Program Handbook (COTR Handbook), dated January 2009, for information on the methods for earning FAC–COTR certification. *See* also *302.101(c)* for further information regarding the definition of a COTR and when designation of a COTR is appropriate. All references to COTRs also apply to their alternates.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21509, Apr. 26, 2010]

301.604–71 HCA authorities and responsibilities.

(a) HCAs are authorized to determine (1) equivalencies for the Basic Contracting Officer's Technical Representative Course; (2) course prerequisites; and (3) approve completion of CLP continuous learning activities, education, and training for maintenance of COTR certification. This authority does not apply to EVM training—*see 301.603–73*. Course equivalencies must meet the Federal Acquisition Institute's (FAI's) required COTR competencies. HCAs may re-delegate the authorities in (1) and (2) to OPDIV Acquisition Career Managers (ACMs) or other comparable officials.

(b) In addition to the authorities specified in *301.604–71(a)*, HCAs or their designees (except where the authority is shown as non-delegable) are responsible for—

(1) Reviewing a candidate's qualifications to be a COTR;

(2) Granting, suspending, denying, and revoking COTR certifications and their continuance;

(3) Authorizing (non-delegable) an individual to perform COTR duties on an interim basis for up to 90 days—*see 301.604–73;* and

(4) Determining (non-delegable) on a case-by-case basis whether to postpone (for up to 90 days) withdrawal of any interim COTR delegation for failure of a candidate to qualify for certification—*see 301.604–73*.

301.604–72 Requirements for certification maintenance.

Maintaining HHS FAC–COTR certification requires at least 40 relevant CLPs every 2 years. See Appendix A of

OFPP's FAC–COTR memorandum, dated November 26, 2007, and HHS' COTR Handbook for information on CLPs.

[75 FR 21509, Apr. 26, 2010]

301.604–73 Certification policy exception.

(a) In the event that an individual who is not currently certified under HHS' FAC–COTR program is urgently required to serve as a COTR, the head of the sponsoring program office (Program Manager) or designee (e.g., the immediate supervisor) may request, and the HCA (non-delegable) may authorize, the individual to perform the designated duties on an interim basis for up to 6 months, provided that—

(1) The individual agrees to become certified during that period and provides evidence of training course registration; and

(2) Prior to assignment to the contract, the individual meets with the cognizant Contracting Officer to discuss the role and specific responsibilities of a COTR and the interrelationships, as applicable, among the Project Officer, Contracting Officer, Program/Project Manager, and COTR functions.

(b) If an extension has been granted, but the individual does not complete the training by the extended date, the HCA's approval for the individual's assignment to the contract will automatically terminate on that date.

301.604–74 Additional COTR training requirements.

(a) See HHS' COTR Handbook for information on additional COTR training requirements.

(b) *Training policy exceptions*—(1) *EVM training*. In the event that there is an urgent requirement for a COTR to administer a contract to which EVM will be applied, and the individual has not yet met the EVM training requirement, the HCA (non-delegable) may authorize the individual to perform the position duties, provided that the individual meets the training requirement within 9 months from the date of assignment to the contract. If the individual does not complete the training requirement within 9 months, the HCA's approval for the individual's assignment to the contract will automatically terminate on that date. In addition, during any extension period, the COTR must work under the direction of a COTR, or Program/Project Manager who has taken an EVM course.

(2) *Other additional HHS training*. The HCA (non-delegable) may grant a time extension of up to 9 months to a COTR to complete the PBA, Federal appropriations law, and green purchasing training requirements, including completion of refresher training. If the individual does not complete the training requirement within the extension period, the HCA's approval will automatically terminate on that date.

[75 FR 21509, Apr. 26, 2010]

301.605 Contracting Officer designation of Contracting Officer Technical Representative.

The Contracting Officer shall ensure that a COTR candidate is currently certified under HHS' FAC–COTR program before delegating authority to that individual to act as a COTR. Even if an individual is FAC–COTR-certified, a candidate becomes a COTR only when a Contracting Officer provides in writing the authorities the individual may exercise for a specified contract or order. Authority for such designations rests solely with the Contracting Officer. The Contracting Officer shall retain in the contract or order file the individual's active FAC–COTR certificate. In the event that the HCA has granted an exception—*see 301.604–73*, the Contracting Officer shall include the HCA's approval in the file.

301.606 Training requirements for Project Officers.

301.606–70 General.

HHS has established a program for training personnel for certification and designation as Project Officers. *See 302.101(g)* for further information regarding the definition of a Project Officer and when designation of a Project Officer is appropriate. All references to Project Officers also apply to their alternates. Program Managers or their designees are authorized to designate individuals to serve as Project Officers. (*Note:* If an individual will also serve as the COTR for a proposed project, the

individual shall comply with the training certification requirements for COTRs—*see 301.604*.)

301.606–71 Project Officer training.

Before an individual may perform the duties of a Project Officer, including development of an Acquisition Plan (AP) or other acquisition request documentation—*see 307.71*, for a proposed project, the Program Manager or designee shall designate an individual as a Project Officer in writing by means of a memorandum to the Project Officer candidate with a copy to the cognizant Contracting Officer. A Project Officer must successfully complete HHS University's Basic Contracting Officer's Technical Representative Course or equivalent and any OPDIV-specific course prerequisites. The Project Officer must provide a course completion certificate to the Contracting Officer with any AP or other acquisition request documentation submitted. See HHS' COTR Handbook for additional information on the basic training requirement for Project Officers and guidance on the training requirement for technical proposal evaluators in 315.305(a)(3)(ii).

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21509, Apr. 26, 2010]

301.606–72 Delegation of authority to HCAs.

HCAs are authorized to determine equivalencies for the Basic Contracting Officer's Technical Representative Course and any OPDIV-specific course prerequisites. This authority may be re-delegated to OPDIV acquisition ACMs or other comparable officials.

301.606–73 Requirements for continuous learning maintenance.

Designated Project Officers require at least 40 relevant CLPs every 2 years. See HHS' COTR Handbook for information on CLPs.

[75 FR 21510, Apr. 26, 2010]

301.606–74 Training policy exception.

(a) In the event that an individual who has not successfully completed the required training course is urgently required to serve as a Project Officer, the Program Manager or designee may authorize the individual to perform the designated duties on an interim basis for up to 6 months, provided that—

(1) The individual agrees to take the Basic Contracting Officer's Technical Representative course during that period and provides evidence of course registration; and

(2) The individual meets, prior to assignment to the project, with the cognizant Contracting Officer to discuss the specific role and responsibilities of a Project Officer and the interrelationships, as applicable, among the Project Officer, Contracting Officer, Program/Project Manager, and COTR functions.

(b) If an extension of time has been granted, but the individual fails to complete the training by the extended date, the Program Manager's or designee's approval for the individual's assignment to the project will automatically terminate on that date.

[74 FR 62398, Nov. 27, 2009. Redesignated at 75 FR 21509, Apr. 26, 2010]

301.606–75 Additional Project Officer training requirements.

(a) See HHS' COTR Handbook for information on additional training requirements.

(b) *Training policy exceptions*—(1) *EVM training*. In the event that there is an urgent requirement to assign a Project Officer to a contract project to which EVM will be applied, and the individual has not yet met the EVM training requirement, the HCA (non-delegable) may authorize the individual to perform the position duties, provided that the individual meets the training requirement within 3 months from the date of submission of the AP or other acquisition request documentation to the contracting office. If the individual does not complete the training requirement within the extension period, the HCA's approval for the individual's assignment to the project will automatically terminate on that date. In addition, during any extension period, the Project Officer must work under the direction of a Project Officer, COTR, or Program/Project Manager who has taken an EVM course.

(2) *Other additional HHS training*. The HCA (non-delegable) may grant a time extension of up to 9 months to a Project Officer to complete the PBA,

Federal appropriations law, and green purchasing training requirements, including completion of refresher training. If the individual does not complete the training requirement within the extension period, the HCA's approval will automatically terminate on that date.

[75 FR 21510, Apr. 26, 2010]

301.607 Certification of Program and Project Managers.

301.607–70 General.

In accordance with the Federal Acquisition Certification—Program and Project Managers (FAC–P/PM) program, HHS has established a certification program for Program or Project Managers. *See* HHS' Federal Acquisition Certification—Program and Project Managers Handbook (P/PM Handbook) for information on the methods for earning FAC–P/PM certification.

301.607–71 FAC–P/PM levels and requirements.

(a)(1) The FAC–P/PM certification program specifies three different levels of certification, depending on the core competency, training, and experience required to manage different types of acquisitions—

(i) Entry/Apprentice—Level I;

(ii) Mid-level/Journeyman—Level II; and

(iii) Senior/Expert—Level III.

(2) Each FAC–P/PM certification level is independent of the others—*i.e.*, applicants for the Senior/Expert level need not have been certified at the Mid-level/Journeyman or Entry/Apprentice levels. General and specific core competencies, training, and required experience vary by certification level. (*Note:* Individuals certified under the FAC–P/PM program meet the general competency and experience standards for P/PM certification. However, IT Program and Project Managers should attain/demonstrate IT-specific P/PM requirements. *See* Appendix C, Federal Acquisition Certification—Program and Project Managers—Information Technology Technical Competencies, in the P/PM Handbook for additional information.

(b)(1) *Competencies*. An applicant can satisfy the competency requirements through:

(i) Successful completion of training;

(ii) Completion of comparable education or certification programs;

(iii) Demonstration of knowledge, skills, and abilities; or

(iv) Any combination of these three.

(2) The FAI describes the following three sets of general core competencies on its Web site:

(3) *General Business Competencies:* Includes decision-making, interpersonal skills, oral communication, team-building, and writing.

(4) *Technical Competencies:* Includes contracting, financial management, quality assurance, and risk management.

(5) *Essential Competencies and Proficiencies:* Includes management processes, systems engineering, test and evaluation, contracting, and business.

(6) Specific core competencies also apply to the three certification levels. *See* Chapter 2, Federal Acquisition Certification—Program and Project Managers—Requirements and Performance Accountability, in the P/PM Handbook for additional information.

(c) *Training*. (1) Suggested training includes coursework, varying from 16–24 hours in duration, in:

(i) Acquisition;

(ii) Project management;

(iii) leadership and interpersonal skills;

(iv) Government-specific training; and

(v) Earned value management and cost estimating.

(2) The depth of the training for each course required may vary by certification level.

(d) *Experience*. Experience requirements vary by certification level. For example, for certification at the Entry/Apprentice—Level I, at least 1 year of project management experience within the last 5 years is required. The Mid-level/Journeyman—Level II requires at least 2 years of program or project management experience within the last 5 years. The Senior/Expert—Level III requires at least 4 years of program and project management experience on *Federal* projects within the last 5 years.

(e) *Additional OPDIV guidance.* OPDIVs may issue supplemental guidance and requirements for selection and assignment of Program and Project Managers and require additional skills and competencies to meet organizational or mission needs. However, OPDIVs may not reduce the requirements specified in the P/PM Handbook.

301.607–72 Applicability.

(a) The FAC–P/PM certification prerequisites and continuous learning requirements apply to all HHS employees who seek to obtain a FAC–P/PM certification. Although obtaining a FAC–P/PM certification qualifies employees to serve as a Program or Project Manager, it does not ensure their selection or designation as such. (*Note:* Contractors and their employees are not eligible to be certified or to serve as Program or Project Managers.)

(b) Mandatory certification is limited to major and non-major IT and construction capital investment acquisitions. Consistent with OFPP guidance, HHS requires FAC–P/PM Level III certification for Program and Project Managers responsible for major IT and construction capital investments—*i.e.*, those requiring preparation of an OMB Exhibit 300, HHS Form 300, or equivalent. An individual must obtain FAC–P/PM Level III certification within 1 year from the date of being assigned to such a major capital investment. Also, HHS requires that an individual obtain FAC–P/PM Level II or I certification for non-major IT and construction—*i.e.*, tactical or supporting, capital investments, respectively, within 2 years from the date of being assigned to such a non-major capital investment. *See* Appendix A, Federal Acquisition Certification—Program and Project Managers—HHS Projects and Programs with Associated Certification Levels, in the P/PM Handbook for additional information regarding major and non-major IT and construction capital investments. FAC–P/PM certification for other types of investments [e.g., advanced research and development (R & D)] is encouraged, but is not mandatory.

301.607–73 Certification waivers.

(a) Waivers to certification requirements may be approved in certain situations. Waivers for additional time to complete certification requirements are not necessary for the first year following an assignment to a major IT or construction capital investment and for 2 years following an assignment to a non-major capital investment. For waivers beyond those periods (for up to 1 additional year), the HHS Chief Information Officer (CIO) (for IT programs and projects) and the Deputy Assistant Secretary for Facilities Management and Policy (DASFMP) (for construction programs and projects) are delegated authority to approve waiver requests. The HHS CAO is the only individual authorized to approve waiver requests for additional time beyond the initial 1-year waiver period.

(b) Approval of a waiver request does not relieve an individual from meeting the certification requirements. Also, unlike FAC–P/PM certifications, waivers issued by other Federal departments and agencies do not transfer to HHS, since a waiver is agency-specific.

301.607–74 Certification transfers.

(a) HHS recognizes and accepts FAC–P/PM certifications issued by other Federal departments and agencies. In addition, HHS complies with FAI determinations as to which certifications by organizations outside the Federal government are eligible for full or partial consideration under FAC–P/PM. *See* FAI's Web site, and Chapter 3, Federal Acquisition Certification—Program and Project Managers—Application and Certification Procedures, in the P/PM Handbook for additional information.

(b) A certification transfer should not be initiated when an individual, who holds a current FAC–P/PM certification from another Federal department or agency, becomes an HHS employee. Instead, the individual must apply for recertification (which will result in issuance of an HHS certification) at the time the candidate's immediate supervisor performs the bi-annual assessment to determine whether the individual has met the HHS FAC–P/PM CLP requirements.

301.607–75 Maintenance of FAC–P/PM certification.

(a) FAC–P/PM certification lasts for 2 years. To maintain FAC–P/PM certification, HHS Program and Project Managers are required to earn 80 CLPs of skills currency every 2 years, starting from the date of their initial certification or recertification, and document completion of all training. If the required CLPs are not earned within each 2-year period, a FAC–P/PM certification will lapse. Lapsed certifications may be reinstated when 80 CLPs have been accumulated.

(b) Continuous learning activities related to FAC–P/PM include, but are not limited to—

(1) Training activities, such as teaching, self-directed study, and mentoring;

(2) Courses completed to achieve certification at the next higher level;

(3) Professional activities, such as attending/speaking/presenting at professional seminars/symposia/conferences, publishing papers, and attending workshops;

(4) Educational activities, such as formal training and formal academic programs; and

(5) Experience, such as developmental or rotational assignments.

See Appendix F, Federal Acquisition Certification—Program and Project Managers—Guidance on Meeting Requirements for Continuous Learning Points, in the P/PM Handbook for additional information.

301.607–76 FAC–P/PM application process.

The P/PM Handbook contains application procedures and forms to be completed for basic certification; certification transfer; certification through fulfillment; recertification; and certification waiver. Applicants for HHS FAC–P/PM certification actions shall comply with the requirements and procedures specified in the P/PM Handbook and refer any questions to their OPDIV ACM for resolution.

301.607–77 Governance.

The Departmental ACM, in ASFR/OGAPA/DA, serves as the Departmental FAC–P/PM Program Manager and is responsible for administering the program. To support the overall management of the FAC–P/PM certification program at the OPDIV level, Executive Officers and their HCAs may either use their existing ACM or designate an additional ACM, whose professional background includes program and project management. *See* Appendix B, Federal Acquisition Certification—Program and Project Managers—Roles and Responsibilities, in the P/PM Handbook for additional information.

[74 FR 62398, Nov. 27, 2009. Redesignated at 75 FR 21510, Apr. 26, 2010]

301.607–78 Contracting Officer designation of a Program/Project Manager as the Contracting Officer's Technical Representative.

Personnel who are FAC–P/PM certified, at any level, meet the requirements for FAC–COTR certification and are, therefore, not required to obtain FAC–COTR certification to serve as a COTR for an HHS acquisition. However, for those individuals serving as a Program or Project Manager under a FAC–P/PM certification waiver—*see 301.607–73*, the Contracting Officer shall ensure that the individual meets the requirements of HHS' FAC–COTR program before delegating authority to that individual to act as a COTR. *See 301.605* for additional information regarding the Contracting Officer's designation of a COTR.

[74 FR 62398, Nov. 27, 2009. Redesignated at 75 FR 21510, Apr. 26, 2010]

301.608 Training requirements for purchase cardholders, Approving Officials, and Agency/Organization Program Coordinators.

Training requirements for purchase cardholders, Approving Officials, and Agency/Organization Program Coordinators are listed in the following table:

HHS PURCHASE CARD TRAINING PROGRAM, BY AUTHORITY LEVEL

Authority [a]	Program participant	Required training [b]
Up to $3,000	Prospective/newly appointed purchase cardholders and Approving Officials.	Basic purchase card training (HHS University course or an OPDIV equivalent course).
	Purchase card holders and Approving Officials	Yearly refresher purchase card training.

HHS PURCHASE CARD TRAINING PROGRAM, BY AUTHORITY LEVEL—Continued

Authority [a]	Program participant	Required training [b]
$3,001 to $25,000	Prospective/newly appointed purchase cardholders and Approving Officials.	• Basic purchase card training (HHS University course or an equivalent). • Basic simplified acquisition procedures (e.g., DAU's CON 237). • Advanced simplified acquisition procedures or Appropriations law.
	Purchase card holders and Approving Officials	Yearly refresher purchase card training.
$25,001 to $100,000	Prospective/newly appointed purchase cardholders and Approving Officials.	• Basic purchase card training (HHS University course or an OPDIV equivalent course). • Basic simplified acquisition procedures (e.g., DAU's CON 237). • Advanced simplified acquisition procedures or Appropriations law. • CON 100 (Shaping Smart Business Arrangements). • CON 110 (Mission Support Planning).
	Purchase cardholders and Approving Officials	Yearly refresher purchase card training.
Not applicable	Prospective/newly appointed Agency/Organization Program Coordinators.	• Basic purchase card training (HHS University course or an OPDIV equivalent course). • Basic simplified acquisition procedures or DAU's CON 237. • Advanced simplified acquisition procedures or appropriations law. • CON 100 (Shaping Smart Business Arrangements). • CON 110 (Mission Support Planning).
	Agency/Organization Program Coordinators	Yearly refresher purchase card training (attendance at GSA's annual training conference satisfies refresher training).

[a] Cardholders and Approving Officials with authorized increases in delegation of procurement authority (DPA) have up to 3 months to complete the training requirements for the new DPA.
[b] CON 237, CON 100, and CON 110 are available at the DAU Web site at *http://www.dau.mil/registrar/enroll.asp.* CON 100 is also offered through HHS University (*see* Web site at: *http://learning.hhs.gov*).

PART 302—DEFINITIONS OF WORDS AND TERMS

Subpart 302.1—Definitions

Sec.
302.101 Definitions.

Subpart 302.2—Definitions Clause

302.201 Contract clause.

Subpart 302.70—Common HHSAR Acronyms and Abbreviations

302.7000 Common HHSAR acronyms and abbreviations.

Subpart 302.71—HHS Standard Templates and Formats

302.7100 HHS standard templates and formats

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 302.1—Definitions

302.101 Definitions.

(a) *Agency head* or *head of the Agency*, unless otherwise stated, means the head of the OPDIV for: AHRQ; CDC; CMS; FDA; HRSA; IHS; NIH; SAMHSA; and ASFR for the Office of the Secretary (OS), including PSC. The Assistant Secretary for Preparedness and Response (ASPR) is the head of the agency for BARDA contracting functions.

(b) *Chief of the Contracting Office* is typically a mid-level management official, usually an office director, division director, or branch chief, who manages and monitors the daily contract operations of an OPDIV or major component of an OPDIV. The CCO is subordinate to the HCA, except where the same individual is the HCA and CCO.

(c) *Contracting Officer's Technical Representative* is a Federal employee whom a Contracting Officer has designated in writing to act as the Contracting Officer's representative in monitoring and administering specified aspects of contractor performance *after* award of a

contract or order that exceeds the simplified acquisition threshold. (*Note:* In accordance with local procedures, OPDIVs may designate COTRs for contracts or orders estimated to be less than the simplified acquisition threshold.) These activities may include verifying that:

(1) The contractor's performance meets the standards set forth in the contract;

(2) The contractor meets the contract/order's technical requirements by the specified delivery date(s) or within the period of performance; and

(3) The contractor performs within the fixed price or cost ceiling stated in the contract or order. COTRs must meet the training and certification requirements specified in *301.604*.

(d) *Head of the contracting activity* is an official who has overall responsibility for managing a contracting activity—*i.e.*, the organization within an OPDIV or other HHS organization which has been delegated broad authority regarding the conduct of acquisition functions.

(1) The HHS HCAs are as follows:

AHRQ: Director, Division of Contracts Management.
ASPR: Director, Office of Acquisitions Management, Contracts and Grants.
CDC: Director, Procurement and Grants Office.
CMS: Director, Office of Acquisition and Grants Management.
FDA: Director, Office of Acquisitions and Grant Services.
HRSA: Director, Office of Acquisition Management and Policy.
IHS: Director, Division of Acquisition Policy.
NIH: Director, Office of Acquisition and Logistics Management.
PSC: Director, Strategic Acquisition Service.
SAMHSA: Director, Division of Contracts Management.

(2) Each HCA shall conduct an effective and efficient acquisition program; establish adequate controls to ensure compliance with applicable laws, regulations, procedures, and the dictates of good management practices; and conduct periodic reviews to evaluate and determine the extent of adherence to prescribed policies and regulations and the need for guidance and training.

(3) HCAs may redelegate their authorities to the extent that redelegation is not prohibited by the terms of their respective delegations of authority, by law, by the *FAR*, by the HHSAR, or by other regulations. To ensure proper control of redelegated acquisition authorities, HCAs shall maintain a file containing successive delegations of HCA authority through the Contracting Officer level.

(e) *Program Manager* is a federal employee whom an OPDIV official or designee one level above the head of the sponsoring program office has designated in writing to act as a Program Manager for a group of related major or non-major IT or construction capital investments—see HHS' P/PM Handbook. *See* also Appendix D, Relationship between Program Management and Project Management, of OFFP memorandum entitled ''The Federal Acquisition Certification for Program and Project Managers,'' dated April 25, 2007. Program Managers must meet the FAC–P/PM certification requirements in *301.607*. A Program Manager may also be delegated authority to act as the COTR for a major or non-major IT or construction capital investment—*see 301.604*.

(f) *Project Manager* is a federal employee whom a head of the sponsoring program office (Program Manager) or designee has designated in writing to act as a Project Manager for a major or non-major IT or construction capital investment—see HHS' P/PM Handbook. *See* also Appendix D, Relationship between Program Management and Project Management, of OFFP memorandum entitled ''The Federal Acquisition Certification for Program and Project Managers,'' dated April 25, 2007. Project Managers must meet the FAC–P/PM certification requirements in *301.607*. A Project Manager may also be delegated authority to act as the COTR for a major or non-major IT or construction capital investment—*see 301.604*.

(g) *Project Officer* is a Federal employee whom a head of the sponsoring program office (Program Manager) or designee has designated in writing to act as a Project Officer and provide guidance, information, and assistance to the Contracting Officer for all technical aspects of a proposed project *before* award of a contract or order that is

estimated to exceed the simplified acquisition threshold. (*Note:* In accordance with local procedures, OPDIVs may designate Project Officers for contracts or orders estimated to be less than the simplified acquisition threshold.) Project Officers must meet the training requirements in *301.606*. Project Officers are often delegated authority to also act as the COTR on a contract or order—*see 301.604*.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

Subpart 302.2—Definitions Clause

302.201 Contract clause.

The Contracting Officer shall insert the clause in *FAR 52.202–1*, Definitions, in solicitations and contracts, except as cited below. This is an authorized FAR deviation.

(a) In accordance with *FAR 52.202–1(a)(1)*, the Contracting Officer shall insert paragraph (a) in *352.202–1* in place of paragraph (a) of the *FAR* clause.

(b) In accordance with *FAR 52.202–1(a)(1)*, the Contracting Officer shall insert paragraph (b), or its alternate in *352.202–1*, to the end of the *FAR* clause. The Contracting Officer shall insert paragraph (b) when a fixed-priced contract is contemplated and the alternate to paragraph (b) when a cost-reimbursement contract is contemplated.

Subpart 302.70—Common HHSAR Acronyms and Abbreviations

302.7000 Common HHSAR acronyms and abbreviations.

(a) The HHSAR cites numerous acquisition-related and organizational acronyms and abbreviations. Each of these is established where first cited in the text, following the use of the unabbreviated term, and are used in subsequent subparts of that part or any other part of the HHSAR.

(b) The table below cites, for reference purposes, the most commonly used acronyms and abbreviations—*i.e.*, those that have applicability to *multiple* parts of the HHSAR, and where they are first cited. They are listed alphabetically. The HHSAR also contains other acronyms and abbreviations, which because they are cited only in *one* HHSAR part, subpart, section, or in reference to a particular topic, are not listed in the table. An example is DCIS (Departmental Contracts Information System) cited in subpart *304.602*.

Acronym/abbreviation	Term	Where first cited in the HHSAR
A & E	Architect and engineer (contracts)	304.803–70(b).
AHRQ	Agency for Healthcare Research and Quality	301.270(b).
AP	Acquisition Plan	301.606–71.
ASFR	Assistant Secretary for Financial Resources (in OS)	301.103(b).
ASPR/OAMCG	Assistant Secretary for Preparedness and Response, Office of Acquisitions Management, Contracts and Grants.	301.270(b).
Associate DAS for Acquisition	Associate Deputy Assistant Secretary for Acquisition (in OS/ASFR/OGAPA/DA).	301.270(a).
BPA or BPAs	Blanket Purchase Agreement(s)	301.603–70(b).
CA	Competition Advocate	306.202(a).
CAO	Chief Acquisition Officer (for HHS)	301.603–72(a)(4).
CCO	Chief of the Contracting Office	301.602–3(b)(3).
CDC	Centers for Disease Control and Prevention	301.270(b).
CFR	Code of Federal Regulations	301.103(c).
CIO	Chief Information Officer (for HHS)	301.607–73(a).
CMS	Centers for Medicare and Medicaid Services	301.270(b).
COTR	Contracting Officer's Technical Representative	301.604–70.
D&F	Determination and Findings	306.202(b)(1).
DA	Division of Acquisition (in ASFR) in OS	301.270(b).
DASFMP	Deputy Assistant Secretary for Facilities Management and Policy.	301.607–73(a).
DAS/GAPA	Deputy Assistant Secretary for Grants and Acquisition Policy and Accountability.	309.403.
EIT	Electronic information technology	301.603–73(e).
EVM	Earned value management	301.603–73(a).
FAR	Federal Acquisition Regulation	301.101(a).
FDA	Food and Drug Administration	301.270(b).
FedBizOpps	Federal Business Opportunities	305.205(a).
FSS	Federal Supply Schedule	304.803–70(b).
GLD	General Law Division (typically referred to with "OGC")	301.602–3(c)(5).
GSA	General Services Administration	304.803–70(b).

Acronym/abbreviation	Term	Where first cited in the HHSAR
GWAC	Government-wide acquisition contract	304.803–70(b).
HCA	Head of the Contracting Activity	301.470(a).
HHS	(Department of) Health and Human Services	301.101(a).
HHSAR	Health and Human Services Acquisition Regulation	301.101(a).
HRSA	Health Resources and Services Administration	301.270(b).
HUBZone	Historically Underutilized Business Zone	305.205(a)(2).
IDIQ	indefinite-delivery, indefinite-quantity (contract type)	301.603–70(b).
IHS	Indian Health Service	301.270(b).
IT	information technology	301.604–74(a).
JOFOC	Justification for Other than Full and Open Competition	306.303–1(b)(1).
NIH	National Institutes of Health	301.270(b).
OCIO	Office of the Chief Information Officer (for HHS)	301.603–73(a).
OFMP	Office of Facilities Management and Policy (for HHS)	301.603–73(a).
OGAPA	Office of Grants and Acquisition Policy and Accountability	301.270(b).
OGC	Office of the General Counsel	301.602–3(c)(5).
OIG	Office of the Inspector General	303.104–7(a)(2)(i).
OMB	Office of Management and Budget	301.106.
OPDIV	Operating Division	301.603–73(a).
OS	Office of the Secretary	302.101(a).
OSDBU	Office of Small and Disadvantaged Business Utilization (in OS)	307.104(a)(4).
Pub. L.	Public Law	304.604.
PWS	performance work statement (typically cited with SOW)	304.1300(c).
PSC	Program Support Center (in OS)	301.270(b).
R&D	research and development	301.607–72(b).
RFI	Request for Information	305.205(a).
SAMHSA	Substance Abuse and Mental Health Services Administration	301.270(b).
SBS	Small Business Specialist (in OSDBU)	307.104(a)(4).
SF	Standard Form	301.603–1(b).
SOW	statement of work [inclusive of specification(s)] and typically cited with PWS.	304.1300(c).
SPE	Senior Procurement Executive—*i.e.,* Associate DAS for Acquisition.	301.603–71.
STAFFDIV	Staff Division (in OS)	311.7001(b).

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

Subpart 302.71—HHS Standard Templates and Formats

302.7100 HHS standard templates and formats.

HHS has developed standard templates and formats for preparation of various acquisition documents, reports, and plans. The templates and formats, which contain instructions for their completion, may be accessed on the ASFR/OGAPA/DA Internet Web site. A complete listing of the standard templates and formats and where they are referenced in the text are cited in the table below:

Title of template/format	HHSAR reference
Acquisition Plan	307.7103.
Acquisition Plan Waiver Request	307.7101(b)(2).
Acquisition Strategy	307.104–70.
Annual Acquisition Plan	307.104(a)(5).
Competition Advocate Report	306.502(b).
Contract File Checklists	304.803–70.
FedBizOpps R & D Sources Sought Notice	305.205(a)(3).
FedBizOpps Request for Information	315.201(e)(4).
FedBizOpps Small Business Sources Sought Notice	319.202–2(a)(3).
FedBizOpps Sources Sought Notice	310.001(a)(3)(iv).
Justification for Other than Full and Open Competition	306.303–1(b)(1).
Limited Source Justification	308.405–6(g)(1)(i).
Request for Information	315.201(e)(4).

PART 303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 303.1—Safeguards

Sec.
303.101 Standards of conduct.
303.101–3 Agency regulations.
303.1047–7 Violations or possible violations of the Procurement Integrity Act.
303.1003 Requirements.

Subpart 303.2—Contractor Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees clause.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

Subpart 303.8—Limitation on the Payment of Funds To Influence Federal Transactions

303.808–70 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 303.1—Safeguards

303.101 Standards of conduct.

303.101–3 Agency regulations.

(a)(3) The HHS Standards of Conduct are prescribed in 45 CFR part 73.

303.104–7 Violations or possible violations of the Procurement Integrity Act.

(a)(1) The Contracting Officer shall submit to the HCA for review and approval the determination (along with supporting documentation) that a reported violation or possible violation of the statutory prohibitions has no impact on the pending award or selection of a contractor for award.

(2) The Contracting Officer shall refer the determination that a reported violation or possible violation of the statutory prohibitions has an impact on the pending award or selection of a contractor, along with all related information available, to the HCA, if the HCA is in the Senior Executive Service (SES), or to another SES official designated by the OPDIV. That individual shall—

(i) Refer the matter immediately to the Associate DAS for Acquisition for review, who may consult with OGC–GLD and the Office of the Inspector General (OIG), as appropriate; and

(ii) Determine the necessary action in accordance with *FAR 3.104–7(c) and (d)*. The HCA shall obtain the approval or concurrence of the Associate DAS for Acquisition before proceeding with an action.

(b) The HCA (non-delegable) shall act with respect to actions taken under the FAR clause *52.203–10*, Price or Fee Adjustment for Illegal or Improper Authority.

303.1003 Requirements.

(b) The Contracting Officer, when notified of a possible contractor violation of Federal criminal law, in accordance with FAR 3.1003(b), shall—

(1) Notify the OIG at *http://www.oig.hhs.gov/fraud/hotline;*

(2) Notify the HCA; and

(3) Cooperate with any investigation by the OIG; and in coordination with the HCA, OIG, OGC and the affected program office, pursue appropriate remedies.

(c)(2) The Contracting Officer shall specify the title of HHS' hotline poster (''Report Fraud'') and the Web site where the poster can be obtained (*http://oig.hhs.gov/fraud/hotline/OIG_Hotline_Poster.pdf*) in subparagraph (b)(3) of the clause at *FAR 52.203–14*.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

Subpart 303.2—Contractor Gratuities to Government Personnel

303.203 Reporting suspected violations of the Gratuities clause.

HHS personnel shall report suspected violations of the Gratuities clause to the Contracting Officer, who will in turn report the matter to the OGC Ethics Division for disposition. The OGC Ethics Division shall identify, and notify the Contracting Officer of, the form and content of the required report.

Subpart 303.3—Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

(h) The HCA shall provide a copy of the draft OPDIV report of suspected antitrust violations to the SPE. If the SPE concurs with the draft report, the SPE will provide it to the OGC–GLD for its review. If the OGD–GLD concurs with the draft report, the SPE will provide the signed OGC-approved report to the Attorney General.

Subpart 303.4—Contingent Fees

303.405 Misrepresentations or violations of the Covenant Against Contingent Fees clause.

(a) HHS personnel shall promptly report suspected misrepresentations or violations of the Covenant Against Contingent Fees clause to the Contracting Officer.

(b)(4) The HCA shall provide a copy of the draft OPDIV report of suspected covenant against contingency fees misrepresentations or violations to the SPE. If the SPE concurs with the draft report, the SPE will provide it to the OGC–GLD for its review. If the OGD–GLD concurs with the draft report, the SPE will provide the signed OGC-approved report to the Attorney General.

Subpart 303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

303.602 Exceptions.

The HCA (non-delegable) is the official authorized to approve an exception to the policy stated in *FAR 3.601*.

Subpart 303.7—Voiding and Rescinding Contracts

303.704 Policy.

(a) For purposes of implementing *FAR subpart 3.7*, the HCA (non-delegable) shall exercise the authorities granted to the ''agency head or designee.''

Subpart 303.8—Limitation on the Payment of Funds To Influence Federal Transactions

303.808–70 Solicitation provision and contract clause.

The Contracting Officer shall insert the clause in *352.203–70*, Anti-lobbying, in solicitations and contracts that exceed the simplified acquisition threshold.

PART 304—ADMINISTRATIVE MATTERS

Subpart 304.6—Contracting Reporting

Sec.
304.602 General.
304.604 Responsibilities.

Subpart 304.8—Government Contract Files

304.803–70 Contract/order file organization and use of checklists.
304.804–70 Contract closeout audits.

Subpart 304.13—Personal Identity Verification

304.1300 Policy.

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.
304.7001 Numbering acquisitions.

Subpart 304.71—Review and Approval of Proposed Contract Awards

304.7100 Policy.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 304.6—Contract Reporting

304.602 General.

HHS' Departmental Contracts Information System (DCIS) captures and stores HHS' Individual Contract Award Reports (ICARs) and forwards copies of them to the Federal Procurement Data System—Next Generation (FPDS–NG). All HHS contracting activities shall use the DCIS, in accordance with the most current version of the ''User Manual for the Enhanced Departmental Contracts Information System,'' (DCIS Users' Manual) available at *http://dcis.hhs.gov*. For the purposes of this policy, reporting shall include inputting and submitting report data through DCIS into FPDS–NG.

304.604 Responsibilities.

In order for HHS to meet its reporting requirements and ensure compliance with the Federal Funding Accountability and Transparency Act (Transparency Act), Public Law (Pub. L.) 109–282, HHS acquisition officials and staff must report their contract information accurately and timely. Ensuring accuracy and timeliness also requires effective and efficient data verification and validation at the time of and following reporting.

Following are descriptions of the organizational roles and responsibilities associated with contract reporting, including data input, oversight, and quality control; training of acquisition staff on reporting responsibilities; and operating, managing, and maintaining DCIS.

(a) *ASFR/OGAPA/DA*. The ASFR/OGAPA/DA shall do the following:

(1) Oversee and provide policy guidance for OPDIV contract reporting by—

(i) Establishing and implementing an effective HHS-wide ICAR data verification and validation program; and

(ii) Identifying cross-cutting trends through periodic testing of selected ICAR data, including Transparency Act data fields.

(2) Ensure that DCIS is properly managed and maintained, including—

(i) Verifying that data included therein meets FPDS–NG and Transparency Act accuracy and timeliness standards;

(ii) Updating the DCIS Users' Manual periodically; and

(iii) Prescribing standard HHS-wide DCIS training.

(3) Certify annually that HHS ICAR information is complete and accurate.

(b) *HCA*. Each HCA (non-delegable) shall—

(1) Ensure that all reportable ICAR information is collected, submitted, and received within the time frames and under the circumstances specified in *FAR Subpart 4.6*.

NOTE: Each CCO shall prepare and submit accurate ICAR data in accordance with HCA guidance.;

(2) Provide continuing oversight, including implementing an OPDIV-level data verification and validation program, to ensure ICAR data quality and timeliness;

(3) Establish a continuous training program for acquisition staff to ensure the quality and timeliness of ICAR data; and

(4) Certify annually to HHS' SPE that OPDIV ICAR information is complete and accurate.

(c) *Contracting Officer*. As part of a normal file review, required under *304.7101*, the Contracting Officer shall—

(1) Ensure that all reportable contracts and orders, including BPA orders and modifications thereto, are reported;

(2) Review and approve proposed ICAR data for completeness and accuracy prior to signing contracts/orders and modifications; and

(3) Correct all DCIS data discrepancies before signing the associated contract, order, or modification.

(d) *OPDIV DCIS coordinator/focal point*. The OPDIV DCIS coordinator/focal point shall—

(1) Identify data errors and ensure their timely correction as part of the DCIS quality control process;

(2) Conduct remedial staff training, as appropriate, to improve data accuracy and timeliness; and

(3) Represent the OPDIV as a member of the DCIS Configuration Committee.

(e) *DCIS Configuration Committee*. The DCIS Configuration Committee is composed of the HHS DCIS manager, other ASFR/OGAPA/DA acquisition management staff, as required; and each OPDIV's DCIS coordinator/focal point. The Committee shall ensure that the DCIS is properly maintained and shall evaluate and recommend changes to DCIS to improve its functionality, features, and quality control, as appropriate.

Subpart 304.8—Government Contract Files

304.803–70 Contract/order file organization and use of checklists.

(a) To provide a consistent approach to the organization and content of HHS contract and order files, OPDIVs shall use the folder filing system and accompanying file checklists specified in *304.803–70(b)*, in accordance with the guidance therein and the instructions specified as ''Contract and Order File Folders, Checklists, and Instructions. The checklists are available on the ASFR/OGAPA/DA Internet.

(b) The checklist requirements apply to files for (i) negotiated, sealed-bid, and Architect-Engineer (A & E) acquisitions; (ii) orders awarded and BPAs established under General Services Administration (GSA) Federal Supply Schedule (FSS) contracts; (iii) orders placed under all types of indefinite-delivery contracts, including task orders under Government-wide Acquisition Contracts (GWACs); and (iv) modifications under the types of acquisitions specified in (i), (ii), and (iii). Simplified acquisitions, including those for commercial items, are exempt from these checklist requirements. However, HHS contracting activities shall adhere to the simplified acquisition file documentation and retention requirements of *FAR 13.106–3(b)*. For commercial item acquisitions using the negotiated or sealed bid methods, HHS contracting activities shall use the applicable checklist.

(1) A complete contract or order file may consist of the following folders that are titled as indicated below for the specified acquisition methods:

Acquisition method	Folder title	Folder title	Folder title	Folder title
Negotiated	Presolicitation to Award	Unsuccessful Proposals	Administration and Closeout.	Reports and Deliverables.
Sealed-bid	Presolicitation to Award	Unsuccessful Bids	Administration and Closeout.	N/A.
A & E	Preannouncement to Award.	Unsuccessful Qualifications Statements.	Administration and Closeout.	Reports and Deliverables.
Task orders	Presolicitation to Award	Unsuccessful Proposals	Administration and Closeout.	Reports and Deliverables.
GSA FSS	Presolicitation to Award	Unsuccessful Quotations/Oral Presentations.	Administration and Closeout.	N/A.

(2) Although the use of the checklists is mandatory, each OPDIV contracting office is permitted to make certain checklist changes or additions as specified in ''Use and modification of checklists'' under ''File checklists and tab dividers'' in the instructions.

(3) OPDIVs using or planning to use electronic filing capabilities shall adhere to the folder and tab nomenclature requirements identified herein to the maximum extent practicable.

304.804–70 Contract closeout audits.

(a) Contracting Officers shall rely, to the maximum extent possible, on single audits to close physically completed cost-reimbursement contracts with colleges and universities, hospitals, non-profit organizations, and State and local governments. In addition, where appropriate, a sample of these contracts or an individual contract may be selected for audit, in accordance with paragraph (b) of this section.

(b) Contracting Officers shall request contract closeout audits on physically completed, cost-reimbursement, contracts with for-profit organizations in accordance with the following:

(1) The OIG and the Associate DAS for Acquisition, in conjunction with the OPDIV's cost advisory/audit focal point, determine which contracts or contractors will be audited, which audit agency will perform the audit, and the type and scope of closeout audit to be performed. These decisions are based on the needs of the customer, risk analysis, return on investment, and the availability of audit resources. When an audit is warranted prior to closing a contract, the Contracting Officer shall submit the audit request to the OIG's Office of Audit Services, through the OPDIV's cost advisory/audit focal point.

(2) Except where a Contracting Officer suspects misrepresentation or fraud, the Contracting Officer shall not request contract closeout field audits, if the cost of performance is likely to exceed the potential cost recovery. Contracting Officers may close contracts that are not selected for a field audit on the basis of a desk review, subject to any later on-site audit findings. In those situations, the release executed by the contractor shall contain the following statement: ''The Contractor agrees, pursuant to the clause in this contract entitled ''Allowable Cost'' or ''Allowable Cost and Fixed Fee,'' as appropriate, that it will refund to the Government the amount of any sustained audit exceptions resulting from any audit made after final payment.''

Subpart 304.13—Personal Identity Verification

304.1300 Policy.

(a) *Definitions.* The following definitions apply to this subpart:

(1) *Access:* ''Physical'' entry to and/or exit from a facility/area of a facility (such as a building or room in a building) or ''logical'' entry into an information system, such as a researcher up-loading data/information through a secure Web site or a contractor accessing an HHS-controlled information system from its own facility. It does not include access to a public Web site, whether by an HHS contractor or member of the public, because such Web sites do not require permission to access. In the case of sensitive data/information that exists in hard copy, ''access'' means providing a contractor the right to view or use written/typed data or information for the purpose described in a contract.

(2) *Long-term:* Greater than 6 months in duration.

(3) *Routine:* On a regular, non-intermittent basis, which is at least once per week during the contract or order period of performance.

(4) *Sensitive data/information:* As defined by the Computer Security Act of 1987, any data/information, ''the loss, misuse, or unauthorized access to or modification of which, could adversely affect the national interest or the conduct of Federal programs, or the privacy to which individuals are entitled under section 552a of the Title 5 of U.S.C. (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive order or an act of Congress to be kept secret in the interest of national defense or foreign policy.'' Examples include individuals' social security numbers; other personal identification information, such as individuals' health, medical, or psychological information; proprietary research data; and confidential legal data.

(5) *Short-term:* Six (6) months or less in duration.

(b) Homeland Security Presidential Directive (HSPD–12), entitled, ''Policy for a Common Identification Standard for Federal Employees and Contractors,'' was issued on August 27, 2004, to enhance security and reduce identity fraud related to contractor physical access to Federally-controlled facilities and/or logical access to Federally-controlled information systems.

(1) The HSPD–12 requirements related to routine, long-term physical access to HHS-controlled facilities and logical access to HHS-controlled information systems, including contractor personnel background checks/investigations (termed herein as ''more stringent'' access procedures), apply to all solicitations and new contracts or orders for services, including services

incidental to supply contracts/orders, regardless of dollar amount, where the contractor will require such access (*FAR* 4.13*03*). In addition, HHS has determined that, when a contractor has routine, long-term access to sensitive data/information, whether it exists in an HHS-controlled information system or in hard copy, that data/information must also be protected and controlled in accordance with HSPD–12's more stringent access procedures—*see 304.1300(e)*.

(2) When a contractor's access to HHS-controlled facilities, information systems, and/or sensitive data/information is of routine but short-term duration, an OPDIV shall use the applicable guidance cited in OMB memorandum M–05–24 related to ''short-term'' access to determine appropriate protections and limit/control contractor access—*see 304.1300(f)*]. However, if the Project Officer determines greater access controls are necessary, an OPDIV may protect and control facilities, information systems, and/or sensitive data information in accordance with HSPD–12's more stringent access procedures.

(3) When a contractor's access to HHS-controlled facilities, information systems, and/or sensitive data/information is not routine, regardless of duration, HHS has determined that OPDIVs shall use the applicable guidance cited in OMB memorandum M–05–24 related to ''occasional visitors'' to determine appropriate protections and limit/control contractor access—*see 304.1300(g)*.

(4) *Summary table of contractor access circumstances and HSPD–12 requirements*.

Type of access	HSPD–12 access procedures required	HSPD–12 security notice required in solicitation/contract SOW/PWS? [*see 304.1300(e)*]
Routine, long-term, physical access to HHS-controlled facilities.	More stringent access procedures apply	YES.
Routine, long-term logical access to an HHS-controlled information system that does not contain sensitive HHS data/information.	More stringent access procedures apply	YES.
Routine, long-term access to sensitive HHS data/information, whether it exists in an HHS-controlled information system (logical access) or in hard copy.	More stringent access procedures apply	YES.
Routine, short-term access to HHS-controlled facilities, information systems, and/or sensitive HHS data/information.	If greater access controls are deemed necessary, more stringent access procedures apply.	YES.
If greater access controls are *not* deemed necessary, applicable guidance cited in OMB memorandum M–05–24 related to ''short-term'' access to determine appropriate protections and limit/control contractor access.	NO, but contractor staff must be provided with the OPDIV documentation on the rules of behavior and consequences for violation [*see 304.1300(f)*].	
Non-routine access, regardless of duration, to HHS-controlled facilities, information systems, and/or sensitive HHS data/information.	Applicable guidance cited in OMB memorandum M–05–24 related to ''occasional visitors'' to determine appropriate protections and limit/control contractor access.	NO, but contractor staff must be provided with the OPDIV ''occasional visitor'' policy and procedures [*see 304.1300(g)*].

(c) As part of the acquisition planning process, the Project Officer shall determine whether, based on the nature of the requirement, contractor personnel may require access to HHS-controlled facilities and/or information systems, including sensitive data/information, in order to perform the contract/order Statement of Work (SOW)/Performance Work Statement (PWS). If contractor access is required, the Project Officer must assess, based on information available at that point in the process, the type, frequency, and duration of such access. Following that determination, the Project Officer shall consult with OPDIV and/or local building and IT security officials/staff, and officials/staff involved with personnel security, including the designated personnel security representative, to determine appropriate security requirements and, as necessary, adjust project requirements to minimize security and access issues. The Project Officer shall comply with HSPD–12 and the

following implementing guidance in making these judgments and determinations:

(1) OMB memorandum M–05–24, Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors, dated August 5, 2005.

(2) National Institutes of Standards and Technology Federal Information Processing Standard Publication (FIPS PUB) 201), dated February 25, 2005, which can be accessed at: *http://csrc.nist.gov/publications/*.

(3) FAR (FAR *4.13* and *52.204–9*).

(4) Any HHS and OPDIV implementation thereof.

(d) If, as part of the acquisition planning process, the Project Officer determines that contractor access will not be required, the Project Officer should so state in the AP (or other acquisition request document)—*see 307.7101*. If an AP does not address access issues or indicates contractor access is not required, and it appears an acquisition may involve access requirements, the Contracting Officer shall request that the Project Officer address or reconsider the initial access determination. The Project Officer's determination shall be final.

(e) If HSPD–12's more stringent access procedures are expected to apply, because access will be routine and of long-term duration, or is routine and of short-term duration, but greater access controls are deemed necessary, the Project Officer shall include the following ''HHS-Controlled Facilities and Information Systems Security'' notice in a separate, clearly designated ''Security'' section of the SOW/PWS. (NOTE: The Contracting Officer is responsible for tailoring the language in the solicitation and contract/order in accordance with the instructions provided below.)

''XXX Security.

HHS-CONTROLLED FACILITIES AND INFORMATION SYSTEMS SECURITY

(a) To perform the work specified herein, Contractor personnel are expected to have routine (1) physical access to an HHS-controlled facility; (2) logical access to an HHS-controlled information system; (3) access to sensitive HHS data or information, whether in an HHS-controlled information system or in hard copy; or (4) any combination of circumstances (1) through (3). (b) To gain routine physical access to an HHS facility, logical access to an HHS-controlled information system, and/or access to sensitive data or information, the Contractor and its employees shall comply with Homeland Security Presidential Directive (HSPD)-12, Policy for a Common Identification Standard for Federal Employees and Contractors; Office of Management and Budget memorandum (M–05–24); and Federal Information Processing Standards Publication (FIPS PUB) Number 201; and with the personal identity verification and investigation procedures contained in the following documents:

(1) HHS Information Security Program Policy.

(2) HHS Office of Security and Drug Testing, Personnel Security/Suitability Handbook, dated February 1, 2005.

(3) HHS HSPD–12 Policy Document, v. 2.0.

(4)

NOTE: Based upon information provided by the Project Officer, the Contracting Officer shall insert references to OPDIV and/or local procedural guideline(s), if any; indicate if they are readily accessible to the public; and, if so, specify where they may be found. If they are not readily accessible, the Contracting Officer shall attach a copy to the solicitation and contract and reference the guideline(s) here.

(c) This contract/order will entail the following position sensitivity level(s): _____.

NOTE: At the time of solicitation, based upon information provided by the Project Officer, the Contracting Officer shall specify all known levels. If the position sensitivity levels are not known at that time, the Contracting Officer shall insert the words ''To Be Determined at the Time of Award.'' However, the Contracting Officer must include the definitive position sensitivity levels in the awarded contract/order.

(d) The personnel investigation procedures for Contractor personnel require that the Contractor prepare and submit background check/investigation forms based on the type of investigation required. The minimum Government investigation for a non-sensitive position is a National Agency Check and Inquiries (NACI) with fingerprinting. More restricted positions—*i.e.*, those above non-sensitive, require more extensive documentation and investigation.

NOTE: The Contracting Officer shall include the following sentence in each *solicitation* as the concluding sentence in paragraph (d)): ''As part of its proposal, and if the anticipated position sensitivity levels are specified in paragraph (c) above, the Offeror shall notify the Contracting Officer of (1) its proposed personnel who will be subject to a background check/investigation and (2) whether any of its proposed personnel who

will work under the contract have previously been the subject of national agency checks or background investigations.''

(The Contracting Officer shall include the following sentence in each *contract/order* as the concluding sentence in paragraph (d) in lieu of the solicitation language: ''The Contractor shall notify the Contracting Officer in advance when any new personnel, who are subject to a background check/investigation, will work under the contract and if they have previously been the subject of national agency checks or background investigations.'')

(e) Investigations are expensive and may delay performance, regardless of the outcome of the investigation. Delays associated with rejections and consequent re-investigations may not be excusable in accordance with the FAR clause, Excusable Delays—*see* FAR 52.249–14.

NOTE: The Contracting Officer shall include the following sentence in each *solicitation* as the concluding sentence in paragraph (e): ''Accordingly, if position sensitivity levels are specified in paragraph (c), the Offeror shall ensure that the employees it proposes for work under this contract have a reasonable chance for approval.'' The Contracting Officer shall include the following sentence in each *contract/order* as the concluding sentence in paragraph (e) in lieu of the solicitation language: ''Accordingly, the Contractor shall ensure that any additional employees whose names it submits for work under this contract have a reasonable chance for approval.''

(f) Typically, the Government investigates personnel at no cost to the Contractor. However, multiple investigations for the same position may, at the Contracting Officer's discretion, justify reduction(s) in the contract price of no more than the cost of the additional investigation(s).

(g) The Contractor shall include language similar to this ''HHS-Controlled Facilities and Information Systems Security'' language in all subcontracts that require subcontractor personnel to have the same frequency and duration of (1) physical access to an HHS-controlled facility; (2) logical access to an HHS-controlled information system; (3) access to sensitive HHS data/information, whether in an HHS-controlled information system or in hard copy; or (4) any combination of circumstances (1) through (3).

(h) The Contractor shall direct inquiries, including requests for forms and assistance, to the Contracting Officer or designee.

(i) Within 7 calendar days after the Government's final acceptance of the work under this contract, or upon termination of the contract, the Contractor shall return all identification badges to the Contracting Officer or designee.''

(f) When a contractor's access to HHS-controlled facilities, information systems, and/or sensitive data/information is of routine, but short-term duration, and greater access controls are not deemed necessary, the Contracting Officer and Project Officer shall use the applicable guidance cited in OMB memorandum M–05–24, dated August 5, 2005, specifically Attachment A, ''HSPD–12 Implementation Guidance for Federal Departments and Agencies,'' to ensure that—

(1) Adequate OPDIV access controls are applied, and a contractor is granted only limited/controlled access to facilities, systems, and/or sensitive data/information, consistent with the requirements of the acquisition;

(2) Contractor staff are provided with clear OPDIV documentation on the rules of behavior and consequences of their violation before being granted access to facilities, systems, and/or sensitive data/information;

(3) Contractor security violations are documented and reported to the appropriate OPDIV authority within 24 hours of their occurrence; and

(4) Identity credentials issued to contractor staff are visually and electronically distinguishable from credentials issued to individuals to whom the more stringent HSPD–12 access procedures apply.

NOTE TO PARAGRAPH (f): However, as indicated in *304.1300(e)*, if the Project Officer determines greater access controls are necessary, an OPDIV may protect and control facilities, information systems, and/or sensitive data information in accordance with HSPD–12's more stringent access procedures.

(g) When a contractor's access to HHS-controlled facilities, information systems, and/or sensitive data/information is not routine, regardless of duration, the Contracting Officer and Project Officer shall use the applicable guidance cited in OMB memorandum M–05–24, dated August 5, 2005, specifically Attachment A, ''HSPD–12 Implementation Guidance for Federal Departments and Agencies,'' related to ''occasional visitors'' to determine appropriate protections and limit/control contractor access to ensure that—

(1) Adequate OPDIV access controls are applied, and the contractor is granted only limited/controlled access to facilities, systems, and/or sensitive

data/information, consistent with the requirements of the acquisition; and

(2) OPDIV visitor policies, including contractor personnel identity badging requirements, are enforced and are provided to the contractor.

Subpart 304.70—Acquisition Instrument Identification Numbering System

304.7000 Scope of subpart.

This subpart prescribes policy and procedures for assigning identification numbers to contracts and related instruments, including solicitation documents, purchase orders, and delivery orders. The HCA (non-delegable) shall establish a numbering system within an OPDIV.

304.7001 Numbering acquisitions.

(a) *Acquisitions which require numbering*. Contracting activities shall number the following acquisitions and related instruments in accordance with the system prescribed in paragraphs (b), (c) and (d) of this section:

(1) Contracts, including letter contracts, that exceed the micro-purchase threshold or the acquisition of personal property or nonpersonal services. (*Note:* The Contracting Officer shall also assign the letter contract number to the superseding definitized contract.)

(2) Basic ordering agreements (BOAs) and BPAs.

(3) Requests for proposals and invitations for bids.

(4) Requests for quotations.

(b) *Numbering* system *for contracts*. The Contracting Officer shall assign a number consisting of the following to all contracts which require numbering (paragraph (a)(1) of this section):

(1) The three-digit identification code (HHS) of the Department.

(2) A one-digit alphabetic identification code of the servicing agency.

AHRQ: A
ASPR/OAMCG: O
CDC: D
CMS: M
FDA: F
HRSA: H
IHS: I
NIH: N
PSC: P
SAMHSA: S

(3) The three-digit numeric identification code assigned by ASFR/OGAPA/DA to the contracting office within the servicing agency.

(4) A four-digit fiscal year designation (e.g., 2009, 2010).

(5) A five-digit alphanumeric tracking number, the content of which is determined by the contracting office within the servicing agency.

(6) A one-digit code describing the type of contract action. For example, the National Cancer Institute, NIH, may number its first contract for fiscal year 2009 as HHSN261200900001C. (*Note:* When more than one code may apply in a specific situation, or for additional codes, refer to the DCIS Users' Manual or consult with the cognizant DCIS coordinator/focal point for guidance on which code governs.):

A Commercial Item Acquisitions (including purchases using simplified acquisition procedures in accordance with the FAR subpart 13.5 Test program)
C New Definitive Contract
P Purchases using simplified acquisition procedures (other than commercial items)
I IDC
O BOA
B BPA
F Facilities Contract
U Contracts placed with or through other Government departments, GSA contracts, or against mandatory source contracts such as AbilityOne and Federal Prison Industries (UNICOR)
L Lease Agreement
W Government-wide Acquisition Contract (GWAC)
E Letter Contract
G Federal Supply Schedule
M Micro-purchase
Q Multi-agency contract

(c) *Numbering system for orders*. The Contracting Officer shall assign order numbers (e.g., task order numbers) to orders issued under contracts. The order number shall be up to a seventeen-digit number consisting of the following:

(1) The three-digit identification code (HHS) of the Department.

(2) A one-digit numeric identification code of the servicing agency:

AHRQ: A
ASPR/OAMCG: O
CDC: D
CMS: M
FDA: F
HRSA: H

IHS: I
NIH: N
PSC: P
SAMHSA: S

(3) The three-digit numeric identification code assigned by ASFR/OGAPA/DA to the contracting office within the servicing agency.

(4) An alphanumeric tracking number, up to ten characters, the content of which is determined by the contracting office within the servicing agency.

(d) *Numbering system for solicitations.* The HCA is responsible for developing a numbering system for solicitations listed in paragraphs (a)(3) and (a)(4) of this section.

(e) *Assignment of identification codes.* ASFR/OGAPA/DA shall assign each contracting office a three-digit identification code. HCAs shall request from ASFR/OGAPA/DA the assignment of codes for newly established contracting offices. A listing of the contracting office identification codes currently in use is contained in the DCIS Users' Manual, available at *http://dcis.hhs.gov.*

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

Subpart 304.71—Review and Approval of Proposed Contract Actions

304.7100 Policy.

(a) The HCA (non-delegable) shall establish review and approval procedures for proposed contract actions to ensure that—

(1) Contractual documents are in conformance with law, established policies and procedures, and sound business practices;

(2) Contract awards properly reflect the mutual understanding of the parties; and

(3) The Contracting Officer is informed of deficiencies and items of questionable acceptability, and takes corrective action.

(b) The HCA shall designate acquisition officials to serve as reviewers. Each HCA shall establish the criteria for determining which contracts to review.

(c) Officials assigned responsibility for review and approval of contract actions shall possess qualifications in the field of acquisition commensurate with the level of review performed. However, if an official is to serve as the Contracting Officer and sign the contractual document, an appropriate official at least one level above the Contracting Officer shall perform the review and approval function.

(d) The Contracting Officer shall review all contractual documents, regardless of dollar value, prior to award to ensure the requirements of paragraph (a) of this section are met.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 305—PUBLICIZING CONTRACT ACTIONS

Subpart 305.2—Synopsis of Proposed Contract Actions

Sec.
305.202 Exceptions.
305.205 Special situations.

Subpart 305.3—Synopses of Contract Awards

305.303 Announcement of contract awards.

Subpart 305.5—Paid Advertisements

305.502 Authority.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 305.2—Synopsis of Proposed Contract Actions

305.202 Exceptions.

(b) When the Contracting Officer deems an advance notice is not appropriate or reasonable, the Contracting Officer shall prepare a memorandum citing all pertinent facts and details and send it through appropriate acquisition channels, including the HCA, to Associate DAS for Acquisition requesting an exception to synopsizing. The Associate DAS for Acquisition shall review the request and decide whether an exception is appropriate and reasonable. If it is, the Associate DAS for Acquisition shall take the necessary coordinating actions required by *FAR 5.202(b)*. ASFR/OGAPA/DA shall promptly notify the contracting office of the Associate DAS for Acquisition's determination on the request.

305.205 Special situations.

(a) An OPDIV may issue an advance notice, entitled ''Research and Development Sources Sought,'' in Federal Business Opportunities (FedBizOpps), in accordance with the requirements of *FAR 5.205(a)*. The primary purpose of an R & D Sources Sought notice is to identify all potential sources, regardless of organizational type and size classification, and determine their capabilities to fulfill a potential Government requirement. The notice is not intended to solicit technical, scientific, or business information for project planning purposes regarding existing or possible solutions. In the latter instance, a Request for Information (RFI) may be used—*see FAR 15.201(e)* and *315.201(e)*.

(1) When using an R & D Sources Sought notice, an OPDIV shall not request that potential sources provide more than the minimum information necessary—*see FAR 10.001(b)*, to determine whether they have the apparent capability to perform a requirement and, therefore, whether they should be included in any future competition. The notice and the information received shall not be used to determine how well respondents can perform a requirement, which can only be evaluated in response to a solicitation. Accordingly, the notice shall not be used to—

(i) Obtain capability statements that are evaluated and determined acceptable or unacceptable;

(ii) Require cost/price proposals or detailed technical solutions;

(iii) Identify a prospective sole source; or

(iv) Exclude small business concerns.

(2) While not the primary intent of an R & D Sources Sought notice, in addition to seeking information regarding all potential qualified R & D sources, the notice may request that respondents provide information regarding their organizational size classification. For example, the notice may ask respondents to identify whether they are small businesses; Historically Underutilized Business (HUB) Zone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; veteran-owned small businesses; woman-owned small businesses; or small disadvantaged businesses in order to determine the appropriate acquisition method, including whether a set-aside is possible. However, such a

notice shall not be used solely to determine the size classification of respondents for a proposed R & D acquisition. In such instances, a ''Small Business Sources Sought'' notice may be used (*see 319.202–2)*, in lieu of the procedures in this section.

(3) OPDIVs shall follow the standard HHS instructions for completing an R & D Sources Sought notice. The template for the notice is available on the ASFR/OGAPA/DA Internet Web site. The Contracting Officer shall post the notice in FedBizOpps by selecting and completing a Sources Sought notice, accessible on the FedBizOpps ''Notices'' page at: *http://www.fedbizopps.gov*. Additional information may be included in the notice in accordance with OPDIV procedures. The Contracting Officer shall document, in the form of a memorandum to the file, the results of the review by technical personnel of information submitted in response to the notice, including whether each respondent appears to be capable of performing the requirement. The Contracting Officer shall attach a copy of the analysis provided by the technical personnel to the memorandum.

(4) In instances where a sufficient number of sources has not been identified to compete for a non-R & D project, an OPDIV may use the procedures specified in *310.001*, including the issuance of a ''Sources Sought'' notice, as appropriate, in lieu of the procedures in this section.

Subpart 305.3—Synopses of Contract Awards

305.303 Announcement of contract awards.

(a) *Public Announcement*. The Contracting Officer shall report awards over $3.5 million, not otherwise exempt under FAR 5.303, to the Office of the Assistant Secretary for Legislation (OASL) (Congressional Liaison). The Contracting Officer shall e-mail a copy of the contract or award document face page to *grantfax@hhs.gov* prior to the day of award or in sufficient time to allow OASL to make an announcement by 5 p.m. Washington, DC time on the day of award.

[75 FR 21510, Apr. 26, 2010]

Subpart 305.5—Paid Advertisements

305.502 Authority.

The Contracting Officer may advertise or place notices in newspapers and periodicals to announce that the contracting office is seeking proposals, quotations, or bids, as appropriate.

PART 306—COMPETITION REQUIREMENTS

Subpart 306.2—Full and Open Competition After Exclusion of Sources

Sec.
306.202 Establishing or maintaining alternative sources.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.
306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
306.302–7 Public interest.
306.303 Justifications.
306.303–1 Requirements.
306.304 Approval of the justification.

Subpart 306.5—Competition Advocates

306.501 Requirement.
306.502 Duties and responsibilities.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 306.2—Full and Open Competition After Exclusion of Sources

306.202 Establishing or maintaining alternative sources.

(a) The reference to the agency head in *FAR 6.202 (a)* shall mean the appropriate Competition Advocate (CA) cited in *306.501*.

(b)(1) The Contracting Officer shall prepare the required determination and

findings (D & F) based on the data provided by program personnel. The appropriate CA (non-delegable) shall sign the D & F.

Subpart 306.3—Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.

306.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a)(2)(iv) Follow-on contracts for the continuation of R & D studies on long-term social and health programs, research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in fulfilling HHS' or the OPDIV's requirements.

(b) *Application*.

(5) when the head of the sponsoring program office has determined that the activity must acquire only specified makes or models of technical equipment or parts to meet the activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available. (NOTE: This criterion is limited to testing and evaluation purposes only and not for initial outfitting or repetitive acquisitions. Project Officers shall support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

306.302–7 Public interest.

(a) *Authority*.

(2) Agency head, in this instance, means the Secretary.

(c) *Limitations*. The Contracting Officer shall prepare a written request for approval and provide it through appropriate acquisition channels, including the HCA and Associate DAS for Acquisition, to the Secretary. The request shall include a D & F for the Secretary's signature that contains all pertinent information to support the justification for exercising the exemption to competition and a letter for the Secretary's signature notifying Congress of the determination to award a contract under the authority of 41 U.S.C. 253(c)(7).

306.303 Justifications.

306.303–1 Requirements.

(b) The responsible Program Office must provide a written justification whenever it requests that goods or services be acquired without obtaining full and open competition. The justification must be submitted with the AP or other acquisition request document—*see* Subpart *307.71*. The Project Officer has responsibility for preparing the justification with assistance, as necessary, from the Contracting Officer.

(1) Justifications for acquisitions at or below the simplified acquisition threshold may be in the form of a paragraph or paragraphs contained in the requisition or other acquisition request document. Justifications for acquisitions in excess of the simplified acquisition threshold shall be in the form of a separate, self-contained document, prepared in accordance with *FAR 6.303* and *306.303*, and titled ''Justification for Other Than Full and Open Competition'' (JOFOC). HHS requires use of a standard format for a JOFOC. The template for the justification is available on the ASFR/OGAPA/DA Internet Web site. Additional information may be included in the JOFOC template in accordance with OPDIV procedures.

(2) Regardless of the dollar amount of the acquisition, justifications shall—

(i) Fully describe what is to be acquired;

(ii) Provide a specific explanation of why it is not feasible to obtain full and open competition;

(iii) Be supported by verifiable facts, rather than untested or unsubstantiated opinions or conclusions; and

(iv) Be written in a manner to permit an individual without technical knowledge of the requirement to understand the supporting rationale.

(3) Preliminary arrangements with, or verbal or written commitments to, a proposed sole-source contractor shall be avoided given the statutory requirement to obtain full and open competition to the maximum extent practicable.

(4) Justifications for orders to be placed under FSS contracts that limit consideration of contractors shall comply with *FAR 8.405–6* and *308.405–6*.

306.304 Approval of the justification.

Certification, concurrence, and approval requirements. The Project Officer, the Project Officer's immediate supervisor, the head of the sponsoring program office, and the Contracting Officer shall certify that the justification is accurate and complete by signing the JOFOC. For acquisitions in the dollar amount cited in *FAR 6.304(a)(2) through (a)(4)*, the CCO, if applicable, and the HCA shall indicate their review of, and concurrence with, the justification by signing the JOFOC.

(a) The approving officials for JOFOCs are as follows:

(1) The Contracting Officer shall exercise this approval authority unless a higher approval level is required by OPDIV procedures.

(2) The CAs are listed in *306.501*. This approval authority is not delegable.

(3) The CA shall exercise this approval authority, except where the individual designated as the CA does not meet the requirements of *FAR 6.304 (a)(3)(ii)*. This approval authority is not delegable.

(4) HHS' SPE is the Associate DAS for Acquisition.

(c) A class justification shall be processed in the same manner as an individual justification. A class justification may consist of contracts/orders for the same or related supplies and services or other contract/order actions that require essentially identical justifications.

Subpart 306.5—Competition Advocates

306.501 Requirement.

The HHS CA is the Director, Strategic Acquisition Service, PSC. The CAs for each of HHS' contracting activities are as follows:

AHRQ: Director, Office of Performance Accountability, Resources and Technology
ASPR/OAMCG: Chief of Acquisition Policy
CDC: Chief Information Officer
CMS: Chief Operating Officer
FDA: Deputy Commissioner for Administration
HRSA: Associate Administrator, Office of Operations
IHS: Director, Office of Management Services
NIH: Senior Scientific Advisor for Extramural Research, Office of Extramural Research (R&D) and Senior Advisor to the Director (other than R&D)
PSC: Director, Strategic Acquisition Service
SAMHSA: Executive Officer

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

306.502 Duties and responsibilities.

(a) Each OPDIV CA shall prepare an annual Competition Advocate Report (CAR), covering the prior fiscal year, in accordance with the requirements of *FAR 6.502(b)(2)* and *306.502(b)*, and provide it to the HHS CA not later than November 16 of each year or the next business day, if the due date falls on a non-business day. NIH's two CAs shall prepare and sign a joint report covering their respective areas of responsibility.

(b) HHS requires that each CAR be prepared in a standard format. The template for the report is available on the ASFR/OGAPA/DA Internet Web site. As long as the standard headings are included and required information is addressed, the OPDIV may include additional information in accordance with OPDIV procedures.

(1) The CAR shall be based on information and data for all acquisitions that exceed the micro-purchase threshold for the applicable fiscal year, unless otherwise noted in the standard format.

(2) Each OPDIV CA shall obtain the information and data needed for preparation of the CAR from the responsible HCA and/or the CCO, as appropriate, who shall assist the CA in preparing the CAR.

(3) Prior to forwarding the CAR to the HHS CA, each OPDIV CA shall provide the CAR to the responsible HCA, who shall review and approve it for accuracy and completeness.

(c) The HHS CA shall consolidate all OPDIV CARs and provide an HHS-wide CAR that addresses all requirements of *FAR 6.502(b)* to the HHS SPE and the CAO by December 20 of each year or the next business day, if the due date falls on a non-business day.

PART 307—ACQUISITION PLANNING

Subpart 307.1—Acquisition Planning

Sec.
307.104 General procedures.
307.104–70 Acquisition strategy.
307.104–71 Purpose and timing.
307.105 Contents of written acquisition plans.
307.108–70 Telecommuting of contractor employees.

Subpart 307.70—Considerations in Selecting an Award Instrument.

307.7000 Scope of subpart.
307.7001 Distinction between acquisition and assistance.
307.7002 Procedures.

Subpart 307.71—Acquisition Plan.

307.7100 Scope of subpart.
307.7101 Policy.
307.7102 Content.
307.7103 Format.
307.7104 Review and certification.
307.7105 Transmittal.
307.7106 Acquisition milestones.
307.7107 Responsibilities.
307.7108 Statement of work.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 307.1—Acquisition Planning

307.104 General procedures.

(a) Each contracting activity shall prepare an Annual Acquisition Plan (AAP) as far in advance of each fiscal year as possible, in accordance with the following:

(1) The AAP shall contain all anticipated acquisition actions for the coming fiscal year that exceed the simplified acquisition threshold, including new acquisitions and contract/order modifications. The AAP must include—

(i) The aggregate dollars planned for simplified acquisitions by quarter;

(ii) Any long lead-time acquisitions that will be awarded in future fiscal years (*see* paragraph (c) below); and

(iii) Proposed multi-agency and intra-agency contracts—*see 317.70*.

(2) The HCA or the CCO, as appropriate, shall prepare the AAP and obtain the information needed for its preparation from the responsible program planning/budget office and/or the program offices.

(3) Contracting activities shall use the AAP for reporting purposes and workload scheduling and monitoring.

(4) The HCA/CCO and Small Business Specialist (SBS) in the Office of Small and Disadvantaged Business Utilization (OSDBU) shall review the AAP at least quarterly, with input from the cognizant program office, and modify it, as appropriate, during the fiscal year, with updated information, particularly regarding the specific acquisition method the contracting activity plans to use.

(5) HHS requires use of a standard format for an AAP. The template for the plan is available on the ASFR/OGAPA/DA Internet Web site. For the data elements specified in the AAP format, the HCA/CCO may include information in addition to that required by the standard instructions accompanying the format.

(b) As early as possible following completion of the AAP, the Contracting Officer shall initiate discussions with the assigned Project Officer, in consultation with the OSDBU SBS, for each action that exceeds the simplified acquisition threshold. As appropriate, the discussions shall include—

(1) Determining the intended acquisition strategy and contract/order type, including the use of options;

(2) Reviewing the SOW, if available, for adequacy and ensuring that a PWS is used for services, where practicable;

(3) Evaluating the potential for, and maximizing the use of, competitive procedures;

(4) Performing market research, identifying potential sources, and determining set-aside potential and small business subcontracting opportunities;

(5) Assessing the availability of commercial items;

(6) Determining required clearances/approvals and supporting documentation; and

(7) Preparing an acquisition milestone schedule;

(8) Determining the best multi- or intra-agency contracting activity to assist in awarding a contract on the requiring organization's behalf, if applicable; and

(9) Determining in the case of direct ordering that the chosen acquisition vehicle is the best way to obtain the required product or service, if a vehicle other than those listed in *317.7002(b)* is proposed.

(c) The HCA or designee (not lower than the CCO) shall establish standard lead-times for processing various types of acquisitions and applicable fiscal year deadlines for receipt of requirements to allow for well-planned and timely awards. The Project Officer shall initiate planning, to the extent possible, for certain requirements, such as major capital IT investments, major capital construction investments, and R & D projects that require peer review, at least 24 months before planned award, given the clearance/approval requirements and lead-time required for such complex acquisitions.

(d) The outcome of the discussions referenced in paragraph (b) above shall be an agreement concerning the acquisition approach and documentation required. For those actions that require development of a written AP—*see 307.7101*, for which the Project Officer has ultimate responsibility, these discussions shall also result in an agreement concerning—

(1) Which elements of the AP the Contracting Officer will assist the Project Officer in preparing; and

(2) The date (as specified in the milestone schedule) the Project Officer will provide the AP to the CCO or designee.

307.104–70 Acquisition strategy.

Program and Project Managers responsible for major IT capital investments (and for any other investments designated by the HHS CIO, DASFMP, the CAO, or the cognizant HCA) shall prepare an acquisition strategy using the HHS acquisition strategy template. The template for the acquisition strategy is available on the ASFR/OGAPA/DA Internet Web site. Program and Project Managers must initiate the acquisition strategy for major IT capital investments as part of the planned investment's business case, usually during the Enterprise Performance Life Cycle concept phase.

307.104–71 Purpose and timing.

(a) The purpose of an acquisition strategy is to describe the overall approach for acquiring capabilities needed to fulfill investment/programmatic objectives. Acquisition strategy development requires identification of issues and risks that might impact an acquisition(s) to allow early action to eliminate or mitigate the issues and risks.

(b) An acquisition strategy differs from an AP with respect to the timing of its development and the level of detail required.

(1) An acquisition strategy is established at the inception (concept phase) of an investment/acquisition to support the business case, identify and mitigate risks, and begin the acquisition planning process. An acquisition strategy addresses the major issues surrounding business objectives, competitive forces, and various risks that need to be considered.

(2) An acquisition strategy is a living document used throughout the investment's life-cycle. It should be continuously updated with the active involvement of the Program or Project Manager and the Contracting Officer at appropriate points, as plans for the investment/acquisition mature. An acquisition strategy ultimately will result in an AP—*see 307.71*.

(3) An AP, which is required to support proposed acquisitions expected to exceed $500,000 (inclusive of options, with certain exceptions)—*see 307.7101*, is developed closer to the time of solicitation. The AP addresses not only those issues in the acquisition strategy, but also the tactical details of how the acquisition will be executed.

307.105 Contents of written acquisition plans.

FAR 7.105 specifies the content requirements of a written AP. Subpart *307.71* incorporates and supplements those requirements.

307.108–70 Telecommuting of contractor employees.

(a) SOWs/PWSs shall permit offerors or contractors to specify their own place(s) of performance (hence authorize their employees to telecommute), except as follows:

(1) The Project Officer may restrict place of performance (hence restrict an offeror's or contractor's telecommuting) for any part of an SOW/PWS, after determining that the work or any portion thereof must be performed at a specified place of performance; or security would be compromised. The Project Officer must document this determination in writing and send a copy of the determination, along with the SOW/PWS, to the Contracting Officer. The Project Officer must also address in an HHS AP (or other acquisition request document) any performance requirements or security considerations that restrict place of performance—*see 307.71*.

(2) In accordance with *FAR 7.108(a)*, if the Contracting Officer concurs with the Project Officer's determination in (a)(1) above, then the Contracting Officer must sign the Project Officer's determination; include it in the official contract file; and specify any prohibition against telecommuting in the solicitation and resultant contract.

(3) In accordance with *FAR 7.108(a)*, if the Contracting Officer decides to restrict a place of performance that the Project Officer did not restrict, then the Contracting Officer must document in writing the determination to preclude telecommuting in part or in whole; include the determination in the official contract file; and specify any prohibition against telecommuting in the solicitation and resultant contract.

(b) If the Contracting Officer disagrees with the Project Officer's determination in (a)(1) above, then the Contracting Officer shall return both the SOW/PWS and determination to the Project Officer for further consideration.

(c) The Contracting Officer shall ensure that authorized telecommuting of contractor employees does not result in increased cost or price to the Government.

Subpart 307.70—Considerations in Selecting an Award Instrument

307.7000 Scope of subpart.

This subpart provides guidance on the appropriate selection of award instruments to fulfill program needs consistent with 31 U.S.C. 6301–6308. This subpart explains the use of the contract as the award instrument for acquisition relationships and a grant or cooperative agreement as instruments for financial assistance relationships.

307.7001 Distinction between acquisition and assistance.

(a) 31 U.S.C. 6301–6308 requires the use of contracts to acquire property or services for the direct benefit or use of the Government and grants or cooperative agreements to transfer money, property, services, or anything of value to eligible entities to accomplish a public purpose of support or stimulation authorized by Federal statute.

(b) OPDIVs shall use a contract as the legal instrument to reflect a relationship between the Government and an entity whenever the—

(1) Principal purpose of the instrument is the acquisition, by purchase, lease, or barter, of property or services for the direct benefit or use of the Government; or

(2) Government determines in a certain situation that specific needs can be satisfied best by using the acquisition process. However, this authority does not permit circumventing the criteria for use of acquisition or assistance instruments. Use of this authority is restricted to extraordinary circumstances and requires the Associate DAS for Acquisition's prior approval.

(c) OPDIVs shall use a grant or cooperative agreement as the legal instrument to reflect a relationship between the Government and an entity whenever the principal purpose of the relationship is the transfer of money, property, services, or anything of value to accomplish a public purpose of support or stimulation authorized by Federal statute.

(1) OPDIVs shall use a grant when no substantial programmatic involvement is anticipated between the Government and the recipient during performance of the contemplated activity.

(2) OPDIVs shall use a cooperative agreement when substantial programmatic involvement is anticipated between the Government and the recipient during performance of the contemplated activity.

(d) As a general rule, OPDIVs shall use contracts for the following purposes:

(1) Evaluation (including research of an evaluative nature) of the performance of Government programs or projects or grantee activity initiated by the funding agency for its direct benefit or use.

(2) Technical assistance rendered to the Government, or on behalf of the Government, to any third party, including those receiving grants or cooperative agreements.

(3) Surveys, studies, and research which provide specific information desired by the Government for its direct activities, or for dissemination to the public.

(4) Consulting services or professional services of all kinds if provided to the Government or, on behalf of the Government, to any third party.

(5) Training projects where the Government selects the individuals or specific groups whose members are to be trained or specifies the content of the curriculum (not applicable to fellowship awards).

(6) Production of publications or audiovisual materials the Government requires primarily for the conduct of its direct operations.

(7) Design or development of items for Government use or pursuant to agency definition or specifications.

(8) Conferences conducted on the Government's behalf.

(9) Generation of management information or other data for Government use.

307.7002 Procedures.

(a) OPDIV program officials shall use existing budget and program planning procedures to propose new activities and major changes in ongoing programs. OPDIV program officials shall meet with the HCA and the Chief Grants Management Officer, or their designees, as necessary, to determine whether award is to be made through the acquisition or assistance process. This determination shall normally occur prior to the time when the AAP is reviewed and approved so that the AAP will reflect all known proposed contract actions. The HCA shall fully document a shift from one award instrument to another in the appropriate files to show a fundamental change in program purpose that unequivocally justifies the rationale for the shift.

(b) The Contracting Officer shall confirm the appropriateness of the use of the contract instrument when reviewing the AP or other acquisition request document.

(c) OPDIVs shall ensure that the choice of instrument is in accordance with 31 U.S.C. 6301–6308 and applicable HHS policies. If, however, there are major individual transactions or programs which contain elements of both acquisition and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other instrument, OPDIVs shall obtain guidance from ASFR/OGAPA/DA, through appropriate acquisition channels, including the HCA, before proceeding with a determination.

(d) Any public notice, program announcement, solicitation, or request for applications or proposals, or request for quotations shall indicate whether the intended relationship will be one of acquisition or financial assistance and specify the award instrument the OPDIV will use.

Subpart 307.71—Acquisition Plan

307.7100 Scope of subpart.

FAR 7.102 requires acquisition planning for all acquisitions. This subpart establishes: (a) when a written AP is required; (b) its contents and format; and (c) the need for review of the AP to certify that it is accurate, complete, and in the proper format. This subpart also establishes the documentation requirements for those acquisitions not requiring an AP.

307.7101 Policy.

(a) An AP is required for all acquisitions, to be placed by an HHS contracting office, expected to exceed $500,000 (inclusive of options) with the following exceptions:

(1) Letter contracts.

(2) Unsolicited proposals.

(3) Regulated utility services available from only one source.

(4) Proposals under the Small Business Innovative Research (SBIR) and

Small Business Technology Transfer (STTR) programs.

(5) Acquisition of commercial items/services—*see FAR 2.101*, including orders placed under FSS contracts meeting the definition of a commercial item/service, and not exceeding $5.5 million [$11 million for acquisitions as described in FAR *13.500(e)*].

(6) Task orders or delivery orders of any dollar amount placed under—

(i) An IDIQ contract, other than a GWAC; or

(ii) A BPA, provided there is an approved acquisition planning document for the original action, and there is no significant deviation from that plan.

(7) Orders of any dollar amount placed under HHS-wide strategic sourcing vehicles.

(8) Contract/order modifications that—

(i) Exercise options;

(ii) Only provide additional funding; or

(iii) Make changes authorized by the Changes clause.

(9) Assisted acquisitions processed pursuant to an interagency agreement. However, the OPDIV must comply with the requirements specified in *317.5* Interagency Agreements under the Economy Act and *317.70*, Multi-agency and Intra-agency Contracts.

(b) In urgent or other justifiable cases, such as an emergency acquisition—*see FAR Part 18*, the HCA may waive, in writing, the requirement for completion of an AP. An HCA shall not approve a waiver request based on the lack of advance planning.

(1) The Project Officer, the Project Officer's immediate supervisor, the head of the sponsoring program office, the Contracting Officer, and other signatories shall sign the waiver request in accordance with OPDIV policies. In OPDIVs where a CCO(s) is designated, as defined in *302.101*, the cognizant CCO also shall sign the waiver request.

(2) HHS has established a standard format for preparing an AP waiver request. The template for the waiver request is available on the ASFR/OGAPA/DA Internet Web site. Contracting activities shall use this format when requesting a waiver.

(3) The OPDIV shall provide ASFR/OGAPA/DA a copy of any approved waiver request within 5 business days after HCA approval.

(c) For those acquisitions not requiring an AP, other than assisted acquisitions processed pursuant to an interagency agreement—*see 317.5* and *317.70*, the Project Officer shall provide an acquisition request document (e.g., memorandum, requisition, or other form of transmittal) to the CCO or designee, requesting completion of the required action. The request must include, as applicable: a SOW/PWS (including deliverables and reporting requirements); a certified funding document; source selection strategy and criteria; necessary clearances, approvals, and justifications (e.g., a JOFOC); a milestone schedule; and an independent Government cost estimate.) In addition, OPDIVs shall use the content requirements of the AP as a reference in determining what other information and documentation is necessary to support the intended acquisition. Alternatively, OPDIVs may prescribe use of an AP for acquisitions excepted under 307.7101(a)(1) through (a)(8).

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

307.7102 Content.

In accordance with *307.105*, the *FAR*, HHSAR, and other Federal requirements that OPDIVs must consider in developing an AP, as well as its format, are stipulated in *307.7103*. An AP shall address each applicable element. As indicated in the instructions, elements that are not applicable to an individual acquisition shall be marked ''N/A.'' The scope and depth of an AP may vary depending on the nature, complexity, and estimated cost of the proposed acquisition. As a result of new or revised FAR requirements or other Federal directives, the—

(a) HCA or designee may make any needed interim changes to the AP;

(b) HCA or designee shall notify ASFR/OGAPA/DA of the need to revise the AP; and

(c) ASFR/OGAPA/DA shall update the AP, which would supersede any interim HCA (or designee) changes made

to the acquisition plan for future acquisitions.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

307.7103 Format.

(a) HHS has established a standard format for preparing an AP. The template for the AP is available on the ASFR/OGAPA/DA Internet Web site.

(b) OPDIVs may use the prescribed format without modification or use it as a guideline, as long as the format used by the OPDIV complies with the requirements specified in subparagraphs (c) and (d) below.

(c) An AP must consist of seven (7) parts with standard headings, as follows:

Part I Transmittal and Approval Form.
Part II Summary Sheet.
Part III Project Considerations and Information.
Part IV Clearance/Approval Checklist.
Part V Acquisition Milestone Schedule.
Part VI Independent Government Cost Estimate.
Part VII Attachments.

(d) Within each of the seven parts, there are required components that an OPDIV cannot modify and specific areas where OPDIVs can make changes. The table in the *Requirements and Responsibilities* section of the AP cites the titles, paragraph/subparagraph headings, narrative, and other requirements that must appear in each part of an AP in the specified format, as well as permissible modifications.

307.7104 Review and certification.

Before the Project Officer transmits the AP to the CCO or designee—*see 307.7105*, the head of the sponsoring program office (typically a Division Director or equivalent), Project Officer, Funds Certification Official, Contracting Officer, and other signatories in accordance with OPDIV policies, shall review the AP and certify that it provides all required information in the prescribed format and the following:

(a) Vague and ambiguous language has been eliminated.

(b) A thorough technical review of the SOW/PWS has been completed.

(c) The project is structured by phases or tasks, as appropriate.

(d) Methods are available to assess the contractor's performance.

(e) The acquisition mechanism is appropriate—*i.e.*, the principal purpose of the project is to acquire supplies or services for the direct benefit or use of the Government.

(f) The planned obligation of appropriated funds for the project satisfies a *bona fide* need of the requiring office arising in the fiscal year for which the appropriation was made.

307.7105 Transmittal.

The Project Officer shall convey the signed AP to the CCO or designee by providing a completed Part I—Transmittal and Approval Form, with other parts of the AP attached, no later than the date agreed to in the acquisition milestone schedule, unless the officials establish a different date by mutual agreement.

307.7106 Acquisition milestones.

The Contracting Officer shall retain the acquisition milestone schedule in the contract file and update/revise it to track progress of the acquisition. The milestone schedule signatories (*see* the *Requirements and Responsibilities* section of the AP—Part V of the table) shall mutually agree to any revisions to the milestone dates that will impact meeting the scheduled award date. Milestone schedule signatories shall report a failure to meet established milestones to a higher level official in accordance with OPDIV procedures.

307.7107 Responsibilities.

The following table summarizes the responsibilities of the various organizations and officials for acquisition planning:

Acquisition planning	Responsible organization/official	HHSAR reference
Make necessary interim changes to the AP and notify ASFR/OGAPA/DA of changes needed.	OPDIV HCA or designee	307.7102.

Acquisition planning	Responsible organization/official	HHSAR reference
Update the AP to reflect new or revised FAR and other Federal directives.	ASFR/OGAPA/DA	307.7102.
Prepare the AAP and update it quarterly, as appropriate.	OPDIV–HCA/CCO	307.104, subparagraph (a).
Establish standard acquisition lead-times and deadlines for receipt of requirements for award in an applicable fiscal year.	OPDIV–HCA/CCO	307.104, subparagraph (d).
Identify and plan requirements, particularly complex, long lead-time acquisitions, well in advance of the fiscal year in which they are to be awarded.	OPDIV–Project Officer	307.104, subparagraph (d).
(i) Participate in acquisition planning; (ii) prepare the AP; and (iii) provide the AP to the Contracting Officer.	OPDIV–Project Officer	(i) 307.104, subparagraph (c); (ii) 307.104, subparagraph (e); and (iii) 307.7105.
(i) Participate in acquisition planning; and (ii) assist the Project Officer in AP preparation.	OPDIV–Contracting Officer	(i) 307.104, subparagraph (c); (ii) 307.104, subparagraph (e).
Waive requirement for development of an AP when justified.	OPDIV–HCA	307.7101, subparagraph (b).
Review and certify that an AP is complete, accurate, and in the proper format.	OPDIV–Head of the Sponsoring Program Office, Project Officer, Funds Certification Official, Contracting Officer, and other signatories in accordance with OPDIV policies.	307.7104
Meet established acquisition milestone dates	OPDIV–Project Officer and Contracting Officer.	307.7106.

307.7108 Statement of work.

(a) *General*. An SOW describes the work or services a contractor is to perform in reaching an end result without describing the method that the contractor shall use, unless the method of performance is critical or required in order to obtain successful performance. An SOW shall be clear and concise; completely define the responsibilities of both the contractor and the Government; and be worded to make misinterpretation virtually impossible.

(b) *Term (level of effort)form and completion form SOWs*. Term-form (level of effort) SOWs essentially require the furnishing of technical effort, which may include a report thereof, while completion-form SOWs require development of tangible items designed to meet specific performance and/or design characteristics—*see FAR 16.306(d)* for this distinction.

(1) Term (or level of effort). A term or level of effort-form SOW is appropriate for research where the objective is to discover the feasibility of later development or to gather general information. A term or level of effort-form SOW specifies that some number of labor hours be expended on a particular course of research or that a certain number of tests be run, without reference to any intended conclusion.

(2) Completion. A completion-form SOW is appropriate for development work where the feasibility of producing an end item is already known. A completion-form SOW may describe what is to be achieved through the contracted effort, such as development of new methods, new end items, or other tangible results.

(c) *Phasing*. Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently phased and often divided into stages of accomplishment, each of which the contractor must complete and the Contracting Officer approve before the contractor may proceed to the next phase or stage. Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluation of the report submitted, that will provide, at the earliest possible time, appropriate data for making decisions relative to future phases. A phased contract, such as one for an R & D or demonstration project,

may include stages of accomplishment. Within each phase, there may be a number of tasks that the SOW should include. When phases of work can be identified, the SOW shall provide for phasing and the solicitation shall require offerors to submit proposed costs by phases. The resultant contract shall reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phase, and require the written acceptance of each phase. The Contracting Officer shall not allow contractors to incur costs for phases that are dependent upon successful completion of earlier phases until the Contracting Officer provides written acceptance of the prior work.

(d) *Elements of the SOW*. The elements of the SOW may vary with the objective, complexity, size, and nature of the acquisition. In general, the SOW shall include the following:

(1) *Purpose of the project*. This includes a general description of the objectives of the project and the desired results.

(2) *Background information*. This includes a brief history of the project and the importance of the project to the overall program objectives.

(3) *A detailed description of the technical requirements*. The SOW shall provide sufficient detail to accurately reflect the Government's requirement. It shall state what is to be accomplished without prescribing the method the contractor is to use and shall include performance standards, if applicable. *See 307.104(b)(2)* and *FAR 37.602* for guidance on preparation of a PWS. An SOW may include tasks and subtasks. The degree of breakout depends on the size and complexity of the project. An SOW shall indicate whether the tasks are sequential or concurrent.

(4) *Reference material*. This includes an explanation of all reference material a contractor needs to carry out the project; the applicability of the reference material; and a statement as to where potential offerors can obtain the material.

(5) *Level of effort*. When a level of effort is necessary, the SOW shall specify the number and type of personnel required, if known, and the type and degree of expertise.

(6) *Special requirements (as applicable)*. This includes providing, in a separate section, any unusual or special contractual requirements that may affect performance. For example, the SOW shall specify separately the work requirements to implement information security management requirements—*see 339.71* for additional information.

(7) *Deliverables and reporting requirements*. This includes clearly and completely describing all deliverables and reports, including the time frame for completion, the format, and the required number of copies.

PART 308—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 308.4—Federal Supply Schedules

Sec.
308.404 Use of Federal Supply Schedules.
308.405–6 Limited source justification and approval.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 308.4—Federal Supply Schedules

308.404 Use of Federal Supply Schedules.

(f) Technical Evaluation. When conducting a technical evaluation of quotations or proposals received under *FAR Part 8*, the provisions of *315.305(a)(3)* apply.

308.405–6 Limited source justification and approval.

(g)(1) As required by *FAR 8.405–1* or *8.405–2*, the responsible program office must provide a written justification whenever it requests an acquisition under the FSS program that restricts consideration of the number of schedule contractors or to an item peculiar to one manufacturer. The justification must be submitted with the AP or other acquisition request document—*see 307.71*. The Project Officer has responsibility for preparing the justification with assistance, as necessary, from the Contracting Officer.

(i) Justifications for orders at or below the simplified acquisition

threshold may be in the form of a paragraph or paragraphs contained in the requisition or other acquisition request document. Justifications for orders in excess of the simplified acquisition threshold shall be in the form of a separate, self-contained document, prepared in accordance with *FAR 8.405–6(g)* and *308.405–6(g)*, and titled ''Limited Source Justification'' (LSJ). HHS requires use of a standard format for an LSJ. The template for the justification is available on the ASFR/OGAPA/DA Internet Web site. Additional information may be included in the LSJ template in accordance with OPDIV procedures.

(ii) Regardless of dollar amount of the acquisition, justifications shall—

(A) Fully describe what is to be acquired;

(B) Cite specific reasons that explain why it is necessary to restrict consideration of sources;

(C) Be supported by verifiable facts rather than untested or unsubstantiated opinions or conclusions; and

(D) Be written in a manner to permit an individual without technical knowledge of the requirement to understand the supporting rationale.

(iii) Preliminary arrangements with, or verbal or written commitments to, a proposed contractor shall be avoided given the requirement to obtain competition for FSS orders using the procedures in *FAR Subpart 8.4—see* also *FAR 6.102(d)(3)*.

(iv) Justifications for non-FSS orders to be awarded without full and open competition shall comply with *FAR 6.303* and *306.303*.

(h) *Justification approvals.*

Certification, concurrence, and approval requirements. The Project Officer, the Project Officer's immediate supervisor, the head of the sponsoring program office, and the Contracting Officer shall certify that the justification is accurate and complete by signing the LSJ. For acquisitions in the dollar amount cited in *FAR 8.405–6(h)(2) through (h)(4)*, the CCO, if applicable, and the HCA shall indicate their review of, and concurrence with, the justification by signing the LSJ. The approving officials for LSJs are as follows:

(1) The Contracting Officer shall exercise this approval authority unless a higher approval level is required by OPDIV procedures.

(2) The CAs are listed in *306.501*. This approval authority is not delegable.

(3) The CA shall exercise this approval authority, except where the individual designated as the competition advocate does not meet the requirements of *FAR 8.405–6(h)(3)(ii)*. This approval authority is not delegable.

(4) The HHS SPE is the Associate DAS for Acquisition.

PART 309—CONTRACTOR QUALIFICATIONS

Subpart 309.4—Debarment, Suspension, and Ineligibility

Sec.
309.403 Definitions.
309.404 List of parties excluded from Federal procurement and non-procurement programs.
309.405 Effect of listing.
309.406 Debarment.
309.406–3 Procedures.
309.407 Suspension.
309.407–3 Procedures.
309.470 Reporting of suspected causes for debarment or suspension or the taking of evasive actions.
309.470–1 Situations where reports are required.
309.470–2 Contents of reports.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 309.4—Debarment, Suspension, and Ineligibility

309.403 Definitions.

Acquiring agency's head or designee, as used in the *FAR*, means, unless otherwise stated in this subpart, the HCA. The HCA may make the required justifications or determinations and take the necessary actions specified in *FAR 9.405, 9.406 and 9.407*, only after obtaining the written approval of the debarring or suspending official, as appropriate.

Debarring official means the Deputy Assistant Secretary for Grants and Acquisition Policy and Accountability (DAS/GAPA).

Initiating official means the Contracting Officer, the HCA, the Associate DAS for Acquisition, or the Inspector General (IG).

Suspending official means the DAS/GAPA.

309.404 List of parties excluded from Federal procurement and non-procurement programs.

(c) The ASFR/OGAPA/DA shall perform the actions required by *FAR 9.404(c)*.

(4) The ASFR/OGAPA/DA shall maintain all documentation the initiating official submits to recommend the debarment or suspension action and all correspondence and other pertinent documentation generated during the review.

309.405 Effect of listing.

(a) The HCA (non-delegable) may, with the written concurrence of the debarring or suspending official, make the determinations referenced in *FAR 9.405(a)* regarding contracts.

(1) If a Contracting Officer considers it necessary to award a contract, or consent to a subcontract with a debarred or suspended contractor, the Contracting Officer shall prepare a determination, including all pertinent documentation, and submit it through appropriate acquisition channels to the HCA. The documentation shall include the date by which approval is required and a compelling reason for the proposed action. Compelling reasons for award of a contract or consent to a subcontract with a debarred or suspended contractor include the following:

(i) Only the cited contractor can provide the property or services.

(ii) The urgency of the requirement dictates that HHS conduct business with the cited contractor.

(2) If the HCA decides to approve the requested action, the HCA shall request the concurrence of the debarring or suspending official and, if given, shall inform the Contracting Officer in writing of the decision within the required time period.

309.406 Debarment.

309.406–3 Procedures.

(a) *Investigation and referral.* When an apparent cause for debarment becomes known, the initiating official shall prepare a report containing the information required by *309.470–2*, along with a written recommendation, and forward it through appropriate acquisition channels, including the HCA, to the Associate DAS for Acquisition in accordance with *309.470–1*. The debarring official shall initiate an investigation.

(b) *Decision making process.* The debarring official shall review the results of the investigation, if any, and make a written determination whether or not debarment procedures shall commence. The ASFR/OGAPA/DA shall promptly send a copy of the determination through appropriate acquisition channels to the initiating official and the Contracting Officer. If the debarring official determines that debarment procedures shall commence, the debarring official shall consult with OGC–GLD and then notify the contractor in accordance with *FAR 9.406–3(c)*. If the proposed action is not based on a conviction or judgment and the contractor's submission in response to the notice raises a genuine dispute over facts material to the proposed debarment, the debarring official shall arrange for fact-finding hearings and take the necessary action specified in *FAR 9.406–3(b)(2)*. The debarring official shall also ensure that written findings of facts are prepared and shall base the debarment decisions on the facts as found, after considering information and argument submitted by the contractor and any other information in the administrative record. The OGC–GLD shall represent HHS at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

309.407 Suspension.

309.407–3 Procedures.

(a) *Investigation and referral.* When an apparent cause for suspension becomes known, the initiating official shall prepare a report containing the information required by *309.470–2* along with a written recommendation and forward

it through appropriate acquisition channels, including the HCA, to the suspending official in accordance with *309.470–1*. The suspending official shall initiate an investigation.

(b) *Decision making process*. The suspending official shall review the results of the investigation, if any, and make a written determination whether or not suspension shall occur. ASFR/OGAPA/DA shall send a copy of the determination through appropriate acquisition channels to the initiating official and the Contracting Officer. If the suspending official determines that suspension is necessary, the suspending official shall consult with OGC–GLD and then notify the contractor in accordance with *FAR 9.407–3(c)*. If the action is not based on an indictment, and, subject to the provisions of *FAR 9.407–3(b) (2)*, the contractor's submission in response to the notice raises a genuine dispute over facts material to the suspension, the suspending official shall, after imposing the suspension, arrange for fact-finding hearings and take the necessary actions specified in *FAR 9.407–3(b)(2)*.

309.470 Reporting of suspected causes for debarment or suspension or the taking of evasive actions.

309.470–1 Situations where reports are required.

The Contracting Officer shall forward a report, incorporating the information required by *309.470–2*, through appropriate acquisition channels, including the HCA, to the Associate DAS for Acquisition whenever a contractor—

(a) Has committed, or is suspected of having committed, any of the acts described in *FAR 9.406–2* or *FAR 9.407–2;* or

(b) Is suspected of attempting to evade the prohibitions of debarment or suspension imposed under this subject, or any other comparable regulation, by changes of address, multiple addresses, formation of new companies, or by other devices.

309.470–2 Contents of reports.

The Contracting Officer shall coordinate each report prepared under *309.470–1* with OGC–GLD and include the following information, when available:

(a) Contractor name and address.

(b) Name of the principal officers, partners, owners, or managers.

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation.

(d) Description of the contract or contracts concerned, including the contract number and office identifying numbers or symbols; the amount of each contract; the amount paid to the contractor and the amount still due; and the percentage of work completed and to be completed.

(e) The status of vouchers.

(f) Whether contract funds have been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and, if so assigned, the name and address of the assignee and a copy of the assignment.

(g) Whether any other contracts are outstanding with the contractor or any affiliates, and, if so, the amount of the contracts, whether these funds have been assigned pursuant to the Assignment of Claims Act, as amended, (31 U.S.C. 3727, 41 U.S.C. 15), and the amounts paid or due on the contracts.

(h) A complete summary of all available pertinent evidence.

(i) A recommendation as to the continuation of current contracts.

(j) An estimate of damages, if any, sustained by the Government as a result of the contractor's action, including an explanation of the method used in making the estimate.

(k) The comments and recommendations of the Contracting Officer and statements indicating whether the contractor should be suspended or debarred, whether any limitations are necessary, and the period of any proposed debarment.

(l) As an enclosure, a copy of the contract(s) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation or a written summary of any information for which documentation is not available.

PART 310—MARKET RESEARCH

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

§ 310.001 Policy.

(a) OPDIVs are encouraged to conduct market research, to the maximum extent practicable, consistent with the urgency, complexity, and dollar value of a proposed acquisition, as well as their past experience with the same or similar requirements.

(3)(i) An OPDIV may issue an advance notice, entitled ''Sources Sought'' in FedBizOpps in accordance with the requirements of *FAR Part 5*, whenever a sufficient number of sources has not been identified to obtain adequate competition for a non-R & D project. The primary purpose of a Sources Sought notice is to identify all potential sources, regardless of organizational type and size classification, and determine their capabilities to fulfill a potential Government requirement. The notice is not intended to solicit technical, scientific, or business information for project planning purposes regarding existing or potential solutions. In the latter instance, an RFI may be used—*see FAR 15.201(e)* and *315.201(e)*.

(ii) When using a Sources Sought notice, an OPDIV shall not request that potential sources provide more than the minimum information necessary—*see FAR 10.001(b)*, to determine whether they have the apparent capability to perform a requirement and, therefore, whether they should be included in any future competition. The notice and the information received shall not be used to determine how well respondents can perform a requirement, which can only be evaluated in response to a solicitation. Accordingly, the notice shall not be used to—

(A) Obtain capability statements that are evaluated and determined acceptable or unacceptable;

(B) Require cost/price proposals or detailed technical solutions;

(C) Identify a prospective sole source; or

(D) Exclude small business concerns.

(iii) While not the primary intent of a Sources Sought notice, in addition to seeking information regarding all potential qualified sources, the notice may request that respondents provide information regarding their organizational size classification. For example, the notice may ask respondents to identify whether they are small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; veteran-owned small businesses; woman-owned small businesses; or small disadvantaged businesses in order to determine the appropriate acquisition method, including whether a set-aside is possible. However, such a notice shall not be used solely to determine the size classification of respondents for a proposed non-R & D acquisition. In such instances, a ''Small Business Sources Sought'' notice may be used—*see 319.202–2*, in lieu of the procedures in this section.

(iv) OPDIVs shall follow the standard HHS instructions for completing a Sources Sought notice. The Contracting Officer shall post the notice in FedBizOpps by selecting and completing a Sources Sought notice. The template for the notice is available on the ASFR/OGAPA/DA Internet Web site. Additional information may be included in the notice in accordance with OPDIV procedures. The Contracting Officer shall document, in the form of a memorandum to the file, the results of the review by technical personnel of information submitted in response to the notice, including whether each respondent appears to be capable of performing the requirement. The Contracting Officer shall attach a copy of the analysis provided by the technical personnel to the memorandum.

(v) In instances where a sufficient number of sources has not been identified to compete for an R & D project, OPDIVs may use the procedures specified in *305.205*, including the issuance of an ''R & D Sources Sought'' notice, as appropriate, in lieu of the procedures in this section.

[74 FR 62398, Nov. 27, 2009]

PART 311—DESCRIBING AGENCY NEEDS

Subpart 311.70—Section 508 Accessibility Standards

Sec.

311.7000 Defining electronic information technology requirements.

311.7001 Section 508 accessibility standards for HHS Web site content and communication materials.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 311.70—Section 508 Accessibility Standards

311.7000 Defining electronic information technology requirements.

HHS staff that define agency needs for EIT products and services, including EIT deliverables such as electronic documents and reports, and perform market research to meet those needs, shall document EIT requirements, identify the applicable Section 508 accessibility standards, and document the market research. OPDIVs may develop procedures for these activities, based on the level of agency investment and risk, and shall ensure any procedures developed are in conformance with *FAR Part 10*. Procedures for defining EIT requirements may, but are not required to, include the use of the Buy Accessible Wizard (*http://www.buyaccessible.gov*), managed by GSA, or other Federal agency tools.

311.7001 Section 508 accessibility standards for HHS Web site content and communications materials.

(a) Section 508 of the Rehabilitation Act of 1973 [29 U.S.C. 794(d)], as amended by the Workforce Investment Act of 1998, (Section 508) specifies the accessibility standards that apply to all new solicitations and new or existing contracts or orders, regardless of dollar amount, for communications products and services that require a contractor or consultant to produce content in any format that is specifically intended for publication on, or delivery via, an HHS-owned or -funded Web site.

(b) Accordingly, before forwarding a request to the contracting/ordering office for the acquisition of communications products and services, including content in any format, such as reports, documents, charts, posters, presentations (such as Microsoft PowerPoint), or video material that is specifically intended for publication on, or delivery via, an HHS-owned or -funded Web site, the Project Officer shall consult with the OPDIV/STAFF Division (DIV) Section 508 Official or Coordinator, as necessary, to determine the applicability of Section 508, identify applicable Section 508 accessibility standards, and resolve any related issues.

(c) Based on those discussions, the Project Officer shall provide a statement in the AP (or other acquisition request document)—*see 307.7101*, as to the applicability of Section 508. If Section 508 applies to an acquisition, the Project Officer shall include the following ''HHS Section 508 Accessibility Standards Notice'' language in a separate, clearly designated section of the SOW/PWS, and any additional information applicable to the acquisition's Section 508 accessibility standards [e.g., the list of applicable accessibility standards of the Architectural and Transportation Barriers Compliance Board (Access Board) Final Rule (36 CFR Part 1194)]. If an AP does not address these issues, and it appears an acquisition involves Section 508, or if the discussion of Section 508 applicability to the acquisition is inadequate or incomplete, the Contracting Officer shall request that the Project Officer modify the AP accordingly.

HHS SECTION 508 ACCESSIBILITY STANDARDS NOTICE (SEPTEMBER 2009)

This contract is subject to Section 508 of the Rehabilitation Act (the Act) of 1973 (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998, and the Architectural and Transportation Barriers Compliance Board (Access Board) Electronic and Information Accessibility Provisions (36 CFR Part 1194). Section 508 of the Act requires that, unless an exception applies, all communications products and services that require a contractor or consultant to produce content in any format that is specifically intended for publication on, or delivery via, a Federally owned or Federally funded Web site permit the following:

(1) Federal employees with disabilities to have access to and use information and data that is comparable to the access and use of information and data by Federal employees who are not individuals with disabilities.

(2) Members of the public with disabilities seeking information or services from a Federal agency to have access to and use of information and data that is comparable to the access and use of information and data by members of the public who are not individuals with disabilities.

NOTE: Information about Section 508 of the Act is available at *http://www.section508.gov/*. The complete text of Section 508 can be accessed at *http://www.access-board.gov/sec508/provisions.htm*.

Accordingly, regardless of format, all Web content or communications materials specifically produced for publication on, or delivery via, HHS Web sites, including text, audio, or video, under this contract shall conform to applicable Section 508 accessibility standards. Remediation of any materials that do not comply with the applicable accessibility standards of 36 CFR Part 1194 as set forth herein shall be the responsibility of the Contractor.

The following Section 508 accessibility standards apply to the content or communications material identified in this SOW or PWS:

NOTE: The Project Officer shall list the applicable accessibility standards of the Access Board Final Rule (36 CFR Part 1194) (e.g., ''36 CFR 1194.21(a)–(j).'' Most Web-based text and communication must meet the accessibility standards in 36 CFR 1194.22, ''Web-based intranet and Internet information and applications.'' Additionally, 36 CFR 1194.41, ''Information, documentation and support,'' and 36 CFR 1194.24 ''Video and multimedia products'' apply to all written, graphical, or broadcast video materials or products produced for HHS, including training. 36 CFR 1194.41(c) specifies that support services for products shall accommodate the communication needs of end-users with disabilities.

PART 312—ACQUISITION OF COMMERCIAL ITEMS

Subpart 312.1—Acquisition of Commercial Items—General

Sec.
312.101 Policy

Subpart 312.2—Special Requirements for the Acquisition of Commercial Items.

312.202(d) Market research and description of agency need.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 312.1—Acquisition of Commercial Items—General

312.101 Policy.

(a) It is HHS policy to leverage its buying power, reduce acquisition administrative costs, and develop long-term, mutually beneficial partnerships with best-in-class providers of products and services. Accordingly, HHS has implemented a Strategic Sourcing Program through which it awards BPAs or other contract vehicles to achieve savings for commercial items and services across HHS and make the acquisition process more efficient. OPDIVs shall use HHS' strategic sourcing vehicles to the maximum extent possible—*see* the HHS strategic sourcing portion of the ASFR/OGAPA/DA intranet site for further information.

Subpart 312.2—Special Requirements for the Acquisition of Commercial Items

312.202(d) Market research and description of agency need.

Whenever an OPDIV/STAFFDIV requires EIT products and services subject to Section 508 of the Rehabilitation Act of 1973, as amended, commercially available products and services shall be acquired to the maximum extent possible while ensuring Section 508 compliance. Consistent with paragraph 4.3.1 of the HHS Section 508 policy—*see* Section 508 policy on the HHS Office on Disability Web site, if products and services are commercially available that meet some but not all of the applicable Section 508 accessibility standards, and no commercially available products or services meet all of the applicable Section 508 accessibility standards, an OPDIV/STAFFDIV shall acquire the products and services that best meet the applicable Section 508 accessibility standards. Commercial nonavailability exception determinations for EIT products and services that do not meet some or all of the applicable Section 508 accessibility standards shall be processed in accordance with *339.203*.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 313—SIMPLIFIED ACQUISITION PROCEDURES

Sec.
313.003 Policy.

Subpart 313.1—Procedures.

313.106–2 Evaluation of quotations or offers.

Subpart 313.3—Simplified Acquisition Methods

313.301 Government-wide commercial purchase card.
313.303 Blanket purchase agreements.
313.303–5 Purchases under blanket purchase agreements.

Subpart 313.5—Test Program for Certain Commercial Items

313.501 Special documentation requirements.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

313.003 Policy.

EIT products and services, including EIT deliverables such as electronic documents and reports, acquired pursuant to *FAR Part 13* shall comply with Section 508 of the Rehabilitation Act of 1973, as amended. Consistent with paragraph 4.3.1 of the HHS Section 508 policy—*see* Section 508 policy on HHS Office on Disability Web site, if products and services, including commercially available items, meet some but not all of the applicable Section 508 accessibility standards, and no commercially available products or services meet all of the applicable Section 508 accessibility standards, an OPDIV/STAFFDIV shall acquire the products and services that best meet the applicable Section 508 accessibility standards. Commercial nonavailability exception determinations for EIT products and services that do not meet some or all of the applicable Section 508 accessibility standards shall be processed in accordance with *339.203*.

Subpart 313.1—Procedures

313.106–2 Evaluation of quotations or offers.

(b)(5) Technical Evaluation. When conducting a technical evaluation of quotations or proposals received under *FAR Part 13*, the provisions of *315.305(a)(3)* apply.

Subpart 313.3—Simplified Acquisition Methods

313.301 Government-wide commercial purchase card.

(b) HHS' procedures for the use and control of the Government-wide commercial purchase card may be found in the HHS Purchase Card Program Guide, available on the ASFR/OGAPA/DA Web site.

(1) ASFR/OGAPA/DA has overall responsibility for monitoring the OPDIVs' implementation of the HHS purchase card program to foster compliance with FAR *13.301;* OMB Circular A–123, Appendix B, ''Improving the Management of Government Charge Card Programs;'' GSA's SmartPay Program guidance; and HHS Purchase Card program standards.

(2) The OPDIVs, through their designated Agency/Organization Program Coordinators, are responsible for establishing the necessary local procedures and appropriate training requirements to ensure effective implementation of the HHS purchase card program.

(3) OPDIVs shall refer to *313.003* and the HHS Purchase Card Program Guide for information regarding acquiring EIT products and services subject to Section 508 of the Rehabilitation Act of 1973, as amended.

313.303 Blanket purchase agreements.

313.303–5 Purchases under blanket purchase agreements.

(e)(5) HHS personnel that sign delivery documents, invoices, *etc.*, verifying the receipt of an item or service shall forward such documents to the fiscal office or other paying office that the

OPDIV designates. The fiscal or other paying officer shall use the signed document, invoice, *etc.*, as the basis for payment. Alternatively, OPDIVs may use electronic methods to document, and transmit to the paying office, the receipt, inspection, and acceptance of items or services for payment purposes, provided such methods are authorized in local fiscal procedures. Contracting offices shall establish procedures to ensure that funds are available prior to placement of orders.

Subpart 313.5—Test Program for Certain Commercial Items

313.501 Special documentation requirements.

(a)(1)

(i) The justification requirements of *306.303–1(b)* and *306.303–1(b)(1) through (b)(4)* apply to proposed noncompetitive acquisitions placed under *FAR Subpart 13.5*.

(ii) The HHS standard format for JOFOCs cited in *306.303–1(b)(1)* shall be used to support noncompetitive acquisitions in excess of the simplified acquisition threshold placed under *FAR Subpart 13.5*.

(iii) The certification, concurrence, and approval requirements cited in *306.304* for JOFOCs apply to applicable noncompetitive acquisitions placed under *FAR Subpart 13.5*.

(2)

(i) The Contracting Officer shall exercise this approval authority unless a higher approval level is required by OPDIV procedures.

(ii) The CAs are listed in *306.501*. This approval authority is not delegable.

(iii) The CA shall exercise this approval authority, except where the individual designated as the competition advocate does not meet the requirements of *FAR 6.304(a)(3)(ii)*. This approval authority is not delegable.

(iv) The HHS SPE is the Associate DAS for Acquisition.

PART 314—SEALED BIDDING

Subpart 314.1—Use of Sealed Bidding

Sec.
314.103 Policy.

Subpart 314.2—Solicitation of Bids

314.202 General rules for solicitation of bids.
314.202–7 Facsimile bids.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.
314.404–1 Cancellation of invitations after opening.
314.407 Mistakes in bids.
314.407–3 Other mistakes disclosed before award.
314.407–4 Mistakes after award.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 314.1—Use of Sealed Bidding

314.103 Policy.

EIT products and services, including EIT deliverables such as electronic documents and reports, acquired using sealed-bid procedures shall comply with Section 508 of the Rehabilitation Act of 1973, as amended. Consistent with paragraph 4.3.1 of the HHS Section 508 policy—*see* Section 508 policy on HHS Office of Disability Web site, if products and services, including commercially available items, meet some but not all of the applicable Section 508 accessibility standards, and no commercially available products or services meet all of the applicable Section 508 accessibility standards, an OPDIV/STAFFDIV shall acquire the products and services that best meet the applicable Section 508 accessibility standards. Commercial nonavailability exception determinations for EIT products and services that do not meet some or all of the applicable Section 508 accessibility standards shall be processed in accordance with *339.203*.

Subpart 314.2—Solicitation of Bids

314.202 General rules for solicitation of bids.

314.202–7 Facsimile bids.

(c) If the HCA (non-delegable) determines that the contracting activity will allow use of facsimile bids and proposals, the HCA shall prescribe internal procedures, in accordance with the

FAR 14.202–7, to ensure uniform processing and control.

Subpart 314.4—Opening of Bids and Award of Contract

314.404 Rejection of bids.

314.404–1 Cancellation of invitations after opening.

(c) The HCA or CCO (non-delegable) shall make the agency head determinations specified in *FAR 14.404–1*.

314.407 Mistakes in bids.

314.407–3 Other mistakes disclosed before award.

(e) The CCO (non-delegable) has the authority to make determinations under paragraphs (a), (b), (c), and (d) of *FAR 14.407–3*.

(f) OGC–GLD shall concur in each proposed determination.

(i) The CCO shall submit directly to OGC–GLD cases in which the evidence is not clear and convincing or is otherwise doubtful.

314.407–4 Mistakes after award.

(c) The HCA or the CCO (non-delegable), in consultation with OGC–GLD, has the authority to make administrative determinations in connection with mistakes in bid alleged after award.

(d) OGC–GLD shall concur in each proposed determination.

PART 315—CONTRACTING BY NEGOTIATION

Subpart 315.2—Solicitation and Receipt of Proposals and Information

Sec.
315.201 Exchanges with industry before receipt of proposals.
315.204–5 Part IV—Representations and instructions.
315.208 Submission, modification, revision, and withdrawal of proposals.
315.209 Solicitation provisions and contract clauses.

Subpart 315.3—Source Selection.

315.303–70 Policy.
315.304 Evaluation factors and significant subfactors.
315.305 Proposal evaluation.
315.306 Exchanges with offerors after receipt of proposals.
315.307 Proposal revisions.
315.370 Finalization of details with the selected source.
315.371 Contract preparation and award.
315.372 Preparation of negotiation memorandum.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.
315.404–2 Information to support proposal analysis.
315.404–4 Profit.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.
315.606 Agency procedures.
315.606–1 Receipt and initial review.
315.609 Limited use of data.

Subpart 315.70—Acquisition of Electronic Information Technology

315.7000 Section 508 accessibility standards.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 315.2—Solicitation and Receipt of Proposals and Information

315.201 Exchanges with industry before receipt of proposals.

(e)(1) An OPDIV may issue an advance notice, entitled ''Request for Information,'' in accordance with the requirements of *FAR 15.201(e)*, whenever it requires technical, scientific, and/or business information and input from the marketplace for project planning purposes regarding the availability of existing or potential solutions. An RFI may be used for any type of requirement, but is particularly appropriate for complex projects involving R & D, IT, construction, and other highly technical requirements. An RFI may also be issued to identify issues about the Government's requirements and the planned acquisition strategy. Use of an RFI generally is appropriate under the following conditions:

(i) It is not clear whether the purpose and performance requirements of a potential or planned project are feasible, achievable, and complete.

(ii) It is not certain that a solution, technical approach, or product needed to accomplish a potential or planned

project exists or can be developed, particularly in the case of a new, highly specialized/unique Government program mandate.

(iii) It is necessary to test the marketplace to determine if there are questions or concerns regarding the use of a new or innovative acquisition strategy or instrument previously untried to accomplish a potential or planned project.

(iv) It is necessary to determine the general effort or time (estimate or rough order of magnitude) that may be required to accomplish a potential or planned project.

NOTE: This type of information may be requested, only if it is necessary, broad in scope, and required for planning purposes. Detailed estimates must not be requested.

(v) It is necessary to ensure that unduly restrictive technical or business/acquisition requirements are not made part of any resultant solicitation so that maximum competition is generated.

(2) When using an RFI, an OPDIV shall not request that potential sources provide more than the minimum information necessary—*see FAR 10.001(b)*, to obtain the input required. The notice and the information received shall not be used to determine how well respondents can perform a requirement, which can only be evaluated in response to a solicitation. Accordingly, the notice shall not be used to—

(i) Obtain capability statements that are evaluated and determined acceptable or unacceptable;

(ii) Require cost/price proposals or detailed technical solutions;

(iii) Identify a prospective sole source; or

(iv) Exclude small business concerns.

(3) While not the primary intent of an RFI, an OPDIV may additionally request that respondents provide information regarding their organizational size classification and capabilities when the OPDIV is uncertain whether any organization, acting individually or in partnership with others, can satisfy the requirement. For example, the notice may ask respondents to identify whether they are small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; veteran-owned small businesses; woman-owned small businesses; or a small disadvantaged businesses. However, an RFI shall not be used solely to determine the availability of qualified sources for a proposed project or to determine their size classification. In such instances, as applicable, an R & D Sources Sought notice, Sources Sought notice, or Small Business Sources Sought notice may be used—*see* HHSAR *305.205*, *310.001*, and *319.202–2*.

(4) OPDIVs shall follow the standard HHS instructions for completing an RFI. The template for an RFI is available on the ASFR/OGAPA/DA Internet Web site. The Contracting Officer shall post the notice in FedBizOpps by selecting and completing a Special Notice, accessible on the FedBizOpps ''Notices'' page at: *http://www.fedbizopps.gov*. RFIs must be published, at a minimum, in FedBizOpps—*see FAR 10.002(b)(2)(iii)* and *15.201(d)*. Additional information may be included in an RFI in accordance with OPDIV procedures. The Contracting Officer shall document, in the form of a memorandum to the file, the results of the review by technical personnel of information submitted in response to the notice, including whether each respondent appears to be capable of performing the requirement. The Contracting Officer shall attach a copy of the analysis provided by the technical personnel to the memorandum.

315.204–5 Part IV—Representations and instructions.

(c) *Section M, Evaluation factors for award*.

(1) *General*.

(i) The Project Officer shall develop technical evaluation factors and submit them to the Contracting Officer as part of the acquisition plan or other acquisition request documentation for inclusion in a solicitation. The Project Officer shall indicate the relative importance or weight of the evaluation factors based on the requirements of an individual acquisition. Since the evaluation factors will serve as the standard for proposal evaluation, they require careful selection.

(ii) Only a formal amendment to a solicitation can change the evaluation factors. Evaluation of proposals shall

include only those factors set forth in a solicitation.

(2) *Review of evaluation factors.*

(i) The Contracting Officer shall review evaluation factors to ensure they are consistent with the SOW/PWS. This review is not intended to dictate technical requirements to the program office or Project Officer, but rather to ensure that the evaluation factors are clear, concise, and fair, so that all potential offerors are fully aware of the bases for proposal evaluation and are given an equal opportunity to compete.

(ii) The Project Officer and the Contracting Officer shall review the evaluation factors to ascertain the following:

(A) The factors address the key programmatic concerns which the offerors must be aware of in preparing proposals.

(B) The factors are specifically applicable to the current acquisition and are not restatements of factors from previous acquisitions which are not relevant.

(C) The factors represent only the significant areas of importance, rather than a multitude of factors. (*Note:* All factors tend to lose importance, if too many are included; and using too many factors may prove as detrimental as using too few.)

(3) Examples of topics that form a basis for evaluation factors. Typical examples of topics that form a basis for the development of evaluation factors are listed in the following paragraphs. These examples may assist in the development of actual evaluation factors for a specific acquisition, as appropriate.

(i) Understanding of the SOW/PWS.

(ii) Method of accomplishing the objectives and intent of the SOW/PWS.

(iii) Soundness of the scientific or technical approach for executing the requirements of the SOW/PWS, including, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach.

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved.

(v) Feasibility or practicality of successfully accomplishing the requirements (including a statement and discussion of anticipated major difficulties and problem areas, and recommended approaches for their resolution).

(vi) Availability of required special research, test, and other equipment or facilities.

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience).

(viii) Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, including proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts).

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel.

(x) Quality of offeror's past performance on recent projects of similar size and scope.

(xi) Extent of proposed participation of small disadvantaged business concerns in performance of the contract.

315.208 Submission, modification, revision, and withdrawal of proposals.

(b) In addition to the provision in *FAR 52.215–1*, Instructions to Offerors—Competitive Acquisition, if an HCA determines that certain classes of biomedical or behavioral R & D acquisitions are subject to conditions other than those specified in *FAR 52.215–1(c)(3)*, the HCA may authorize for use in competitive solicitations for R & D, valued at more than the simplified acquisition threshold, the use of the provision in *352.215–70*, Late Proposals and Revisions. This is an authorized FAR deviation.

(2) When the provision at *352.215–70* is included in the solicitation and a proposal is received after the exact time specified for receipt, the Contracting Officer, with the assistance of cost and technical personnel, shall make a written determination as to whether the proposal meets the requirements of the provision at *352.215–70* and, therefore, can be considered.

315.209 Solicitation provisions and contract clauses.

(a) The Contracting Officer shall insert paragraph (e) in *352.215–1* in place of paragraph (e) in the provision in *FAR 52.215–1*, Instructions to Offerors—Competitive Acquisition, in solicitations for competitive, negotiated acquisitions valued at more than the simplified acquisition threshold. This is an authorized FAR deviation.

Subpart 315.3—Source Selection

315.303–70 Policy.

(a) If an OPDIV is required by statute to use peer review for technical review of specified contracts, the requirements of those statutes, any implementing regulatory requirements, the Federal Advisory Committee Act, and as applicable, any approved HHSAR deviation(s) from this subpart take precedence over the otherwise applicable requirements of this subpart.

(1) The statutes that require such review and implementing regulations are as follows: NIH—42 U.S.C. 289a and 42 CFR Part 52h; SAMHSA—42 U.S.C. 290aa–3, and AHRQ—42 U.S.C. 299c–1.

315.304 Evaluation factors and significant subfactors.

(a) A solicitation for EIT products and services, including EIT deliverables such as electronic documents and reports, shall include a separate technical evaluation factor (which may be in the form of a technical evaluation criterion or a mandatory qualification criterion, as appropriate) developed by the Contracting Officer, Project Officer, and the OPDIV Section 508 Coordinator to determine vendor compliance with applicable Section 508 accessibility standards. The technical evaluation panel's assessment of Section 508 accessibility standards conformance shall be based on the Section 508 Product Assessment Template—*see* Section 508 policy on Office of Disability Web site for the template, and on any other pertinent information that offerors provide in response to a solicitation. The HHS Office on Disability is responsible for providing technical assistance in Section 508 evaluation factor development.

(b) Before conducting negotiations or making an award, the Contracting Officer shall provide a summary of the technical evaluation panel's assessment of vendor responses to the solicitation's Section 508 evaluation factor for review by the Section 508 Official or designee. The Section 508 Official or designee shall indicate approval/disapproval of the evaluation panel's assessment. The Contracting Officer shall coordinate the resolution of any issues raised by the Section 508 Official or designee with the chair of the technical evaluation panel or Project Officer, as appropriate. The acquisition process shall not proceed unless and until the Section 508 Official or designee has approved the technical evaluation panel's assessment. The Contracting Officer shall include the assessment in the official contract file. *See 339.203* regarding processing exception determination requests.

315.305 Proposal evaluation.

(a)(1) *Cost or price evaluation.*

(i) The Contracting Officer shall evaluate proposals in accordance with the *FAR 15.404*. The extent of cost or price analysis in each case depends on the availability of competition, contract type, the proposed amount, and technical complexity.

(A) For competitive firm-fixed-price and fixed price with economic price adjustment contracts, price analysis should be sufficient to determine price fairness and reasonableness.

(B) When competition is not adequate for the above contract types, and for cost-reimbursement and time and materials contracts, cost analysis may be required. In such cases, the Contracting Officer shall request the Project Officer's assistance in analyzing the following cost elements, if

applicable, to determine if the proposed amounts are necessary and reasonable for efficient contract performance:

(1) The number and mix of proposed labor hours relative to the technical requirements.

(2) Types, numbers and hours/days of proposed consultants.

(3) The kinds and quantities of material, equipment, supplies, and services.

(4) Kinds and quantities of IT.

(5) Logic of proposed subcontracting.

(6) Travel proposed, including number of trips, locations, purpose, and travelers.

(7) Other direct costs not specified above.

(ii) The Project Officer shall provide written comments, including the rationale for any exceptions to the cost elements. The Contracting Officer shall consider the Project Officer's comments for negotiations or to support award without discussions. The Contracting Officer shall also request assistance of a cost/price analyst, when necessary.

(2) *Past performance evaluation*. When evaluating past performance, the Contracting Officer shall check references to obtain information concerning the performance history of offerors in compliance with *FAR 42.1502*. The Contracting Officer may require the assistance of the Project Officer as well as other Government technical personnel in performing this function.

(3) *Technical evaluation*.

(i) *Technical evaluation plan*.

(A) The Contracting Officer shall require a technical evaluation plan if the proposed acquisition either requires preparation of an AP—*see 307.71* or is otherwise sufficiently complex.

(B) The technical evaluation plan shall include, at a minimum, the following elements:

(1) A list of recommended technical evaluation panel members, their organizations, a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if applicable).

(2) A statement that the technical evaluation panel will include non-Federal technical proposal evaluators, if applicable, and a determination that sufficient Federal technical proposal evaluators are unavailable—*see FAR 37.204*. A determination to use non-Federal proposal evaluators shall be signed at a level no lower than the HCA. A determination is not required, however, if non-Federal evaluators will be used in accordance with *315.303–70(a)*.

(3) A statement that there is no apparent or actual conflict of interest regarding any recommended panel member.

(4) A copy of each rating sheet, approved by the Contracting Officer, to ensure consistency with the evaluation criteria.

(5) A brief description of the general evaluation approach.

(6) A description of the methodology for evaluating key elements in the technical evaluation plan, including any solicitation evaluation factor involving the acquisition of EIT products and services subject to Section 508.

(C) Except as provided in OPDIV procedures, a program office official at least one level above the Project Officer shall approve the technical evaluation plan.

(D) The Project Officer shall provide the technical evaluation plan to the Contracting Officer for review and approval before the solicitation is issued. The Contracting Officer shall ensure that the evaluation criteria reflect the significant factors and subfactors relating to the evaluation when conducting the review of the plan.

(ii) *Technical evaluation panel*.

(A) *General*.

(1) A technical evaluation panel is required for all acquisitions subject to this subpart that require preparation of an AP. The Contracting Officer may require a technical evaluation panel for acquisitions that do not require preparation of an AP, based on the complexity of the acquisition and the role that the technical evaluation will have in the award decision.

(2) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The panel's efforts will influence the success or failure of the acquisition.

(*3*) At least 50 percent of the HHS personnel on a technical evaluation

panel shall have successfully completed HHS University's ''Basic Contracting Officer's Technical Representative'' course or an equivalent course within 4 years before assuming their designated role. This training requirement applies to evaluators performing the initial technical evaluation and any subsequent technical evaluations, but does not apply to peer review panel members. The Contracting Officer may waive this training requirement in exigent circumstances if documented in writing and approved by the Head of Contracting Activity. This training requirement applies to evaluators performing the initial technical evaluation and any subsequent technical evaluations. However, this training requirement does not apply to peer review panel members.

(B) *Role of the Project Officer.*

(1) The Project Officer provides guidance, information, and assistance to the Contracting Officer on all technical aspects of a proposed acquisition—*see 302.101*. The Project Officer may be a voting member of the technical evaluation panel and may serve as the chairperson of the panel unless prohibited by law or contracting activity procedures.

(2) The Project Officer shall recommend panel members who have sufficient expertise in the technical aspects of the acquisition to be able to evaluate strengths and weaknesses in proposals.

(3) The Project Officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and disability are included as panel members for acquisitions to which such issues apply.

(4) The Project Officer shall submit a list of recommended panel members to a program office official at least one level higher than him/herself. This official shall review the list and select the chairperson.

(5) The Project Officer shall arrange for adequate and secure working space for the panel.

(C) *Role of the Contracting Officer.*

(1) The term ''Contracting Officer,'' as used in this subpart, may be the Contracting Officer or a Contract Specialist possessing an appropriate FAC–C certification.

(2) The Contracting Officer shall not serve as a member of the technical evaluation panel, but shall—

(i) Address the initial meeting of the technical evaluation panel;

(ii) Provide assistance to the evaluators as required; and

(iii) Ensure that the scores adequately reflect the written technical report comments.

(D) *Conflict of interest.*

(1) If a panel member has an actual or apparent conflict of interest related to a proposal under evaluation, the individual cannot serve on the panel. If a suitable replacement is not available, the panel shall perform the review without a replacement.

(2) For the purposes of this subpart, conflicts of interest are defined in the *Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), Supplemental Standards of Ethical Conduct for Employees of the Department of Health and Human Services (5 CFR part 5501)*, and the *Procurement Integrity Act*. For outside evaluators serving on the technical evaluation panel, *see* paragraph (a)(3)(ii)(F) of this section.

(E) *Continuity of evaluation process.*

(1) The technical evaluation panel shall evaluate all original proposals; make recommendations to the chairperson regarding strengths and weaknesses of proposals; if required by the Contracting Officer, assist the Contracting Officer during communications and discussions; and review supplemental, revised or final proposal revisions. To the extent possible, the same evaluators shall be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

(i) The answers to questions do not have a substantial impact on the proposal.

(ii) Final proposal revisions are not materially different from the original proposals.

(iii) Revisions to the proposals are relatively minor and do not affect the rankings of the offerors.

(2) The Contracting Officer, with the written concurrence of the technical evaluation panel chairperson, may decide not to have the panel evaluate the revised proposals. The Contracting Officer shall fully document such a decision in the contract file.

(3) When the Contracting Officer considers technical evaluation panel meetings necessary, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall remove or replace the individual after discussing the situation with the Contracting Officer and obtaining the Contracting Officer's concurrence and the approval of the official responsible for appointing the panel members.

(4) When continuity of the evaluation process is not possible, and new evaluators are selected or the size of the evaluation panel is reduced, each panel member shall review all proposals at the current stage of the acquisition—*i.e.*, initial proposal, final proposal revisions, *etc.* Also, the Contracting Officer shall provide guidance concerning what steps to take if an unusually large number of proposals is received, including how to determine what constitutes an unusually large number of proposals.

(F) *Use of outside evaluators.*

(1) Except when peer review is required by statute as provided in 315.303–70*(a)*, decisions to disclose proposals to evaluators outside of the Government shall be made by the official responsible for appointing panel members in accordance with OPDIV procedures. The avoidance of organization conflict of interest and competitive relationships must be taken into consideration when making the decision to use outside evaluators.

(2) When a solicited proposal will be disclosed outside the Government for evaluation purposes, the following or similar conditions shall be part of the written agreement with the evaluator(s) prior to disclosure:

CONDITIONS FOR EVALUATING PROPOSALS

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal for evaluation purposes only. The foregoing requirement does not apply to data obtained from another source without restriction. Any notice or legend placed on the proposal by either HHS or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return to the Government the furnished copy of the proposal or abstract, and all copies thereof, to the HHS office which initially furnished the proposal for evaluation. Unless authorized by the HHS initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents. The evaluator's employees and subcontractors shall abide by these conditions.

(iii) *Receipt of proposals.*

(A) After the closing date for the receipt of proposals set in the solicitation, the Contracting Officer shall forward the technical proposals, by memorandum, to the Project Officer or chairperson for evaluation. The Contracting Officer shall retain the business proposals for evaluation.

(B) The transmittal memorandum shall include at least the following elements:

(1) A list of the names of the organizations submitting proposals.

(2) A reference to the need to preserve the integrity of the source selection process.

(3) A statement that only the Contracting Officer is authorized to conduct discussions.

(4) A requirement for a technical evaluation report in accordance with paragraph (a)(3)(vi) of this section.

(5) The establishment of a date for receipt of the technical evaluation report.

(iv) *Convening the technical evaluation panel.*

(A) Normally, the technical evaluation panel convenes to evaluate proposals. However, there may be situations when the panel chairperson determines that it is not feasible for the panel to convene. Whenever the panel does not convene, the panel chairperson shall closely monitor the technical review to produce acceptable results.

(B) When a panel convenes, the chairperson shall control the technical proposals provided by the Contracting Officer for use during the evaluation process. The chairperson normally distributes the technical proposals prior to the initial panel meeting and establishes procedures for securing the proposals whenever they are not being evaluated to ensure their confidentiality. After an evaluation is completed, the chairperson shall return all proposals to the Contracting Officer.

(C) The Contracting Officer shall address the initial meeting of the panel and state the basic rules for conducting the evaluation. The Contracting Officer shall provide written guidance to the panel, if the Contracting Officer cannot attend the initial panel meeting. The guidance shall include the following elements:

(1) An explanation of the evaluation process and the role of evaluators throughout the process.

(2) The need for evaluators to read and understand the solicitation, especially the SOW/PWS and evaluation criteria, prior to reading the proposals.

(3) The need for evaluators to restrict the review to only the SOW/PWS, the evaluation criteria, and the contents of the technical proposals.

(4) The need for each evaluator to review all of the proposals.

(5) The need for evaluators to identify ambiguities, inconsistencies, errors, and deficiencies.

(6) The need for the evaluators to provide complete written documentation of the individual strengths and weaknesses for each proposal.

(7) An instruction specifying that, until an award is made, they may not disclose information concerning the acquisition to any person not directly involved in the evaluation process.

(8) An explanation of conflicts of interest.

(v) *Rating and ranking of proposals.* The evaluators shall individually read each proposal, describe tentative strengths and weaknesses, and independently assign preliminary scores in relation to each evaluation factor set forth in the solicitation. The evaluators may then discuss in detail the individual strengths and weaknesses described by each evaluator and, if possible, arrive at a common understanding of the major strengths and weaknesses and the potential for correcting each offeror's weakness(es). Each evaluator shall assign a final score to each proposal, and the technical evaluation panel shall collectively rank the proposals. Normally, ranking is the result of adding the numerical scores assigned to the evaluation factors and determining the average for each offeror. The evaluators shall then identify whether each proposal is acceptable or unacceptable. The technical evaluation panel shall not employ predetermined cutoff scores.

(vi) *Technical evaluation report.* The chairperson shall prepare a technical evaluation report and provide it to the Contracting Officer, who shall maintain it as a permanent record in the contract file. The report shall reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable. The report shall also include a narrative evaluation specifying the strengths and weaknesses of each proposal, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. The report shall include concrete technical reasons supporting any determination of unacceptability of a proposal and, for acceptable proposals, include specific points and questions for discussions or negotiations. The technical evaluation report shall also include a copy of each signed rating sheet, unless the Contracting Officer determines, in accordance with FAR *15.305(a)(3)(ii)*, and *315.305(a)(3)(vi)*, that the technical evaluation report includes appropriate and sufficiently detailed supporting narrative (with specific references to particular portions of offerors' proposals) to (1) fully and reasonably explain the basis for the technical evaluation panel's assessments of each proposal, including an evaluation rating of ''acceptable'' or ''unacceptable; and (2) support any recommendation to include or not include a proposal in the competitive range. However, when peer review of proposals is required as provided in *315.303–70(a)*, OPDIVs shall follow applicable peer review guidelines

and practices regarding the submission, maintenance, and disposal of reviewer rating sheets.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21510, Apr. 26, 2010]

315.306 Exchanges with offerors after receipt of proposals.

(d) *Exchanges with offerors after establishment of the competitive range.* The Project Officer or technical evaluation panel shall develop technical questions as part of the technical evaluation report. The questions shall disclose the ambiguities, weaknesses, and deficiencies of offeror(s)' proposals. The Contracting Officer, with the assistance of the Project Officer or panel as required, shall prepare the management, past performance, and cost or price questions. The method of requesting offerors in the competitive range to submit additional information may vary depending on the complexity of the questions, the extent of additional information necessary, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers shall be in writing. The Contracting Officer shall give each offeror in the competitive range an equitable period of time for preparation of responses to questions to the extent practicable.

315.307 Proposal revisions.

(b) Final proposal revisions are subject to—

(1) A final evaluation of price or cost and other salient factors by the Contracting Officer and Project Officer, with assistance from a cost/price analyst, as appropriate; and

(2) An evaluation of technical factors by the technical evaluation panel, as necessary.

The technical evaluation panel may rescore and re-rank technical proposals in the competitive range and prepare a technical evaluation report. To the extent practicable, the same evaluators who reviewed the original proposals shall perform the evaluation. The Contracting Officer and Project Officer shall conduct a final evaluation of past performance. The technical evaluation panel may be involved in the final evaluation of past performance, if the panel is comprised solely of Government personnel.

315.370 Finalization of details with the selected source.

(a) After selection of the successful proposal, the Contracting Officer may finalize details with the selected offeror, if necessary. However, the Contracting Officer shall not introduce any factor that could have an effect on the selection process after the common cutoff date for receipt of final proposal revisions, nor shall the finalization process in any way prejudice the competitive interest or rights of the unsuccessful offerors. The Contracting Officer shall restrict finalization of details with the selected offeror to definitizing the final agreement on terms and conditions, assuming none of these factors were involved in the selection process.

(b) Whenever a change occurs in the requirements, the Contracting Officer shall reopen the competition, and provide all offerors submitting final proposal revisions an opportunity to resubmit proposals based on the revised requirements. If there is a question as to whether a change is material and would require the initiation of a new competition, the Contracting Officer shall obtain the advice of technical personnel and OGC–GLD before proceeding. Significant changes in the offeror's cost proposal may also necessitate a reopening of a competition, if the changes alter the factors involved in the original selection process.

(c) Upon finalization of details, the Contracting Officer shall obtain a confirmation letter from the successful offeror which includes any revisions to its technical proposal, the agreed upon price or cost, and, as applicable, a certificate of current cost or pricing data.

315.371 Contract preparation and award.

(a) After completing any activities that may be necessary to finalize details with the selected offeror, the Contracting Officer shall—

(1) Prepare the negotiation memorandum in accordance with *315.372;*

(2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;

(3) Include in the contract file the pertinent documents referenced in *FAR 4.803;* and

(4) Obtain the appropriate approval of the proposed contract award(s) in accordance with subpart *304.71* and contracting activity procedures.

(b) After receiving the required approvals, the Contracting Officer shall—

(1) Transmit the contract to the prospective contractor for signature; and

(2) Inform the prospective contractor that the contract is not effective until the Contracting Officer transmits the fully executed contract to the contractor.

(c) The Contracting Officer shall not sign or issue the contract until the finance office certifies that the funds are available for obligation.

315.372 Preparation of negotiation memorandum.

The Contracting Officer shall prepare a negotiation memorandum, or summary of negotiations, to document all actions leading to award of a contract and support the source selection decision discussed in *FAR 15.308*. The memorandum also satisfies the requirement for preparation of a ''cost/price negotiation memorandum'' required by *FAR 15.406–3*. The memorandum shall be in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum shall document the negotiation process and reflect the negotiator's actions and judgments in concluding a satisfactory agreement for the Government. The memorandum shall address each item listed below. If an item is not applicable, the memorandum shall so state. The Contracting Officer may reference information already contained in the contract file rather than reiterate it.

(a) *Description of articles and services and period of performance*. Provide a description of the articles or services, quantity, unit price, total contract amount, and period of contract performance.

(b) *Acquisition planning*. Summarize or reference any acquisition planning activities that have taken place.

(c) *Synopsis of acquisition*. Provide a statement as to whether the acquisition has or has not been publicized in accordance with *FAR Subpart 5.2*. Include a brief statement referencing the specific basis for exemption under the FAR, if applicable.

(d) *Contract type*. Provide sufficient detail to support the type of contractual instrument recommended for the acquisition. If the contract is a cost-sharing type, explain the essential cost-sharing features.

(e) *Extent of competition*. Discuss the extent to which full and open competition was solicited and obtained. Include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision.

(f) *Technical evaluation*. Summarize or reference the results presented in the technical evaluation report.

(g) *Business evaluation*. Summarize or reference results presented in the business report.

(h) *Past performance*. Summarize or reference results of both the past performance evaluation and reference checks.

(i) *Competitive range* (if applicable). Describe how the competitive range was determined, and indicate the offerors that were included in and excluded from the competitive range.

(j) *Cost breakdown and analysis*. Include a complete cost breakdown together with the Contracting Officer's analysis of the estimated cost by individual cost elements. The analysis shall discuss the items specified in *FAR 15.406–3* and other cost factors, such as—

(1) A comparison of cost factors proposed for the current requirement with actual factors used in earlier contracts, using the same cost centers of the same supplier or cost centers of other sources having recent contracts for the same or similar item;

(2) Any pertinent Government-conducted audit of the proposed contractor's record or any pertinent cost advisory report;

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses;

(4) Any other pertinent information to fully support the basis for the cost analysis;

(5) If the contract is an incentive type, a discussion of all elements of profit and fee structure; and

(6) A justification of the reasonableness of the contractor's proposed profit or fixed fee considering the requirements of *FAR 15.404–4* and *315.404–4*.

(k) *Cost realism*. Describe the cost realism analysis performed on proposals.

(l) *Government-furnished property and facilities*. With respect to Government-furnished facilities, equipment, tooling, or other property, include the following:

(1) If the Government will not provide property, a statement to that effect.

(2) If the Government will provide property, a full description of it, its estimated dollar value, the basis of price comparison with competitors, and the basis of rental charge, if rental is involved.

(3) If a decision to furnish property has not been made, a detailed explanation.

(m) *Negotiations*. Include a statement as to the date and place of negotiations, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the SOW/PWS, terms and conditions, and special provisions. The results of cost or price negotiations shall include the information required by *FAR 31.109* and *15.406–3*. In addition, if the potential contractor provided cost or pricing data, specify the extent to which the Contracting Officer relied upon the factual cost or pricing data submitted and used it in negotiating the cost or price.

(n) *Other considerations*. Include coverage of areas such as the following:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payments, advance payments, *etc.*, is necessary and cite any required D & F's.

(4) Information with respect to obtaining a certificate of current cost or pricing data.

(5) Other required special approvals.

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s). Also, the Project Officer shall provide sufficient information for the Contracting Officer to determine that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor.

(7) A statement that the Contracting Officer has explained the equal opportunity provisions of the proposed contract to the contractor, and the contractor is aware of its responsibilities. Also, state whether or not an Equal Employment Opportunity (EEO) clearance is required.

(8) If the contract is for services, a statement, in accordance with *FAR 37.103*, that the services are nonpersonal in nature.

(o) *Terms and conditions*. Identify the general and special clauses and conditions that are contained in the contract, such as option arrangements, multi-year contracting, anticipatory costs, deviations from standard clauses, *etc*. The Contracting Officer shall state the rationale for inclusion of any special terms and conditions and, where applicable, identify the document which granted approval for their use.

(p) *Recommendation*. Briefly state the basis (or bases) for recommending award.

(q) *Signature*. The Contracting Officer and the individual who prepared the negotiation memorandum must sign the document.

Subpart 315.4—Contract Pricing

315.404 Proposal analysis.

315.404–2 Information to support proposal analysis.

(a)(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, the Contracting Officer may request less-than-complete field pricing support (specifying in the request the information needed) or may waive in writing the requirement for audit and

field pricing support by documenting the file to indicate what information will be used instead of the audit report and the field pricing report.

(3) When initiating audit and field pricing support, the Contracting Officer shall do so by sending a request to the cognizant Administrative Contracting Officer, with an information copy to the cognizant audit office. When field pricing support is not available, the Contracting Officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the OIG Office of Audit Services, Regional Inspector General. In both cases, the Contracting Officer shall, in the request—

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

(iii) Include the information necessary to perform the review, such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules;

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility, if other than the HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report and the written audit report. If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the Contracting Officer and indicate the additional time needed. The Contracting Officer shall submit one copy of the audit request letter provided to the Office of Audit Services, Regional Inspector General and a complete copy of the contract price proposal to OIG Office of Audit Services. Whenever the Office of Audit Services has conducted an audit review, the Contracting Officer shall forward two (2) copies of the memorandum of negotiation to OIG Office of Audit Services.

315.404–4 Profit.

(b) *Policy*. (1) The structured approach for determining profit provides a technique for establishing a profit objective for negotiation. A profit objective is that part of the estimated contract price objective or value which, in the judgment of the Contracting Officer, constitutes an appropriate amount of profit for the acquisition being considered. This technique allows for consideration of the profit factors described in paragraph (d) of this section. The Contracting Officer's analysis of these factors shall be based on available information, such as proposals, audit data, assessment reports, and pre-award surveys. The structured approach provides a basis for documenting the profit objective. The Contracting Officer shall explain any significant departure from this objective. The amount of documentation depends on the dollar value and complexity of the proposed acquisition. The profit objective is a part of the overall negotiation objective and is directly related to the cost objective and any proposed sharing arrangement. The profit objective shall exclude factors considered inapplicable to the acquisition.

(ii) The Contracting Officer shall negotiate the profit objective at the same time as the other cost items and as a whole rather than as individual profit factors. The profit factor breakdown shall be part of the documentation. The Contracting Officer shall use the profit analysis factors in *FAR 15.404–4(d)* in lieu of the structured approach in the following circumstances:

(A) Contracts not expected to exceed $100,000.

(B) A & E contracts.

(C) Management contracts for operations or maintenance of Government facilities.

(D) Construction contracts.

(E) Contracts primarily requiring delivery of material supplies by subcontractors

(F) Termination settlements.

(G) Cost-plus-award-fee contracts.

However, the Contracting Officer may perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement. The Contracting Officer may make other exceptions in the negotiation of contracts having unusual pricing situations, but shall justify in writing those situations where the structured approach is determined to be unsuitable.

(c) *Contracting Officer responsibilities*. The Contracting Officer shall develop

the profit objective, which shall realistically reflect the total overall effort of the contractor. The Contracting Officer shall not begin to develop the profit objective until he or she has completed a thorough review of the proposed contract work; conducted a review of all available knowledge regarding the contractor pursuant to *FAR subpart 9.1*, including audit data, pre-award survey reports and financial statements, as appropriate; and completed an analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost.

(d) *Profit-analysis factors*—(1) *Common factors*. The Contracting Officer shall consider the following factors in all cases in which profit is negotiated and shall use the weight ranges listed after each factor in all instances where the structured approach is used.

Profit factors	Weight ranges (%)
Contractor Effort:	
Material acquisition	1 to 5.
Direct labor	4 to 15.
Overhead	4 to 9.
General & Administrative (G & A)	4 to 8.
Other costs	1 to 5.
Other Factors:	
Cost risk	0 to 7.
Investment	−2 to +2.
Performance	−1 to +1.
Socioeconomic programs	−.5 to +.5.
Special situations	

(i) The Contracting Officer shall measure ''Contractor Effort'' by assigning a profit percentage within the designated weight range to each element of contract cost. The categories listed are for reference purposes only, but are broad and basic enough to provide guidance for other elements of cost. The Contracting Officer shall not include facilities capital cost of money. ''Contractor Effort'' shall include a computed total dollar profit.

(ii) The Contracting Officer shall use the total dollar profit for the ''Contractor Effort'' to calculate specific profit dollars for ''Other Factors''—cost risk, investment, performance, socioeconomic programs, and special situations. The Contracting Officer shall multiply the total dollar profit for the ''Contractor Effort'' by the weight assigned to each of the elements in the ''Other Factors'' category. Facilities capital cost of money is not included. Form HHS 674, Structured Approach Profit/Fee Objective, shall be used.

(iii) In making a judgment of the value of each factor, the Contracting Officer shall consider the definition, description, and purpose of the factors together with considerations for evaluating them.

(iv) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, the Contracting Officer shall use the modified structured approach in paragraph (d)(1)(iv)(B) of this section to establish fee objectives for nonprofit organizations.

(A) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501(c)(3) of the Internal Revenue Code.

(B) For contracts with nonprofit organizations where fee is involved, the Contracting Officer shall subtract up to three percentage points from the total ''profit'' objective percentage. In determining the amount of this adjustment, the Contracting Officer shall consider the following factors:

(1) Tax position benefits.

(2) Granting of financing through advance payments.

(3) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its position as a nonprofit organization.

(2) *Contractor effort*. Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what resources are necessary and what steps the contractor must take to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary

efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective shall reflect the extent and nature of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental or R & D work, is the difficulty or complexity of the work to be performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(i) *Material acquisition* (subcontracted items, purchased parts, and other material). Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The Contracting Officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor must develop complex specifications. The Contracting Officer shall also consider the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions, which may be substantial. Normally, the lowest unadjusted weight for direct material is two percent. A weighting of less than two percent may be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(ii) *Direct labor* (professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract shall include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, the Contracting Officer shall consider the amount of notable scientific talent or unusual or scarce talent needed in contrast to nonprofessional effort, including the contribution this talent will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and the contractor may easily obtain it, it is less critical to the successful performance of contract objectives. Therefore, the Contracting Officer cannot weight it nearly as high as professional or semiprofessional labor. The Contracting Officer shall evaluate service contract labor in a like manner by assigning higher weights to engineering or professional type skills required for contract performance and considering the variety of manufacturing and other categories of labor skills required and the contractor's personnel resources for meeting those requirements. For purposes of evaluation, the Contracting Officer may separately categorize, as appropriate, certain types of labor (e.g., quality control, receiving and inspection), that do not fall within the definition of professional, service or manufacturing labor; but shall apply the same evaluation considerations as outlined in this paragraph.

(iii) *Overhead and G & A expense.*

(A) Analysis of these overhead items of cost shall include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis shall include a determination of the amount of labor within these overhead pools and how this labor would be treated if it were considered direct labor under the contract. The Contracting Officer shall give the allocable labor elements the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools require analysis to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools shall be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead

expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(B) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system, if CAS exempt, to correspond with these classifications. The Contracting Officer, in an evaluation of such a contractor's overhead rate, may break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(C) The Contracting Officer shall consider management problems that may surface in varying degrees and the management expertise exercised to solve them as an element of profit. For example, a contract for a new R & D program or an item which is on the cutting edge may cause more problems and require more managerial time and abilities of a higher order than a follow-on contract. If new contracts create more problems and require a higher profit weight, the Contracting Officer shall adjust follow-ons downward because many of the problems should have been solved. In any event, the evaluation shall consider the underlying managerial effort involved on a case-by-case basis.

(D) It may not be necessary for the Contracting Officer to make a separate profit evaluation of overhead expenses, in connection with each acquisition action for substantially the same project with the same contractor. Where the Contracting Officer has made an analysis of the profit weight to be assigned to the overhead pool, the weight assigned may apply to future acquisitions with the same contractor unless there is a change in the cost composition of the overhead pool or contract circumstances, or unless the factors discussed in paragraph (d)(2)(iii)(C) of this section are involved.

(iv) *Other costs.* Analysis of this factor shall include all other direct costs associated with contractor performance (e.g., travel and relocation, direct support, and consultants). Analysis of these items of cost shall include the significance of the cost of contract performance, nature of the cost, and how much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than one percent. Also, the contractor may designate individuals as ''consultants,'' but in reality the contractor may obtain these individuals to supplement its workforce in the performance of routine duties required by contract. These costs would normally receive a minimum weight. However, there may be instances when contract performance may require the contractor to obtain the services of consultants having expertise in fields such as medicine or human services. In these instances, the contractor may expend greater managerial and technical effort to obtain these services and, consequently, the costs shall receive a much greater weight.

(3) *Other factors:*

(i) *Contract cost risk.* The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit shall be less than where the contractor assumes all the risk.

(A) In developing the prenegotiation profit objective, the Contracting Officer shall consider the type of contract anticipated and the contractor risk associated therewith, when selecting the position in the weight range for profit that is appropriate for the risk the contractor will bear. This factor is one of the most important in arriving at the prenegotiation profit objective. Evaluation of this risk requires a determination of: The degree of cost responsibility assumed by the contractor; the reliability of the cost estimates in relation to the tasks assumed by the contractor; and the complexity of the

tasks assumed by the contractor. This factor is specifically limited to the risk of contract costs. Risks associated with a contractor's reputation, a contractor's potential loss of a commercial market, or a contractor's loss of potential profits in other fields, are not within the scope of this factor.

(B) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm-fixed-price contract would reflect a complete assumption of cost responsibility. The determination of risk by contract type usually falls into the following percentage ranges:

	Percent
Cost-reimbursement type contracts	0–3
Fixed-price type contracts	2–7

(C) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar efforts. An excessive cost estimate reduces the likelihood that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(D) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or easy, regardless of the type of contract.

(E) Contractors are likely to assume greater cost risk only if Contracting Officers objectively analyze the risk associated with proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the structured approach. The reward for risk, by contract type, will usually fall into the following percentage ranges:

(*1*) Type of contract and percentage ranges for profit objectives based on structured approach for R & D and manufacturing contracts:

	Percent
Cost-plus-fixed-fee	0 to 0.5.
Cost-plus-incentive-fee: With cost incentive only.	1 to 2.
With multiple incentives	1.5 to 3.
Fixed-price-incentive: With cost incentive only.	2 to 4.
With multiple incentives	3 to 5.
Prospective price redetermination	3 to 5.
Firm-fixed-price	5 to 7.

(*2*) Type of contract and percentage ranges for profit objectives based on the structured approach for service contracts:

	Percent
Cost-plus-fixed-fee	0 to 0.5.
Cost-plus-incentive-fee	1 to 2.
Fixed-price incentive	2 to 3.
Firm-fixed-price	3 to 4.

(F) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price incentive contract with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the Contracting Officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain cost-plus-incentive-fee contract features. In this situation, the Contracting Officer may determine that the Government is retaining much of the contract cost responsibility and that the risk the contractor assumes is minimal. Similarly, if a cost-plus-incentive-fee contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the Contracting Officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under

a normal cost-plus-incentive-fee contract.

(G) The contractor's subcontracting program may have a significant impact on the contractor's acceptance of risk. It could cause risk to increase or decrease in terms of both cost and performance. This consideration shall be a part of the Contracting Officer's overall evaluation in selecting a factor to apply to cost risk. The Contracting Officer may determine, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost risk evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. However, without any substantial transfer of cost risk from the prime contractor to a subcontractor, the Contracting Officer shall not lower the contract cost risk evaluation merely because a substantial portion of the contract costs represents subcontracts.

(H) In making a contract cost risk evaluation for an acquisition that involves definitization of a letter contract, unpriced change orders, and unpriced orders under basic ordering agreements, the Contracting Officer shall consider the effect on total contract cost risk of partial performance before definitization. Under some circumstances, the total amount of cost risk may have been effectively reduced. Under other circumstances it may be apparent that the contractor's cost risk remains substantially unchanged. To be equitable, the Contracting Officer shall make the determination of profit weight for all recognized costs, both incurred and yet to be expended, considering all attendant circumstances—not merely the portion of costs incurred or percentage of work completed prior to definitization.

(I) The Contracting Officer shall consider time-and-materials and labor-hour contracts to be cost-plus-fixed-fee contracts for the purpose of establishing profit weights in the evaluation of the contractor's assumption of contract cost risk, unless otherwise exempt from use of the structured approach under paragraph (b)(1)(ii) of this section.

(ii) *Investment*. HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor shall include an analysis of the following:

(A) *Facilities* (including equipment). Evaluating how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost-effectiveness of the facilities offered. The Contracting Officer shall provide contractors with additional profit, if they furnish their own facilities and such contractor-furnished facilities contribute significantly to lower total contract costs. On the other hand, contractors that rely on the Government to provide or finance needed facilities shall receive a corresponding reduction in profit. Between these extremes, the Contracting Officer shall evaluate cases on their merits and make positive or negative adjustments in profit, as appropriate. When applicable, the contractor's computation of facilities capital cost of money under CAS 414 can help the Contracting Officer identify the level of facilities investment the contractor will employ in contract performance.

(B) *Payments*. In analyzing this factor, the Contracting Officer shall consider the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow. Generally, negative consideration applies to advance payments and payments more frequent than monthly, with the Contracting Officer making a maximum reduction as the contractor's working capital approaches zero. The Contracting Officer shall generally give positive consideration for payments less frequent than monthly and for a capital turn-over rate on the contract less than the contractor's or the industry's normal capital turn-over rate.

(iii) *Performance* (cost control and other past accomplishments). The Contracting Officer shall evaluate the contractor's past performance in areas such as: quality of services or products, meeting performance schedules, efficiency in cost control (including need for and reasonableness of costs incurred), accuracy and reliability of previous cost estimates, degree of cooperation (both business and technical), compliance with previous contract requirements, and management of subcontract programs. Where a contractor has consistently achieved excellent results in these areas in comparison with other contractors in similar circumstances, this performance merits a proportionately greater opportunity for profit. Conversely, a poor record in this regard warrants less profit.

(iv) *Federal socioeconomic programs.* This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in Government sponsored programs involving: Small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; women-owned small businesses; small disadvantaged businesses; sheltered workshops for the disabled; mentor-protégé; energy conservation, *etc.* The Contracting Officer shall give positive consideration for the contractor's policies and practices that support Federal socioeconomic programs and contribute to successful results. Conversely, the Contracting Officer shall view failure or unwillingness on the part of the contractor to support Federal socioeconomic programs as evidence of poor performance for the purpose of establishing a profit objective.

(v) *Special situations.*

(A) *Inventive and developmental contributions.* The Contracting Officer shall consider the extent and nature of contractor-initiated and contractor-financed independent development in formulating the profit objective, provided that the Contracting Officer has made a determination that the effort will benefit the contract. Examples of profit weighting factors include contribution of the independent development to health and human service-related missions; the initiative demonstrated by the contractor in pursuing the independent development; the extent of the contractor's cost risk; and whether the independent development cost was recovered directly or indirectly from Government sources.

(B) *Unusual pricing agreements.* Occasionally, unusual contract pricing arrangements are made with the contractor wherein it agrees to cost ceilings (e.g., a ceiling on overhead rates for conditions other than those discussed at *FAR 42.707).* In these circumstances, the Contracting Officer shall give the contractor favorable consideration in developing a profit objective.

(C) *Negative factors.* Special situations need not be limited to those which only increase profit levels. A negative consideration may be appropriate when the contractor is expected to obtain spin-off-benefits as a direct result of the contract (e.g., products or services with commercial application).

(4) *Facilities capital cost of money.* When facilities capital cost of money (cost of capital committed to facilities) is included as an item of cost in the contractor's proposal, the Contracting Officer shall reduce the profit objective in an amount equal to the amount of facilities capital cost of money allowed in accordance with the Facilities Capital Cost-of-Money cost principle. If the contractor does not propose this cost, the Contracting Officer shall insert a provision in the contract that makes facilities capital cost of money an unallowable cost.

Subpart 315.6—Unsolicited Proposals

315.605 Content of unsolicited proposals.

(d) *Certification by offeror.* To ensure against contacts between HHS personnel and prospective offerors that would exceed the limits of advance guidance set forth in *FAR 15.604* and potentially result in an unfair advantage to an offeror, the Contracting Officer shall: Furnish the following certification template to any prospective offeror of an unsolicited proposal; and require that the executed certification be

included in any resultant unsolicited proposal:

UNSOLICITED PROPOSAL

CERTIFICATION BY OFFEROR

This is to certify, to the best of my knowledge and belief, that—

(a) This proposal has not been prepared under Government supervision;

(b) The methods and approaches stated in the proposal were developed by this offeror;

(c) Any contact with Department of Health and Human Services (HHS) personnel has been within the limits of appropriate advance guidance set forth in *FAR 15.604;* and

(d) No prior commitments were received from HHS personnel regarding acceptance of this proposal.

Date: _____

Organization _____

Name _____

Title _____

(This certification shall be signed by a responsible management official of the proposing organization or by a person authorized to contractually obligate the organization.)

315.606 Agency procedures.

(a) The HCA is responsible for establishing procedures to comply with *FAR 15.606(a)*.

(b) The HCA or designee shall be the point of contact for coordinating the receipt and processing of unsolicited proposals.

315.606–1 Receipt and initial review.

(d) OPDIVs shall not refuse consideration of an unsolicited proposal because an organization initially submitted it as a grant application. However, OPDIVs shall not award contracts based on unsolicited proposals that have been rejected for grant awards due to lack of scientific merit.

315.609 Limited use of data.

An offeror shall use the legend, Use and Disclosure of Data, prescribed in *FAR 15.609(a)*, to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may need to be disclosed as a result of a request submitted pursuant to the Freedom of Information Act. Because of this possibility, the Contracting Officer shall provide the following notice to all prospective offerors of unsolicited proposals:

''The Government will attempt to comply with the ''Use and Disclosure of Data'' legend. However, the Government may not be able to withhold a record (data, document, *etc.*) or deny access to a record requested by an individual (the public) when an obligation is imposed on the Government under the Freedom of Information Act, 5 U.S.C. 552, as amended. The Government determination to withhold or disclose a record will be based upon the particular circumstances surrounding the record and on whether the record is exempt from disclosure under the Freedom of Information Act. Per *FAR 15.609(e)*, the offeror should identify any records that it considers to be trade secrets, commercial or financial information, and privileged or confidential information.''

Subpart 315.70—Acquisition of Electronic Information Technology

315.7000 Section 508 accessibility standards.

EIT products and services, including EIT deliverables such as electronic documents and reports, acquired using negotiated procedures shall comply with Section 508 of the Rehabilitation Act of 1973, as amended. Consistent with paragraph 4.3.1 of the HHS Section 508 policy—*see* Section 508 policy on HHS Office on Disability Web site, if products and services, including commercially available items, meet some but not all of the applicable Section 508 accessibility standards, and no commercially available products or services meet all of the applicable Section 508 accessibility standards, an OPDIV/STAFFDIV shall acquire the products and services that best meet the applicable Section 508 accessibility standards. Commercial nonavailability exception determinations for EIT products and services that do not meet some or all of the applicable Section 508 accessibility standards shall be processed in accordance with *339.203*.

PART 316—TYPES OF CONTRACTS

Subpart 316.3—Cost-reimbursement Contracts

Sec.

316.307 Contract clauses.

Subpart 316.5—Indefinite-Delivery Contracts

316.505 Ordering.

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.
316.603–3 Limitations.
316.603–70 Procedure for requesting authority to issue a letter contract.
316.603–71 Approval for modifications to letter contracts.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.
316.770–2 Memoranda of understanding.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 316.3—Cost-reimbursement Contracts

316.307 Contract clauses.

(a) If a contract for R & D is with a hospital (profit or nonprofit), the Contracting Officer shall modify the ''Allowable Cost and Payment'' clause at *FAR 52.216–7* by deleting from paragraph (a) the words ''Subpart 31.2 of the Federal Acquisition Regulation (FAR)'' and substituting ''45 CFR Part 74 Appendix E.''

(j) The Contracting Officer shall insert the clause in *352.216–70*, Additional Cost Principles, in solicitations and contracts when a cost-reimbursement contract is contemplated.

Subpart 316.5—Indefinite-Delivery Contracts

316.505 Ordering.

(b)(5) The HHS task-order and delivery-order ombudsman is the Director, Strategic Acquisition Service, PSC. The task-order and delivery-order ombudsmen for each of the HHS contracting activities are as follows:

AHRQ: Director, Office of Performance Accountability, Resources and Technology
ASPR/OAMCG: Chief of Acquisition Policy
CDC: Chief Information Officer
CMS: Chief Operating Officer
FDA: Director, Office of Acquisitions and Grants Services
HRSA: Associate Administrator, Office of Operations
IHS: Director, Office of Management Services
NIH: Senior Scientific Advisor for Extramural Research, Office of Extramural Research (R & D) and Senior Advisor to the Director (Other than R & D)
PSC: Director, Strategic Acquisition Service
SAMHSA: Executive Officer

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

Subpart 316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

316.603 Letter contracts.

316.603–3 Limitations.

An official one level above the Contracting Officer shall make the written determination that no other contract type is suitable.

316.603–70 Procedure for requesting authority to issue a letter contract.

The Contracting Officer shall include the following information in a memorandum requesting approval to award a letter contract:

(a) Name and address of proposed contractor.

(b) Location where contract is to be performed.

(c) Contract number, including modification number, if possible.

(d) Brief description of work and services to be performed.

(e) Proposed performance or delivery schedule.

(f) Amount of letter contract.

(g) Estimated total amount of definitized contract.

(h) Type of definitive contract to be executed (fixed price, cost-reimbursement, *etc.*).

(i) Statement of the necessity and advantage to the Government of the use of the proposed letter contract.

(j) Statement of percentage of the estimated cost that the obligation of funds represents (in rare instances where the obligation represents 50 percent or more of the proposed estimated cost of the acquisition, the Contracting Officer shall include a justification for that obligation (e.g., the contractor requires a large initial outlay of funds for major subcontract awards or an extensive purchase of materials to meet an urgent delivery requirement)). In

every case, documentation shall demonstrate that the amount to be obligated is not in excess of an amount reasonably required to perform the work.

(k) Period of effectiveness of a proposed letter contract. (If more than 180 days, the Contracting Officer shall provide a detailed justification).

(l) A statement of any substantive matters that need to be resolved.

316.603–71 Approval for modifications to letter contracts.

An official one level above the Contracting Officer shall approve all letter contract modifications. Contracting activities shall process requests for authority to issue letter contract modifications in the same manner as requests for authority to issue letter contracts. A request shall include the following:

(a) Name and address of the contractor.

(b) Description of work and services.

(c) Date original request was approved and name/title of approving official.

(d) Letter contract number and date issued.

(e) Detailed justification as to why the letter contract cannot currently be definitized.

(f) Detailed justification as to why the level of funding must be increased.

(g) Detailed justification as to why the period of effectiveness must be increased beyond 180 days, if applicable.

(h) If the funding of the letter contract is to be increased to more than 50 percent of the estimated cost of the acquisition, the Contracting Officer shall include the information required by *316.603–70(j)*.

Subpart 316.7—Agreements

316.770 Unauthorized types of agreements.

316.770–2 Memoranda of understanding.

Use of a ''memorandum of understanding,'' which purports to modify mandatory *FAR* and HHSAR provisions to make them acceptable to a prospective contractor, is not authorized because it may address matters contrary to the language of the solicitation or prospective contract. A memorandum of understanding does not bind the Government under the contract. The Contracting Officer shall make a change in a solicitation or contract only by amendment or modification, respectively. When a change to a prescribed contract clause is considered necessary, the Contracting Officer shall request a deviation.

PART 317—SPECIAL CONTRACTING METHODS

Subpart 317.1—Multi-year Contracting

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317.104 General.
317.105 Policy.
317.105–1 Uses.
317.107 Options.
317.108 Congressional notification.

Subpart 317.2—Options

317.204 Contracts.
317.207 Exercise of options.

Subpart 317.5—Interagency Acquisitions Under the Economy Act

317.503 Determination and findings requirements.

Subpart 317.70—Multi-agency and Intra-agency Contracts

317.7000 Scope of subpart.
317.7001 Definitions.
317.7002 Potential multi-agency and intra-agency sources.
317.7003 Documentation for multi-agency contracts.
317.7004 Documentation for intra-agency contracts.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 317.1—Multi-year Contracting

317.104 General.

(b) The Senior Procurement Executive is the agency head for the purpose of *FAR 17.104(b)*.

317.105 Policy.

317.105–1 Uses.

(a) Each HCA determination to use multi-year contracting, as defined in FAR 17.103, is limited to individual acquisitions where the full estimated cancellation ceiling does not exceed 20 percent of the total contract value over the multi-year term or $11.5 million, whichever is less. Cancellation ceiling provisions shall conform to the requirements of *FAR 17.106–1(c)*. The determination is not delegable and shall address the issues in *FAR 17.105–1(a)* and the following:

(1) The amount of, and basis for, the estimated cancellation ceiling.

(2) Identification and assignment of a Contracting Officer holding a FAC–C Level III certification or, alternatively, one familiar with the application of this contracting method.

(3) Availability of appropriations to fund the obligation of total contract costs for the first year of performance plus the estimated amount of the full cancellation ceiling.

(4) Reasonable expectation that, throughout the contemplated contract performance period, the OPDIV, through its annual budget request, will seek funding for the contract at the level necessary to avoid contract cancellation; and

(5) Program requirements are reasonably stable and the associated technical risks are not excessive—*i.e.*, not of the nature or level to jeopardize contract completion or result in its cancellation.

Upon SPE request, the HCA shall provide a copy of each determination (other than those specified in *317.105–1(b)* below).

(b)(1) SPE approval is required for any—

(i) Individual determination to use multi-year contracting with a cancellation ceiling in excess of the limits in 317.105–1(a); or

(ii) Class determination (see FAR Subpart 1.7).

(2) A determination involving a cancellation ceiling in excess of the limits in 317.105–1(a) shall present a compelling justification for the estimated cancellation ceiling. When the estimated cancellation ceiling exceeds $11.5 million, the determination shall be accompanied by a draft congressional notification letter pursuant to FAR 17.108 and 317.108.

(c) The funding required for performance of each year of a multi-year contract under FAR Subpart 17.1 and this subpart must be provided in full at the start of that program year.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

317.107 Options.

When used as part of a multi-year contract, options shall not be used to extend the performance of the original requirement for non-severable services beyond 5 years. Options may serve as a means to acquire related services (severable or non-severable) and, upon being exercised, shall be funded from the then-current fiscal year's appropriation.

[75 FR 21511, Apr. 26, 2010]

317.108 Congressional notification.

(a) The SPE is the agency head for the purposes of *FAR 17.108(a)*. Upon SPE approval of the determination required by *317.105–1(b)(1)*, the SPE will finalize and sign the congressional notification letter and provide it to the appropriate House and Senate committees.

Subpart 317.2—Options

317.204 Contracts.

(e) The total of the basic and option periods shall not exceed 10 years in the case of services and the total of the basic and option quantities shall not exceed the requirement for 5 years in the case of supplies. These limitations do not apply to IT and R & D contracts. However, statutes applicable to various classes of contracts may place additional restrictions on the length of contracts.

317.207 Exercise of options.

(h) Before exercising an option for a subsequent performance period/additional quantity under a multiple-year contract/order—*see 339.201–70(c)*, which involves the acquisition of EIT products and services, including EIT

deliverables such as electronic documents and reports, subject to Section 508 of the Rehabilitation Act of 1973, as amended, the Contracting Officer shall ensure that the contractor has provided to the Contracting Officer and Project Officer a properly completed HHS Section 508 Annual Report—*see* Section 508 policy on HHS Office on Disability Web site. The Contracting Officer shall request that the contractor provide the report in sufficient time for its review and approval by the Contracting Officer, Project Officer, and the Section 508 Official or designee, prior to exercise of an option. The Contracting Officer shall ensure that the report and all related approvals are made a part of the official contract/order file.

Subpart 317.5—Interagency Acquisitions Under the Economy Act

317.503 Determination and findings requirements.

(a) In addition to the D & F contents specified in *FAR 17.503(a)(1) and (2)*, each Assisted Contracting D & F shall address—

(3) The servicing organization(s) contemplated (the assigned HHS contracting office shall be one of the servicing organizations contemplated);

(4) For each organization and alternative approach contemplated, the anticipated benefits to the OPDIV; the anticipated costs, including associated fees or other compensation; and the contract/order placement timeframe;

(5) The tradeoffs (cost, schedule, performance) among the approaches considered;

(6) The recommended multi-agency or intra-agency contracting approach;

(7) The conclusion that the contract to be awarded by the selected servicing organization is the most advantageous alternative to the Government, notwithstanding fees and the increased risk associated with assisted contracting; and

(8) The steps that will be taken to ensure that contract funding will comply with the *bona fide* needs rule and the Anti-Deficiency Act.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

Subpart 317.70—Multi-agency and Intra-agency Contracts

317.7000 Scope of subpart.

(a) This subpart prescribes policies for HHS' use of multi-agency and intra-agency contracting under all authorities. It does not apply when HHS transfers funds to another agency under an interagency agreement whose primary purpose is other than contracting on HHS' behalf.

(b) For multi-agency contracts under the authority of the Economy Act, *see FAR Subpart 17.5* and *317.503*.

(c) Multi-agency contracting authorities other than the Economy Act include but are not limited to the Clinger-Cohen Act [40 U.S.C. 11302(e)]; the Government Management Reform Act (Pub. L. 103–356); Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, *et seq.*); and 40 U.S.C. 501, Services for Executive Agencies.

317.7001 Definitions.

As used in this subpart:

Multi-agency contracting describes a procedure in which a Federal agency needing supplies or services obtains them using another Federal agency's contract (direct ordering), the contracting assistance of another Federal agency (assisted contracting), or both. In some cases, more than one servicing organization may be involved in assisted contracting.

Intra-agency contracting describes a procedure in which an HHS OPDIV/STAFFDIV needing supplies or services obtains them by issuing an order under another HHS OPDIV/STAFFDIV's contract or agreement (e.g., a BPA—direct ordering); or using the contracting assistance of another OPDIV/STAFFDIV (assisted contracting); or both.

Assisted contracting is a subset of multi-agency/intra-agency contracting in which a servicing contracting office

other than the requesting organization's assigned contracting office contracts on behalf of the requesting organization.

Direct ordering is a subset of multi-/intra-agency contracting in which a contracting or ordering officer issues an order under another OPDIV's or Federal agency's indefinite delivery vehicle (e.g., a GSA FSS schedule or a GWAC).

Requesting organization refers to the organization with the requirement for a multi- or intra-agency contract.

Servicing organization refers to an organization that assists a requesting organization by awarding a contract or order on its behalf. In the context of multi-agency contracting, the servicing organization and requesting organization must be in different Federal agencies. For intra-agency contracting, the servicing and requesting organizations must both be HHS organizations.

317.7002 Potential multi-agency and intra-agency sources.

(a) Prior to deciding to use multi-agency or intra-agency contracting, the requesting organization must perform sufficient market research to consider the relative merits and costs of available contracts and contracting offices for meeting the requesting organization's need.

(b) Direct ordering conducted by HHS contracting officers using GSA vehicles, GWACs, and vehicles established under the Federal Strategic Sourcing Initiative does not require justification. HHS contracting officers should be cautious about using unfamiliar contract vehicles. When using vehicles other than those listed above, the Contracting Officer shall include in the contract file a D & F, which is prepared in consultation with the SBS, and which concludes that the chosen vehicle is the best way to obtain the required product or service.

(c) With the exception of assisted contracts and direct order acquisitions to be placed pursuant to the authority of the Economy Act, which always require preparation of a supporting D & F—*see FAR 17.503*, proposed assisted contracts approved as part of an annual or updated acquisition plan require no additional documentation or approvals.

(d) For proposed assisted contracts *not* approved as part of an annual or update acquisition plan, the requiring organization shall identify the potential servicing organization(s); summarize the services each source provides; and describe the compensation arrangement(s). The assigned contracting office shall be one of the alternatives considered. For multi-agency contract actions, this information shall be included in the Assisted Contracting D & F required in *317.7003(b)*.

317.7003 Documentation for multi-agency contracts.

(a) In the case of proposed direct ordering using vehicles other than those listed in *317.7002(b)*, the HHS contracting officer shall comply with the D & F requirement in *317.7003(b)*.

(b) If a proposed assisted contract, using a servicing organization outside HHS, was not approved during preparation and review of the annual acquisition plan, including updates, then the program/project office or other requiring activity shall prepare an Assisted Contracting D & F, similar to the D & F specified in *FAR 17.503*, but augmented with the information specified in *317.503*. The Project Officer or other requiring official shall be responsible for preparing and staffing this Assisted Contracting D & F.

(1) For assisted contracts greater than or equal to $500,000 (including the value of the base contract and all options and, for indefinite delivery vehicles, the value of the vehicle and all potential orders), the assigned HHS Contracting Officer shall review and approve or reject the Assisted Contracting D & F, annotated with the SBS' recommendation. The Contracting Officer's signature on the Assisted Contracting D&F signifies his/her concurrence that assisted contracting through the proposed servicing contracting office is in the best interest of the government. The Project Officer must retain a copy of the approved Assisted Contracting D & F.

(2) For assisted contracts less than $500,000, the HCA may delegate authority to the Project Officer or other requiring official to approve the required Assisted Contracting D & F. The $500,000 threshold includes the value of the base contract and all options and, for indefinite delivery vehicles, the value of the vehicle and all potential orders.

(3) During a declared (Presidential or HHS Secretarial) emergency, funding and requirements documentation may be transferred to a servicing organization without an Assisted Contracting D & F. The Project Officer shall document his/her file, explaining the exigent circumstances.

(c) Assisted contracts require supporting interagency agreements, as described in OFPP's memorandum, ''Interagency Acquisitions,'' dated June 2008. Note that Part A of an interagency agreement can support multiple assisted contracts. Each interagency agreement shall address all the elements identified in OFPP's model interagency agreement (Appendix 2 of OFPP's ''Interagency Acquisitions''). The level of detail in HHS interagency agreements should be commensurate with the dollar value and complexity of the assisted contract. HHS requesting organizations shall not forward funding or requirements documentation outside HHS without a properly executed interagency agreement; and servicing activities within HHS (e.g., PSC and the NIH Information Technology Acquisition and Assessment Center), shall not contract on behalf of non-HHS requesting organizations without properly executed interagency agreements.

317.7004 Documentation for intra-agency contracts.

(a) In the case of proposed direct ordering, using vehicles other than those listed in *317.7002(b)*, the HHS contracting officer shall comply with the D & F requirement in *317.7003(b)*.

(b) With the exception of assisted contracts and direct order acquisitions to be placed pursuant to the authority of the Economy Act, which always require preparation of a supporting D & F—*see FAR 17.503*, proposed assisted contracts approved as part of an annual or updated acquisition plan require no additional documentation or approvals.

(c) For proposed assisted contracts *not* approved as part of an annual or updated acquisition plan, the requiring organization shall identify the potential servicing organization(s); summarize the services the source(s) provide(s); and describe the compensation arrangement(s). The assigned contracting office shall be one of the alternatives considered.

(d) Assisted intra-agency contracts may require supporting intra-agency agreements or other documentation as prescribed by OPDIV procedures.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 319—SMALL BUSINESS PROGRAMS

Subpart 319.2—Policies

Sec.
319.201 General policy.
319.202–2 Locating small business sources.
319.270–1 Solicitation provision and contract clause.

Subpart 319.5—Set-Asides for Small Business

319.501 General.
319.506 Withdrawing or modifying set-asides.

Subpart 319.7—Subcontracting With Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns

319.705 Responsibilities of the Contracting Officer under the subcontracting assistance program.
319.705–5 Awards involving subcontracting plans.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 319.2—Policies

319.201 General policy.

(d) The functional management responsibilities for HHS' small business program (*i.e.*, small businesses; veteran-owned small businesses; service-disabled, veteran-owned small businesses; HUBZone small businesses; small disadvantaged businesses; and women-owned small businesses) are delegated to the OSDBU Director. *See* the HHS Small Business Program manual for information on the HHS small business program, including SBS and Small Business Administration (SBA) Procurement Center Representative (PCR) acquisition review timeframes.

(e)(1) One or more qualified SBSs will implement the HHS small business program and shall be co-located within the following OPDIVs: AHRQ; ASPR/OAMCG; CDC; CMS; FDA; HRSA; IHS; NIH; PSC; and SAMHSA. The OSDBU Director shall exercise full management authority over SBSs.

(2) Within IHS, the primary SBS will be responsible for IHS' overall implementation of the HHS small business program; however, each IHS contracting office will have a small business technical advisor (SBTA) to carry out those functions and responsibilities to implement the small business program. The primary IHS SBS shall assist and provide guidance to respective SBTAs.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

319.202–2 Locating small business sources.

(a) OPDIVs shall foster, to the extent practicable, maximum participation by small businesses in HHS acquisitions. Prior to issuing a solicitation, the Contracting Officer shall make every reasonable effort to find small business concerns that can compete for the proposed requirement—*see FAR 19.202*, *10.001(2)(v)*, and *10.002(b)(1)(vii)*.

(1) If it cannot be determined in advance (through market research under *FAR Part 10*, discussions between the Contracting Officer and the SBS, or other means—*see FAR 15.201*, whether a solicitation in excess of the simplified acquisition threshold can be set aside exclusively for small business participation [whether for small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; or 8(a) small business(es)], the Contracting Officer may publish a notice entitled ''Small Business Sources Sought'' in FedBizOpps. The purpose of a Small Business Sources Sought notice is to identify the availability and capability of qualified small business sources; and their size classification relative to the appropriate North American Industry Classification System (NAICs) code. This will assist the Government in determining the appropriate acquisition method, including whether a set-aside is possible. However, to solicit technical, scientific, or business information for project planning purposes, an RFI may be used—*see 315.201(e)*.

(2) When using a Small Business Sought notice, an OPDIV shall not request that potential sources provide more than the minimum information necessary—*see FAR 10.001(b)*, to determine whether they have the apparent capability to perform a requirement and, therefore, whether they should be included in any future competition. The notice and the information received shall not be used to determine how well respondents can perform a requirement, which can only be evaluated in response to a solicitation. Accordingly, the notice shall not be used to—

(i) Obtain capability statements that are evaluated and determined acceptable or unacceptable;

(ii) Require cost/price proposals or detailed technical solutions;

(iii) Identify a prospective sole source; or

(iv) Exclude small business concerns.

(3) OPDIVs shall follow the standard HHS instructions for completing a ''Small Business Sources Sought'' notice.'' The template for the notice is available on the ASFR/OGAPA/DA Internet Web site. The Contracting Officer shall post the notice in FedBizOpps by selecting and completing a Sources Sought notice, accessible on the FedBizOpps ''Notices'' page at: *http://www.fedbizopps.gov*. Additional information may be included in the notice in accordance with OPDIV procedures. The Contracting Officer shall document, in the form of a memorandum to the file, the results of the review by technical personnel of information submitted in response to the notice, including whether each respondent appears to be capable of performing the requirement. The Contracting Officer shall attach a copy of the analysis provided by the technical personnel to the memorandum.

319.270–1 Solicitation provision and contract clause.

(a) The Contacting Officer shall insert the provision in *352.219–70*, Mentor-Protégé Program, in solicitations that include the clause in *FAR 52.219–9*, Small Business Subcontracting Plan. The provision requires that offerors provide the Contracting Officer a copy of their HHS Office of Small and Disadvantaged Business Utilization (OSDBU)-approved mentor-protégé agreement in response to a solicitation. (b) The Contacting Officer shall insert the clause in *352.219–71*, Mentor-Protégé Program Reporting Requirements, in contracts that include the clause in *FAR 52.219–9*, Small Business Subcontracting Plan, and which are awarded to a contractor with an HHS OSDBU-approved mentor-protégé agreement.

Subpart 319.5—Set-Asides for Small Business

319.501 General.

(e) Subsequent to the Contracting Officer's recommendation on *Form HHS 653*, HHS Small Business Review Form, the SBS shall review each proposed acquisition strategy and either concur or not concur with the Contracting Officer's recommendation. The PCR shall also review the acquisition strategy and either concur or not concur with the Contracting Officer's recommendation. If the Contracting Officer disapproves the SBS's or the PCR's set-aside recommendation, the Contracting Officer shall document the reasons on *Form HHS 653* and place the form in the contract file. The Contracting Officer shall make the final determination as to whether the proposed acquisition will be set-aside or not.

319.506 Withdrawing or modifying set-asides.

(d) Immediately upon notice from the Contracting Officer, the SBS shall provide notification of all set-aside withdrawals to the OSDBU Director by both telephone and e-mail.

Subpart 319.7—Subcontracting With Small Business, Small Disadvantaged Business, and Women-Owned Small Business Concerns

319.705 Responsibilities of the Contracting Officer under the subcontracting assistance program.

319.705–5 Awards involving subcontracting plans.

(a)(3) The Contracting Officer shall provide the PCR a period of 1 to 5 working days to review the contract award package, depending upon the circumstances and complexity of the individual acquisition.

PART 322—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 322.8—Equal Employment Opportunity

Sec.
322.810 Solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 322.8—Equal Employment Opportunity

322.810 Solicitation provisions and contract clauses.

(h) The Contracting Officer shall insert the clause in *352.222–70*, Contractor Cooperation in Equal Employment Opportunity Investigations, in solicitations, contracts, and orders that include the clause in FAR *52.222–26*, Equal Opportunity.

PART 323—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 323.70—Safety and Health

Sec.
323.7000 Scope of subpart.
323.7001 Policy.
323.7002 Actions required.

Subpart 323.71—Green Purchasing Requirements

323.7100 Policy.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 323.70—Safety and Health

323.7000 Scope of subpart.

This subpart prescribes the use of a safety and health clause in contracts involving hazardous materials or operations, and provides procedures for administering safety and health provisions.

323.7001 Policy.

Various statutes and regulations (e.g., the Walsh-Healy Act and *Service Contract Act)*, require adherence to minimum safety and health standards by contractors engaged in potentially hazardous work. *FAR subpart 23.3* serves as the primary reference regarding hazardous materials. The Contracting Officer shall follow the guidance in this subpart when the guidance in the FAR is not sufficient or does not meet the safety and health situation for an acquisition.

323.7002 Actions required.

(a) *Contracting activities*. The Contracting Officer shall insert the clause in *352.223–70*, Safety and Health, or a clause substantially the same, in solicitations and contracts that involve hazardous materials or operations for the following types of requirements:

(1) Services or products.

(2) Research, development, or test projects.

(3) Transportation of hazardous materials.

(4) Construction, including construction of facilities on the contractor's premises.

(b) *Safety officers*. OPDIV safety officers shall advise and assist initiators of acquisition requests and Contracting Officers in—

(1) Determining whether safety and health provisions shall be part of a prospective contract;

(2) Evaluating a prospective contractor's safety and health programs; and

(3) Conducting post-award reviews and surveillance to the extent deemed necessary.

(c) *Initiators*. Initiators of acquisition requests for items described in paragraph (a) of this section shall—

(1) During the preparation of an acquisition plan or other acquisition request documentation, and in the solicitation, ensure that hazardous materials and operations to be used in the performance of the contract are clearly identified; and

(2) During the period of performance—

(i) Apprise the Contracting Officer of any noncompliance with safety and health provisions identified in the contract; and

(ii) Cooperate with the safety officer in conducting review and surveillance activities.

Subpart 323.71—Green Purchasing Requirements

323.7100 Policy.

(a) The HHS guidelines and procedures for ''green purchasing'' may be found in the HHS Affirmative Procurement Plan (APP), ''Purchasing Environmentally Preferable Products and Services at the U.S. Department of Health and Human Services.'' The APP encompasses the acquisition and use of designated recycled content, and Energy Star®, Electronic Product Environmental Assessment Tool (EPEAT)-registered, energy-efficient, bio-based, and environmentally preferable products.

(1) ASFR/OGAPA/DA has overall responsibility for monitoring the OPDIVs' implementation of HHS' APP to ensure compliance with Executive Order 13423, ''Strengthening Federal Environmental, Energy, and Transportation Management;'' the White House Council on Environmental Quality's Implementing Instructions for Executive Order 13423; Section 6002 of the Resource Conservation and Recovery Act of 1976; Section 104 of the Energy Policy Act of 2005; Section 9002 of the Farm Security and Rural Investment Act of 2002; Section 612 of the Clean Air Act of 1990; and FAR *Part 23*.

(2) The OPDIVs, through their designated APP Program Managers, are responsible for establishing the necessary local procedures and appropriate training requirements to ensure effective implementation of the HHS APP.

PART 324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 324.1—Protection of Individual Privacy

Sec.
324.000 Scope of subpart.
324.102 General.
324.103 Procedures.

Subpart 324.2—Freedom of Information Act

324.203 Policy.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 324.1—Protection of Individual Privacy

324.000 Scope of subpart.

This part prescribes policies and procedures that apply requirements of the Privacy Act of 1974 (5 U.S.C. 552a) and *OMB Circular A–130, Revised, November 30, 2000*, to HHS contracts and cites the Freedom of Information Act (5 U.S.C. 552, as amended).

324.102 General.

(a) It is HHS policy to protect the privacy of individuals to the maximum possible extent, while permitting the exchange of records required to fulfill HHS administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information Act (5 U.S.C. 552). The Privacy Act of 1974 and the HHS implementation under 45 CFR Part 5b apply ''when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish any agency function * * *.'' The key factor is whether an HHS function is involved. Therefore, the Privacy Act requirements apply to an HHS contract when, under the contract, the contractor must maintain or

operate a system of records to accomplish an HHS function.

(e) The Project Officer, and, as necessary, the official designated as the OPDIV's Privacy Act Coordinator and OGC–GLD, shall determine the applicability of the Privacy Act to each proposed acquisition. The Project Officer is required to include a statement in the AP or other acquisition request document indicating whether the Privacy Act is or is not applicable to a proposed acquisition.

(f) Whenever a Contracting Officer is informed that the Privacy Act is not applicable, but the resultant contract will involve the collection of individually identifiable personal data by the contractor, the Contracting Officer shall include provisions to protect the confidentiality of the records and the privacy of individuals identified in the records.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

324.103 Procedures.

(a) The Contracting Officer shall review all acquisition request documentation to determine whether the Privacy Act requirements are applicable. The Privacy Act requirements apply when a contract or order will require the contractor to design, develop, or operate any Privacy Act system of records on individuals to accomplish an agency function. When applicable, the Contracting Officer shall include the two Privacy Act clauses required by *FAR 24.104* in the solicitation and contract or order. In addition, the Contracting Officer shall include the two FAR Privacy Act clauses, and other pertinent information specified in this subpart, in any modification which results in the Privacy Act requirements becoming applicable to a contract or order.

(b)(1) The Contracting Officer shall identify in the SOW/PWS the system(s) of records to which the Privacy Act and the implementing regulations are applicable.

(2) The Contracting Officer shall include the clause specified in *352.224–70*, Privacy Act, in solicitations, contracts, and orders that involve Privacy Act requirements to notify the contractor that it and its employees are subject to criminal penalties for violations of the Privacy Act (5 U.S.C. 552a(i)) to the same extent as HHS employees. The clause also requires the contractor to ensure that each of its employees knows the prescribed rules of conduct and each contractor employee is aware that he/she is subject to criminal penalties for violations of the Privacy Act. These requirements also apply to all subcontracts awarded under the contract or order that require the design, development, or operation of a system of records. The Contracting Officer shall send the contractor a copy of 45 CFR Part 5b, which includes the rules of conduct and other Privacy Act requirements.

(c) The Contracting Officer shall specify in the contract SOW/PWS the disposition to be made of the system(s) of records upon completion of contract performance. The contract SOW/PWS may require the contractor to destroy the records, remove personal identifiers, or turn the records over to the Contracting Officer. If there is a legitimate need for a contractor to keep copies of the records after completion of a contract, the contractor must take measures, as approved by the Contracting Officer, to keep the records confidential and protect the individuals' privacy.

(d) For any acquisition subject to Privacy Act requirements, the Project Officer, prior to award, or the COTR, after award, shall prepare and have published in the FEDERAL REGISTER a ''system notice,'' describing HHS' intent to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system. The Project Officer shall attach a copy of the system notice to the acquisition plan or other acquisition request documentation. If a system notice is not attached, the Contracting Officer shall inquire about its status and shall obtain a copy from the Project Officer for inclusion in the contract file. If a system notice has not been published in the FEDERAL REGISTER, the Contracting Officer may proceed with the acquisition but shall not award the contract until the system notice is published and the Contracting Officer verifies its publication.

Subpart 324.2—Freedom of Information Act

324.203 Policy.

(a) The HHS regulation implementing the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended, is set forth in 45 CFR Part 5.

(b) The Contracting Officer, upon receiving a FOIA request, shall follow HHS and OPDIV procedures. As necessary, the Contracting Officer shall coordinate all actions with the cognizant Freedom of Information (FOI) Officer and the OGC–GLD. Only the FOI Officer is authorized to release or deny release of records. The Contracting Officer shall be familiar with the entire FOIA regulation in 45 CFR Part 5.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 327—PATENTS, DATA, AND COPYRIGHTS

Subpart 327.4—Rights in Data and Copyrights

Sec.
327.404–70 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 327.4—Rights in Data and Copyrights

327.404–70 Solicitation provision and contract clause.

The Contracting Officer shall insert the clause in *352.227–70*, Publications and Publicity, in solicitations, contracts, and orders that involve requirements which could lead to the contractor's publishing the results of the award.

PART 328—BONDS AND INSURANCE

Subpart 328.3—Insurance

Sec.
328.301 Policy.
328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
328.311–2 Agency solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 328.3—Insurance

328.301 Policy.

It is HHS policy to limit the Government's reimbursement, of its contractors' liability to third persons for claims not covered by insurance in cost-reimbursement contracts, to the Limitation of Funds or Limitation of Cost clause of the contract. In addition, the amount of the Government's reimbursement cannot exceed the final judgments or settlements approved in writing by the Government.

328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

328.311–2 Agency solicitation provisions and contract clauses.

The Contracting Officer shall insert the clause in *352.228–7*, Insurance—Liability to Third Persons, in lieu of the clause in *FAR 52.228–7*, Insurance—Liability to Third Persons, in solicitations and contracts when a cost-reimbursement contract is contemplated. The Contracting Officer shall insert Alternate I or II based on the conditions specified therein. This is an authorized FAR deviation.

PART 330—COST ACCOUNTING STANDARDS

Subpart 330.2—CAS Program Requirements

Sec.
330.201 Contract requirements.
330.201–5 Waiver.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 330.2—CAS Program Requirements

330.201 Contract requirements.

330.201–5 Waiver.

(a) OPDIVs shall forward waiver requests through appropriate acquisition channels, including the HCA, to the Associate DAS for Acquisition (non-delegable) for review. Associate DAS for Acquisition shall exercise the waiver authority under *FAR 30.201–5(a)(2)*.

PART 331—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 331.1—Applicability

Sec.
331.101–70 Salary rate limitation.
331.102–70 Pricing of adjustments.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 331.1—Applicability

331.101–70 Salary rate limitation.

(a) Beginning in fiscal year 1990, Congress has stipulated in HHS appropriations acts and continuing resolutions that, under applicable NIH, SAMHSA, and AHRQ contracts, appropriated funds cannot be used to pay the direct salary of an individual at a rate in excess of the Federal Executive Schedule Level I.

(b) The Contracting Officer shall insert the clause in *352.231–70*, Salary Rate Limitation, in NIH, SAMHSA, and AHRQ solicitations and contracts that exceed the simplified acquisition threshold when a cost-reimbursement, fixed-price level-of-effort, time-and-materials, or labor-hour contract is contemplated, including modifications of contracts of those types for projects that support extramural program activities. For purposes of this clause, for NIH: Projects that support extramural program activities are basic and applied research projects; and for SAMHSA and AHRQ: Projects that support extramural program activities are mission-related projects, exclusive of contracts for general support services.

331.102–70 Pricing of adjustments.

The Contracting Officer shall insert the clause in *352.231–71*, Pricing of Adjustments, in solicitations and contracts when a fixed-price contract is contemplated.

PART 332—CONTRACT FINANCING

Subpart 332.4—Advance Payments for Non-Commercial Items

Sec.
332.402 General.
332.403 Applicability.
332.407 Interest.
332.409 Contracting Officer action.
332.409–1 Recommendation for approval.

Subpart 332.5—Progress Payments Based on Cost

332.501 General.
332.501–2 Unusual progress payments.

Subpart 332.7—Contract Funding

332.703–70 Funding contracts during a continuing resolution.
332.704 Limitation of cost or funds.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 332.4—Advance Payments for Non-Commercial Items

332.402 General.

(e) The HCA (non-delegable) shall determine whether an advance payment is in the public interest in accordance with *FAR 32.402(c)(1)(iii)(A)*.

332.403 Applicability.

All R&D contracts with educational institutions located in the United States shall provide for financing by use of advance payments, in reasonable amounts, unless otherwise prohibited by law.

332.407 Interest.

(d) The HCA (non-delegable) shall make the determinations in *FAR 32.407(d)*. The HCA may also approve interest-free advance payments for educational institutions and other nonprofit organizations, whether public or private, performing work under nonprofit contracts (without fee) involving health services, educational programs, or social service programs, such as the following:

(1) Community health representative services for an Indian Tribe.

(2) Narcotic addict rehabilitative services.

(3) Comprehensive health care services for Model Neighborhood programs.

(4) Planning and development of health maintenance organizations.

(5) Dissemination of information derived from educational research.

(6) Surveys or demonstrations in the field of education.

(7) Producing or distributing educational media for disabled persons including captioned films for the hearing impaired.

(8) Operation of language or area centers.

(9) Biomedical research and support services.

(10) Research surveys or demonstrations involving the training and placement of health personnel and health professionals, and dissemination of related information.

(11) Surveys or demonstrations in the field of social service.

332.409 Contracting Officer action.

332.409–1 Recommendation for approval.

The Contracting Officer shall transmit the information in *FAR 32.409–1* (or *FAR 32.409–2*) to the HCA by memorandum.

Subpart 332.5—Progress Payments Based on Cost

332.501 General.

332.501–2 Unusual progress payments.

(a)(3) The HCA (non-delegable) shall approve an unusual progress payment.

Subpart 332.7—Contract Funding

332.703–70 Funding contracts during a continuing resolution.

(a) *Continuing resolutions*. A continuing resolution (CR) is a legislative measure enacted to keep existing Federal programs functioning, generally at minimal levels, after the expiration of prior fiscal year budget authority and until passage of regular appropriation acts by Congress.

(b) *Operating guidance*. Because the terms of CRs may vary, for each CR, specific operating guidance will be issued by the Office of the Assistant Secretary for Financial Resources (ASFR). This guidance will—

(1) Establish the availability of funds for existing and new projects or activities (consistent with the language of the CR);

(2) Identify any specific limits or constraints imposed; and

(3) Establish the authorized level and timing of obligations permitted.

(c) Contracting activities, in concert with program, budget and finance personnel, must carefully assess contract funding decisions to—

(1) Ensure compliance with HHS guidance regarding the specific terms of a CR;

(2) Maintain essential operations and activities; and

(3) Guard against violations of the Anti-Deficiency Act—*see FAR 32.702*.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

332.704 Limitation of cost or funds.

See subpart *342.71*, ''Administrative Actions for Cost Overruns,'' for procedures for handling anticipated cost overruns.

PART 333—PROTESTS, DISPUTES, AND APPEALS

Subpart 333.1—Protests

Sec.
333.102 General.
333.103 Protests to the agency.
333.104 Protests to GAO.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.
333.209 Suspected fraudulent claims.
333.211 Contracting Officer's decision.
333.212 Contracting Officer's duties upon appeal.
333.212–70 Formats.
333.213 Obligation to continue performance.
333.215–70 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 333.1—Protests

333.102 General.

(g)(1) The OGC–GLD serves as the liaison for protests lodged with the Government Accountability Office (GAO); is designated as the office responsible for all protests within HHS; and serves as the notification point with GAO for all protests.

(2) Each contracting activity shall designate a protest control officer to serve as an advisor to the Contracting Officer and to monitor protests from the time of initial notification until the protest has been resolved. Contracting activities shall forward a copy of each appointment and termination of appointment of protest control officers through appropriate acquisition channels, including the HCA, to ASFR/OGAPA/DA and the Deputy Associate General Counsel, OGC–GLD.

333.103 Protests to the agency.

(f)(1) The Contracting Officer is authorized to make the determination, using the criteria in *FAR 33.104(b)*, to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and the OGC–GLD. If a protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, the Contracting Officer shall also obtain approval from Associate DAS for Acquisition and OGC–GLD before making the award.

(2) The Contracting Officer shall require written confirmation of any oral protest. To be considered timely, the protester must file a written confirmation in accordance with the applicable provisions in *FAR 33.102(d)(2) and (e)*. In the following cases, the Contracting Officer shall forward written protests received before award through appropriate acquisition channels, including the HCA, to OGC–GLD for processing:

(i) The protester requests referral to the Secretary of HHS.

(ii) The protest is known to have been lodged with GAO or the Secretary or is addressed to either.

(iii) The Contracting Officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the Secretary or GAO consider the protest. Otherwise, the Contracting Officer may answer protests addressed to the Contracting Officer with the concurrence of the contracting activity's protest control officer and OGC–GLD.

The Contracting Officer shall submit files concerning these protests in duplicate, or as otherwise specified by OGC–GLD, within 5 calendar days after protest receipt; mark the files ''IMMEDIATE ACTION—PROTEST BEFORE AWARD;'' and include any documents relevant to issues raised in the protest.

(3) The Contracting Officer shall treat protests received after award as indicated in *FAR 33.103(f)(3)*.

333.104 Protests to GAO.

(a) *General procedures*.

(3)(ii) OGC–GLD shall process protests filed with GAO, whether pre- or post- award. The Contracting Officer shall prepare protest files as follows: assemble them in a secure binder, fastened at the left side with a fastener that will permit the full page to be read; include a numerical document index, with the first two positions reserved for the Contracting Officer's Statement of Facts and Circumstances and the second for OGC–GLD's Memorandum of Law, that is paginated and, as necessary for sizable files, divided into two or more volumes; and the cover of the report shall identify it as the protest file and include the solicitation number and the GAO Bid Protest file number—*i.e.*, ''B- number.'' In addition, the Contracting Officer shall fold drawings and place them in an envelope in the binder and the solicitation/contract shall constitute a separate exhibit, if it is voluminous in size. The Contracting Officer shall distribute protest files as follows: four copies to OGC–GLD and one copy to the contracting activity's protest control officer. In addition to the items listed in *FAR 33.104(a)(3)(ii)(A) through (G)*, the protest file shall include the following documents:

(H) The current status of award. (*Note*: When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.)

(I) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate—*see FAR 33.104(c)(4)*.

(J) Copies of the notice of protest given offerors and other parties when the notice is appropriate—*see FAR 33.104(a)(2)*.

(K) A copy of the negotiation memorandum, when applicable.

(L) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest.

(M) A copy of the competitive range determination.

(N) The acquisition plan, source selection plan, and the source selection decision document.

(O) The Contracting Officer's statement of facts and circumstances, including numbered findings of fact prepared with complete documentation,

and all the facts and rationale, both favorable and unfavorable, to the Contracting Officer's position.

(4) OGC–GLD shall make the necessary distributions referenced in *FAR 33.104(a)(4)*.

(5) Unless an alternative arrangement is reached with OGC–GLD, the Contracting Officer shall furnish one copy of the protest file containing the documentation specified in paragraph (a)(3)(ii) of this section (with the exception of the Contracting Officer statement of facts and circumstances) and *FAR 33.104(a)(3)(ii)(A) through (G)* to OGC–GLD within 5 calendar days from receipt of the protest. In addition, the Contracting Officer shall also accommodate any other OGC–GLD requests for documents which may be needed prior to the aforementioned 5-day time period. The Contracting Officer shall submit the Contracting Officer's statement of facts and circumstances and the additional copies of documentation within 14 calendar days from receipt of the protest. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the Contracting Officer shall handle each protest on a priority basis. OGC–GLD shall submit copies of the protest file to GAO, the protestor, and any intervenors in accordance with *FAR 33.104(a)(4)(i)*.

(6) Since OGC–GLD will furnish the protest file to GAO, the protestor, and any intervenors, comments on the file from the protestor and any intervenors will be sent to OGC–GLD.

(7) OGC–GLD shall serve as the GAO point of contact for protests lodged with GAO.

(b) *Protests before award*.

(1) To make an award notwithstanding a protest, the Contracting Officer shall prepare a finding using the criteria in *FAR 33.104(b)(1)*, have it executed by the HCA (non-delegable), and forward it, along with a written request for approval to make the award (addressed to the Associate DAS for Acquisition through OGC–GLD). Should OGC–GLD concur, it shall forward the request to the Associate DAS for Acquisition for final approval. The written request for approval shall contain all relevant documentation as attachments to the request, so that the information may be considered by Associate DAS for Acquisition.

(2) If the request to make an award notwithstanding the protest is approved by the Associate DAS for Acquisition, OGC–GLD shall notify GAO. Whether the request is approved or not, OGC–GLD shall telephonically notify the contracting activity's protest control officer of the Associate DAS for Acquisition decision, and the contracting activity's protest control officer shall immediately notify the Contracting Officer. Should the Associate DAS for Acquisition approve the request, ASFR/OGAPA/DA shall send a copy of that written approval to the contracting activity's protest control officer.

(c) *Protests after award*.

(2) If the Contracting Officer believes performance should be allowed to continue notwithstanding a protest, the Contracting Officer shall prepare a written finding using the criteria in *FAR 33.104(c)(2)*. The HCA (non-delegable) shall execute the written finding, which the contracting office shall forward pursuant to the procedures described in paragraph (b)(1) of this section. The notification procedures stated in paragraph (b)(2) of this section shall apply to protests after award.

(d) *Findings and notice*. The Contracting Officer shall prepare the written notice required by *FAR 33.104(d)* and provide a copy to OGC–GLD. OGC–GLD shall provide copies to GAO, the protester, and any intervenors.

(g) *Notice to GAO*. *FAR 33.104(g)* requires the agency to notify GAO, if the agency has not followed any of GAO's recommendations (other than costs) within 60 days after its decision. By the end of the 60-day period, the Contracting Officer shall notify OGC–GLD of the status of implementing the recommendations and reasons for any non-compliance. OGC–GLD shall serve as the designated official to comply with the requirements of *FAR 33.104(g)*.

(i) *Express option*. When GAO invokes the express option, the Contracting Officer shall prepare the complete protest file as described in paragraph (a)(3) of this section, to include the item in paragraph (a)(3)(i), and deliver it (hand-carry, if necessary) to OGC–GLD in time to meet the submittal date

GAO established. OGC–GLD shall notify the Contracting Officer of the submittal date after GAO has finalized its requirements. If the Contracting Officer is not notified about a changed schedule, the timelines for a regular bid protest outlined in *FAR 33.104(a)(3)(i)* shall apply.

Subpart 333.2—Disputes and Appeals

333.203 Applicability.

(c) The Secretary has designated the Civilian Board of Contract Appeals (CBCA) as the authorized ''Board'' to hear and determine disputes for the Department.

333.209 Suspected fraudulent claims.

The Contracting Officer shall submit any instance of a contractor's suspected fraudulent claim to the OIG for investigation.

333.211 Contracting Officer's decision.

(a)(2) The Contracting Officer shall refer a proposed final decision to OGC–GLD, for advice as to the legal sufficiency and format before sending the final decision to the contractor. The Contracting Officer shall provide OGC–GLD with the pertinent documents with the submission of each proposed final decision.

(4)(v) When using the paragraph in *FAR 33.211 (a)(4)(v)*, the Contracting Officer shall insert the words ''Civilian'' before each mention of the term ''Board of Contract Appeals.''

(h) At any time within the period of appeal, the Contracting Officer may modify or withdraw the final decision. If a contractor has appealed the final decision to the CBCA, the Contracting Officer shall forward the recommended action to OGC–GLD with a supplement to the contract file that supports the recommended correction or amendment.

333.212 Contracting Officer's duties upon appeal.

(a) The rules set forth in the ''Rules of the Civilian Board of Contract Appeals,'' or the rules established by the U.S. Court of Federal Claims, as appropriate, shall govern appeals.

(b) The OGC–GLD is designated as the Government Trial Attorney to represent the Government in the defense of appeals before the CBCA. OGC–GLD shall provide the decision by CBCA to the appropriate Contracting Officer for compliance in accordance with the CBCA's decision.

(c) If an appeal is filed with the CBCA, the Contracting Officer shall assemble a file, within 30 days of receipt of an appeal or notification that an appeal has been filed, that consists of all documents pertinent to the appeal, including the following:

(1) The decision and findings of fact from which the appeal is taken.

(2) The contract, including specifications and pertinent modifications, plans and drawings.

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued.

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witness on the matter in dispute made prior to the filing of the notice of appeal with the CBCA.

(5) Any additional information considered pertinent. The Contracting Officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the Contracting Officer shall prepare four copies of the file—*i.e.*, one for the CBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the Contracting Officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the Contracting Officer shall provide Government witnesses and specified physical and documentary evidence to the Trial Attorney. The Trial Attorney shall ensure the presence of all witnesses and documentary evidence at both the prehearing conference and hearing.

(e) If a contractor, which has filed an appeal with the CBCA, elects to accept fully the decision from which the appeal was taken, or any modification to

it, and gives written notification of acceptance to the Government Trial Attorney or the concerned Contracting Officer, the Government Trial Attorney shall notify the CBCA of the disposition of the dispute in accordance with Rule 27 of the CBCA.

(f) If the contractor has elected to appeal to the U.S. Court of Federal Claims, the U.S. Department of Justice will represent HHS. However, the Contracting Officer shall coordinate all actions through OGC–GLD.

333.212–70 Formats.

(a) Contracting activities shall use the following format in transmitting appeal files to CBCA:

Your reference:
(*Docket No.*)
(*insert name*)

Clerk of the Board, Civilian Board of Contract Appeals
1800 F. Street, Washington, DC 20405 *(for regular mail delivery)*
1800 M Street, 6th floor, Washington, DC 20036 *[for overnight and physical (hand-carry) delivery]*

Dear (*insert name*):

Transmitted herewith are documents relative to the appeal under Contract No. ____ with the _____ (*insert name of contractor*) in accordance with the procedures under Rule 4. The Government Trial Attorney for this case is _____ (*insert General Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, SW., Washington, DC 20201*).

The request for payment of charges resulting from the processing of this appeal shall be addressed to: _____ (*insert name and address of cognizant finance office.*)

Sincerely yours,

Contracting Officer

Enclosures

(b) Contracting activities shall use the following format in notifying the appellant that the appeal file was submitted to CBCA:

_____
_____
_____

(insert contractor name and address)
Dear _____: *(insert name)*

An appeal file has been compiled relative to the appeal under Contract No. _____ *(insert number)*, and has been submitted to the Civilian Board of Contract Appeals (CBCA). The enclosed duplicate of the appeal file is identical to that submitted to CBCA, except for contract documents which you already have been provided. You may furnish or suggest any additional information deemed pertinent to the appeal to CBCA according to their rules.

The CBCA will provide you with further information concerning this appeal.

Sincerely yours,

Contracting Officer

Enclosure

333.213 Obligation to continue performance.

(a) The Contracting Officer shall use the Disputes clause at *FAR 52.233–1* without the use of Alternate I. However, if the Contracting Officer determines that the Government's interest would be better served by use of paragraph (i) in Alternate I, the HCA or CCO shall approve its use.

333.215–70 Contract clauses.

(a) The Contracting Officer shall insert the clause in *352.233–70*, Choice of Law (Overseas), in solicitations and contracts when performance will be outside the United States, its possessions, and Puerto Rico, except as otherwise provided in a government-to-government agreement.

(b) The Contracting Officer shall insert the clause in *352.233–71*, Litigation and Claims, in solicitations and contracts when a cost-reimbursement, time-and-materials, or labor-hour contract is contemplated (other than a contract for a commercial item.)

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 334—MAJOR SYSTEM ACQUISITION

Subpart 334.2—Earned Value Management System

Sec.
334.200 Definitions.
334.201 Policy.
334.202 Integrated Baseline Reviews (IBRs).
334.203 Solicitation provisions and contract clauses.
334.203–70 HHS solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 334.2—Earned Value Management System

334.200 Definitions.

As used in this subpart, the following definitions shall apply:

Full EVMS means tracking and reporting of both the cost and schedule aspects of a contract using the principles and guidelines described in ANSI/EIA Standard-748, Earned Value Management Systems (using the version of the Standard that is in effect at the time of the solicitation).

Partial EVMS means tracking and reporting of only the schedule aspects of a contract using the principles and guidelines described in ANSI/EIA Standard-748, Earned Value Management Systems (using the version of the Standard that is in effect at the time of the solicitation).

334.201 Policy.

(a) For acquisitions for development designated as major in accordance with both OMB Circular A–11 and HHS policy on major acquisitions; for acquisitions that involve substantial development, modification or enhancement; or for acquisitions that involve significant upgrade of operational or steady state systems or programs, use of an Earned Value Management System (EVMS) is required as follows:

(1) For individual cost-reimbursement or fixed-price-incentive contracts (with incentive based on cost) valued at $10 million to $25 million, including options, full EVMS (as defined in *334.200*) is required and the contractor's EVMS shall comply with the guidelines in ANSI/EIA Standard-748.

(2) For individual firm-fixed-price, term form (level-of-effort) of any type, time-and-materials, or labor-hour contracts valued at $10 million to $25 million, including options, partial EVMS (as defined in *334.200*) is required and the contractor's EVMS shall comply with the guidelines in ANSI/EIA Standard-748.

(3) For individual cost-reimbursement or fixed-price-incentive contracts (with incentive based on cost) valued at more than $25 million, including options, full EVMS (as defined in *334.200*) is required and the contractor's EVMS must be formally validated and accepted by the Government—*i.e.*, the contractor's Cognizant Federal Agency (CFA), as defined in *FAR 2.101* and described in *FAR 42.003*).

(4) For individual firm-fixed-price, term form (level-of-effort) of any type, time-and-materials, or labor-hour contracts valued at more than $25 million, including options, partial EVMS (as defined in *334.200*) is required and the contractor's EVMS must be formally validated and accepted by the Government—*i.e.*, the contractor's CFA.

(5) For individual contracts of any type valued at less than $10 million, including options, full or partial EVM application, as appropriate to the contract type involved, is optional. The recommendation to use EVM should be based upon a risk analysis by the Program Manager/Project Officer. A decision to use EVM at this level requires the prior approval of the cognizant HCA.

(b) EVM is not required, but may be applied with prior written approval of the HCA, on contracts of any dollar amount meeting either of the following criteria:

(1) The acquisition is for non-developmental support services (e.g., program office support, Independent Verification & Validation services), steady state operations, basic and applied research, and routine services

(e.g., building maintenance, help-desk services, landscaping services).

(2) The contract is for a commercial item(s) under FAR *Part 12*.

(c) When full EVM is required on a prime contract, it applies to subcontracts issued there under if those subcontracts have a value and are of a type and subject matter that would have required the use of full EVM had they been prime contracts. However, if the prime contract requires the use of only partial EVM, any subcontracts to which EVM is made applicable, because of dollar value, contract type or subject matter, shall require only partial EVM.

(d) When offerors are required to provide an EVMS plan as part of their proposals, the Contracting Officer shall request the assistance of the Project Officer (and/or an appropriate HHS-designated third party) in determining the adequacy of such proposed EVMS plans.

(e) The selection or use of a particular contract type, if done only or primarily to avoid the application of full EVM to the acquisition is prohibited.

334.202 Integrated Baseline Reviews (IBRs).

(a) An IBR normally should be conducted as a post-award activity. A pre-award IBR may be conducted only if—

(1) The AP contains documentation that demonstrates the need and rationale for a pre-award IBR, including an assessment of the impact on the source selection schedule and the expected benefits;

(2) The use of a pre-award IBR is approved in writing by the HCA prior to the issuance of the solicitation;

(3) The source selection plan specifically addresses how the results of a pre-award IBR will be used during source selection, including any weight to be given to it in source evaluation, and that same or similar rationale is clearly set forth in the solicitation; and,

(4) Specific arrangements are made, and budget authority is provided, to compensate all offerors who prepare for or participate in a pre-award IBR; and the solicitation informs prospective offerors of the means for and conditions of such compensation.

334.203 Solicitation provisions and contract clauses.

The FAR EVMS solicitation provisions and contract clause shall not be used in HHS contracts. *See 334.203–70* for the HHS solicitation provisions and contract clauses.

334.203–70 HHS solicitation provisions and contract clauses.

As provided in *334.201(a)* and *334.202*, the Contracting Officer shall insert the following:

(a) The provision in *352.234–1*, Notice of Earned Value Management System—Pre-Award IBR, in solicitations that will require the contractor to use an EVMS, whether full or partial, when the Government requires an IBR prior to award.

(b) The provision in *352.234–2*, Notice of Earned Value Management System—Post-Award IBR, in solicitations that will require the contractor to use an EVMS, whether full or partial, when the Government requires an IBR after contract award.

(c) The clause in *352.234–3*, Full Earned Value Management System, in solicitations and contracts, valued at, or greater than, $25 million, when a cost-reimbursement or fixed-price-incentive contract (where the incentive is based on cost) is contemplated, and which require a contractor to use full EVMS. The Contracting Officer shall use the clause with its Alternate I when the contract value is equal to or greater than $10 million, but less than $25 million.

(d) The clause in *352.234–4*, Partial Earned Value Management System, in solicitations and contracts, valued at, or greater than, $25 million, when a firm-fixed-price, time-and-materials, labor-hour, or term-form cost-plus-fixed-fee contract is contemplated, and which require a contractor to use partial EVMS. The Contracting Officer shall use the clause with its Alternate I when the contract value, is equal to or greater than $10 million, but less than $25 million.

PART 335—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
335.070 Cost sharing.
335.070–1 Policy.
335.070–2 Amount of cost sharing.
335.070–3 Method of cost sharing.
335.070–4 Contract award.
335.071 Special determinations and findings affecting research and development contracting.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

335.070 Cost-sharing.

335.070–1 Policy.

(a) Contracting activities shall encourage performing organizations to contribute to the cost of performing R & D, through the use of cost-sharing contracts, where there is a probability that the contractor will receive present or future benefits from participation, such as increased technical know-how, training for employees, acquisition of equipment, and use of background knowledge in future contracts. Cost-sharing is intended to serve the mutual interests of the Government and the performing organization by helping to ensure efficient utilization of the resources available for the conduct of R & D projects and by promoting sound planning and prudent fiscal policies of the performing organization. The Contracting Officer shall use a cost-sharing contract, unless the Contracting Officer determines that a request for cost-sharing would not be appropriate because of the following circumstances:

(1) The particular R & D objective or scope of effort for the project is specified by the Government rather than proposed by the performing organization. This would usually include any formal Government solicitation for a specific project.

(2) The R & D effort has only minor relevance to the non-Federal activities of the performing organization, and the organization is proposing to undertake the R & D primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Organizations which are predominantly engaged in R & D and have little or no production or other service activities may not be in a favorable position to make a cost contribution. Accordingly, the Contracting Officer shall normally not request cost-sharing, if cost-sharing would require the Government to provide funds through some other means (such as fees) to enable the organization to cost-share.

(b) The Contracting Officer has the responsibility for negotiating cost-sharing. Each R & D contract file shall indicate whether the Contracting Officer considered cost-sharing appropriate for that particular contract and in what amount. If cost sharing was not appropriate, the file must include a statement and factual basis for that decision (e.g., ''Because the contractor will derive no benefits from this award that can be applied to its commercial activities, cost-sharing is not considered appropriate.'') The Contracting Officer shall coordinate with the Project Officer before documenting this decision.

(c) If the Contracting Officer considers cost-sharing appropriate for an R & D contract and the contractor refuses to accept this type of contract, the Contracting Officer may make an award without cost-sharing, if the Contracting Officer concludes that payment of the full cost of the R & D effort is necessary to obtain the services of that particular contractor.

335.070–2 Amount of cost sharing.

When cost-sharing is appropriate, the Contracting Officer shall use the following guidelines to determine the amount of cost participation by the contractor:

(a) The amount of cost participation depends on the extent to which the R & D effort or results are likely to enhance the performing organization's capability, expertise, or competitive position, and the value of this enhancement to the performing organization. Therefore, contractor cost participation could reasonably range from as little as one percent or less of the total project cost to more than 50 percent of the total project cost. Ultimately, cost-sharing is a negotiable item. As

such, the amount of cost-sharing shall be proportional to the anticipated value of the contractor's gain.

(b) If the performing organization will not acquire title to, or the right to use, inventions, patents, or technical information resulting from the R & D project, it is normally appropriate to obtain less cost-sharing than in cases in which the performer acquires these rights.

(c) A fee or profit is not normally paid to the performing organization, if the organization is to contribute to the cost of the R & D effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the R & D is expected to be of only minor value to the performing organization, and if a statute does not require cost-sharing, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit rather than sharing costs of the project.

(d) The organization's participation may be considered over the total term of the project, so that a relatively high contribution in one year may be offset by a relatively low contribution in another.

(e) A relatively low degree of cost-sharing may be appropriate, if an area of R & D requires special stimulus in the national interest.

335.070–3 Method of cost sharing.

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed or by a fixed amount or stated percentage of the total allowable costs of the project. Contractors shall not charge costs contributed to the Government under any other instrument (e.g., grant or contract), including allocations to other instruments as part of any independent R & D program.

335.070–4 Contract award.

Consistent with HHS' objectives of competition and support of the small business program, Contracting Officers shall not award contracts solely on the basis of an organization's ability or willingness to cost-share. Contracting Officers shall make awards primarily on the contractor's competence and only after adequate competition has been obtained among large and small business organizations, whenever possible. An offeror's willingness to share costs is not a technical evaluation consideration, but a business consideration, which is secondary to selecting the best qualified source.

335.071 Special determinations and findings affecting research and development contracting.

OPDIV heads shall sign individual and class D & Fs for—

(a) Acquisition or construction of equipment or facilities on property not owned by the United States pursuant to 42 U.S.C. 241(a)(7); and

(b) Use of an indemnification provision in an R & D contract pursuant to 42 U.S.C. 241(a)(7).

PART 337—SERVICE CONTRACTING—GENERAL

Subpart 337.1—Service Contracts—General

Sec.

337.103–70 Solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 337.1—Service Contracts—General

337.103–70 Solicitation provisions and contract clauses.

(a) The Contracting Officer shall insert the clause in *352.237–70*, Pro-Children Act, in solicitations, contracts, and orders that involve (a) kindergarten, elementary, or secondary education or library services or (b) health or daycare services that are provided to children under the age of 18 on a routine or regular basis pursuant to the Pro-Children Act of 1994.

(b) The Contracting Officer shall insert the clause in *352.237–71*, Crime Control Act—Reporting of Child Abuse, in solicitations, contracts, and orders that require performance on Federal

land or in a Federally operated (or contracted) facility and involve the professions/activities performed by persons specified in the Crime Control Act of 1990, including, but not limited to, physicians, nurses, dentists, health care practitioners, optometrists, psychologists, emergency medical technicians, alcohol or drug treatment personnel, child care workers and administrators, emergency medical technicians and ambulance drivers.

(c) The Contracting Officer shall insert the clause in *352.237–72*, Crime Control Act—Requirement for Background Checks, in solicitations, contracts, and orders that involve providing child care services to children under the age of 18, including social services, health and mental health care, child- (day) care, education (whether or not directly involved in teaching), and rehabilitative programs covered under the Crime Control Act of 1990 (Act).

PART 339—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 339.1—General

Sec.
339.101 Policy.

Subpart 339.2—Electronic and Information Technology

339.201 Clarification.
339.201–70 Required provision and contract clause.
339.203 Approval of exceptions.

Subpart 339.70—Use of General Services Administration Blanket Purchase Agreements for Independent Risk Analysis Services

339.7000 Policy.
339.7001 Request for approval to make an award to other than a GSA BPA holder.
339.7002 Notice of intended award.

Subpart 339.71—Information Security Management

339.7100 Definitions.
339.7101 Policy.
339.7102 Applicability.
339.7103 Solicitation and contract clause.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 339.1—General

339.101 Policy.

(d)(1) The Contracting Officer shall insert the clause in *352.239–70*, Standard for Security Configurations, in solicitations, contracts, and orders that involve the operation or acquisition of an information technology system (for definition of the latter term, *see http://www.hhs.gov/ocio/policy*.)

An HHS information security policy waiver, the template for which is available at: *http://intranet.hhs.gov/infosec/policies_memos.html*, must be approved in order to deviate from HHS OCIO Standard 2009–0001.001S, HHS Standard for Security Configurations Language in HHS Contracts, dated January 30, 2009. A copy of the approved waiver shall be forwarded to the Contracting Officer who, in turn, shall request a comparable deviation for the clause in *352.239–70*.

(2) The Contracting Officer shall insert the clause in *352.239–71*, Standard for Encryption Language, in solicitations, contracts, and orders that involve the acquisition or lease of, or the requirement to use, desktop or laptop computers, mobile devices, or portable media to store or process HHS sensitive information that the Project Officer categorizes as moderate or high under Federal Information Processing Standard (FIPS) 199, Standards for Security Categorization of Federal Information and Information Systems, dated February 2004. An HHS information security policy waiver, the template for which is available at: *http://intranet.hhs.gov/infosec/policies_memos.html*, must be approved in order to deviate from HHS OCIO Standard 2009–0002.001S, HHS Standard for Encryption Language in HHS Contracts, dated January 30, 2009. A copy of the approved waiver shall be forwarded to the Contracting Officer who, in turn, shall request a comparable deviation for the clause in *352.239–71*.

Subpart 339.2—Electronic and Information Technology

339.201 Clarification.

FAR Subpart 39.2, Electronic and Information Technology, requires Federal

agencies to ensure that, when acquiring EIT, Federal employees with disabilities and members of the public with disabilities have access to and use of information and data that is comparable to individuals without disabilities. This EIT access requirement does not apply to a contractor's internal workplaces. EIT that is neither used nor accessed by Federal employees or members of the public is not subject to the Access Board accessibility standards. Contractors in their professional capacity are not members of the public for purposes of Section 508.

339.201–70 Required provision and contract clause.

(a) The Contracting Officer shall insert the provision in *352.239–73(a)*, Electronic and Information Technology Accessibility, in solicitations valued at more than the micro-purchase threshold that involve the development, acquisition, maintenance, or use of EIT products and services subject to Section 508 of the Rehabilitation Act of 1973, as amended, including EIT deliverables such as electronic documents and reports. (NOTE: Exceptions to this requirement can be found in *FAR 39.204*.) After approval of the Section 508 Official or designee, the Contracting Officer may waive the requirement for offerors to provide an HHS Section 508 Product Assessment Template, if Section 508 EIT conformance can be determined conclusively through other less formal methods. The Contracting Officer shall document in the award file any waiver for submission of the Product Assessment Template. The approval of a waiver by the Section 508 Official does not, however, eliminate the requirement for product assessment against Section 508 accessibility standards.

(b) The Contracting Officer shall insert the clause in *352.239–73(b)*, Electronic and Information Technology Accessibility, in contracts and orders that involve the development, acquisition, maintenance, or use of EIT products and services, including EIT deliverables such as electronic documents and reports, subject to Section 508 of the Rehabilitation Act of 1973, as amended, unless the EIT products and services are incidental to the project. (NOTE: Other exceptions to this requirement can be found at *FAR 39.204*.)

(c) When acquiring EIT products and services subject to Section 508 of the Rehabilitation Act of 1973, as amended, in the following circumstances, the Contracting Officer shall insert the paragraph in *352.239–73(c)*, Schedule for Contractor Submission of Section 508 Annual Report, which requires a contractor to provide an HHS Section 508 Annual Report, at the end of the clause in *352.239–73(b)* and cite the schedule for report submission, where indicated:

(1) New multiple-year contracts.

(2) Existing multiple-year contracts, with a performance period of 1 year or more remaining as of January 16, 2008 (the effective date of HHS' interim acquisition guidance).

(3) New multiple-year task and delivery orders exceeding $100,000 awarded under IDIQ or FSS contracts.

(4) Existing multiple-year task and delivery orders exceeding $100,000 awarded under IDIQ or FSS contracts, with a task/delivery order performance period of 1 year or more remaining as of January 16, 2008.

(5) New multiple-year BPA orders that exceed $100,000.

(6) Existing multiple-year BPA orders with a performance period of 1 year or more remaining as of January 16, 2008.

(7) New multiple-year contracts with option periods/quantities.

(8) Existing multiple-year contracts with option periods/quantities remaining as of January 16, 2008.

(d) Before adding funds to a multiple-year contract or order—*see 339.201–70(c)*, that involves the acquisition of EIT products and services, including EIT deliverables such as electronic documents and reports, subject to Section 508 of the Rehabilitation Act of 1973, as amended, the Contracting Officer shall ensure that the contractor has provided to the Contracting Officer and COTR a properly completed HHS Section 508 Annual Report—*see* Section 508 policy on HHS Office on Disability Web site. The Contracting Officer shall request that the contractor provide the report in sufficient time for its review and approval by the Contracting Officer, COTR, and the Section 508 Official

or designee, prior to funding performance beyond the currently funded contract performance period. The Contracting Officer shall ensure that the report and all related approvals are made a part of the official contract/order file. The Section 508 Official or designee shall monitor the Annual Reports, direct corrective measures to improve their submission and quality, and report improvement actions taken to the HHS Office on Disability.

339.203 Approval of exceptions.

(a) Procedures to document exception and determination requests are set forth in the OPDIV/STAFFDIV Section 508 Implementation Plans required by paragraph 4.1 of the HHS Section 508 policy.

(b) In the development of an AP or other acquisition request document, the Contracting Officer shall ensure that all Section 508 commercial non-availability or undue burden exception determination requests for applicable EIT requirements are: (1) Documented and certified in accordance with the requirements of paragraph 4.3, Section 508 Compliance Exceptions, of the HHS Section 508 policy; (2) signed by the Project Officer; (3) approved by the OPDIV Section 508 Official or designee; and (4) included in the AP or other acquisition request document provided by the Project Officer to the contracting office.

(c) In instances where a technical evaluation has been performed, and no organization's proposed products or services meet some or all of Section 508 accessibility standards, in order to proceed with the acquisition, the Contracting Officer shall provide an exception determination request along with the technical evaluation panel's assessment of the Section 508 evaluation factor to the designated Section 508 Official or designee for review and approval/disapproval. *See 315.304* regarding obtaining approval of technical evaluation panel assessments by the Section 508 Official or designee. The Contracting Officer shall include the Section 508 Official's or designee's approval/disapproval of the exception determination request in the official contract file and reference it, as appropriate, in all source selection documents. For further information, *see* paragraphs 4.3, Section 508 Compliance Exceptions, and paragraph 11, Appendix A, of HHS Section 508 policy—*see* Section 508 policy on HHS Office on Disability Web site.

Subpart 339.70—Use of General Services Administration Blanket Purchase Agreements for Independent Risk Analysis Services

339.7000 Policy.

GSA has established government-wide BPAs for independent risk analysis services, including verification and validation of in-house risk assessments. For information on ordering procedures, *see* the attachment to OMB memorandum (M–08–10), Use of Commercial Independent Risk Analysis Services Blanket Purchase Agreements (BPA), dated February 4, 2008, available on the OMB Web site. HHS policy is for contracting activities to use the GSA BPA sources to the maximum practicable extent.

339.7001 Request for approval to make an award to other than a GSA BPA holder.

The Contracting Officer, in conjunction with the OPDIV/STAFFDIV Chief Information Security Officer (CISO), may determine, as part of conducting market research for independent risk analysis services expected to exceed the micro-purchase threshold, that obtaining the required services from a source other than a GSA BPA holder will result in the best value to the Government. In that event, the Contracting Officer shall prepare a request for approval at least 15 business days prior to the planned date of the contract or order award and forward it through the HCA and the OPDIV/STAFFDIV CISO for concurrence, to the SPE. The SPE shall coordinate the processing of the request with the CAO and the HHS CIO. The request for approval shall briefly describe the services required, indicate the intended source's pricing and other terms and conditions, and provide the rationale for award to the intended source rather

than the GSA BPA holders. The request may include additional supporting rationale to document the best value decision, as appropriate.

339.7002 Notice of intended award.

The CAO, or designee, in conjunction with the HHS CIO, will review the Contracting Officer's request for approval to make an award to other than a GSA BPA holder for independent risk analysis services and either approve or disapprove the request in writing. If the CAO, or designee, approves the request, upon approval, the CAO, or designee, shall send a notice of intended award to the designated GSA BPA Contracting Officer, with a copy to OMB's E-Government and Information Technology Administrator, at least 10 business days prior to the date of the proposed award explaining how it provides the best value to the Government. In the event of unusual and compelling urgency, the CAO, or designee, shall provide the notice of intended award to GSA as soon as practicable.

Subpart 339.71—Information Security Management

339.7100 Definitions.

As used in this subpart, the following definitions shall apply:

Adequate security means, in accordance with OMB Circular A–130, Management of Federal Information Resources, Appendix 3 (Security of Federal Automated Information Resources), security commensurate with the risk and magnitude of harm resulting from the loss, misuse, or unauthorized access to or modification of information.

Federal information means, in accordance with OMB Circular A–130, Management of Federal Information Resources, Appendix 3 (Security of Federal Automated Information Resources), information created, collected, processed, disseminated, or disposed of by or for the Federal Government.

Federal information system means an information system used or operated by an executive agency, by a contractor of an executive agency, or by another organization on behalf of an executive agency.

Information means, in accordance with OMB Circular A–130, Management of Federal Information Resources, Appendix 3 (Security of Federal Automated Information Resources), any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual forms.

Information infrastructure means the underlying framework that information systems and assets rely on in processing, transmitting, receiving, or storing information electronically.

Information security means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification or destruction in order to provide—

(1) *Integrity*, which means guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity;

(2) *Confidentiality*, which means preserving authorized restrictions on access and disclosure, including means of protecting personal privacy and proprietary information;

(3) *Availability*, which means ensuring timely and reliable access to and use of information; and

(4) *Privacy*, which means regulating the appropriate collection, maintenance, use, and dissemination of personal information by Federal executive branch agencies. It essentially prohibits disclosure without consent.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, transmission, and dissemination of information, in accordance with defined procedures, whether automated or manual.

Information technology includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services) and related resources.

339.7101 Policy.

HHS is responsible for implementing an information security program to ensure that its information systems and associated facilities, as well as those of its contractors, provide a level of security commensurate with the risk and magnitude of harm that could result from the loss, misuse, disclosure, or modification of the information contained in those systems. Each system's level of security shall protect the integrity, confidentiality, and availability of the information and comply with all security and privacy-related laws and regulations.

339.7102 Applicability.

Contracting Officers are responsible for ensuring that all information technology acquisitions comply with the Federal Information Security Management Act (FISMA), the HHS–OCIO Information Systems Security and Privacy Policy, and FISMA-related FAR and HHSAR requirements. This policy does not apply to national security systems as defined in FISMA.

339.7103 Solicitation and contract clause.

The Contracting Officer shall insert the clause in *352.239–72*, Security Requirements for Federal Information Technology Resources, in solicitations and contracts that involve contractor access to Federal information or Federal information systems.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 342—CONTRACT ADMINISTRATION

Subpart 342.3—Contract Administration Office Functions

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342.302 Contract administration functions.

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

Subpart 342.70—Contract Monitoring

342.7000 Purpose.
342.7001 Contract monitoring responsibilities.
342.7002 Procedures to be followed when a contractor fails to perform.
342.7003 Withholding of contract payments.
342.7003–1 Solicitation provisions and contract clauses.
342.7003–2 Procedures to be followed when withholding payments.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.
342.7101 Contract administration.
342.7101–1 General.
342.7101–2 Procedures.
342.7102 Contract modifications.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 342.3—Contract Administration Office Functions

342.302 Contract administration functions.

(c)(1) In multiple-year contracts or orders, the OPDIV's Section 508 Official or designee, as well as the Contracting Officer and COTR, shall review and approve all Section 508 Annual Reports before the Contracting Officer makes final payment or any option is exercised under any applicable contract/order. In contracts/orders of 1 year or less in duration, the aforementioned officials shall review and approve the Section 508 conformance certification before final payment is made. The Contracting Officer also shall ensure that the report and all related approvals are made a part of the official contract/order file.

(2) The Contracting Officer shall insert the clause in *352.242–70,* Key Personnel, in solicitations and contracts when the Contracting Officer will designate contractor key personnel. *See FAR 35.015* for additional information regarding key personnel when contracting for R & D.

(3) The Contracting Officer shall insert the clause in *352.242–71,* Tobacco-free Facilities, in solicitations, contracts, and orders when some or all of the contractor's performance (including construction services), will take place on HHS-owned or controlled properties. The clause shall not be included if performance requires only that contractor staff attend occasional meetings on HHS properties. In that case, contractor employees are considered ''visitors.'' Further, for any proposed or existing construction contract or order, the Contracting Officer shall coordinate any exceptions to the policy, raised by an incumbent or potential contractor based on union or collective bargaining agreements, with the designated OPDIV tobacco-free policy contact point for final disposition.

(4) The Contracting Officer shall insert the clause in *352.242–72,* Native American Graves Protection and Repatriation Act, in solicitations, contracts, and orders that require performance on Tribal lands or are for construction on Federal or Tribal lands.

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

(a) The Division of Cost Allocation, PSC, shall establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts awarded to State and local governments, colleges and universities, hospitals, and other nonprofit organizations.

(b) The Division of Financial Advisory Services, NIH, shall establish indirect cost rates, fringe benefit rates,

and similar rates for use in contracts awarded to commercial organizations.

Subpart 342.70—Contract Monitoring

342.7000 Purpose.

Contract monitoring is an essential element of contract administration that the Contracting Officer and the COTR perform jointly. This subpart describes HHS' operating concepts.

342.7001 Contract monitoring responsibilities.

(a) The contract establishes the obligations of both the Government and the contractor. The Contracting Officer is the only person authorized to modify the contract and shall confirm all modifications in writing.

(b) The Contracting Officer shall ensure the contractor's compliance with all the terms and conditions of the contract. The Contracting Officer shall inform the contractor by letter (if not already stipulated in the contract) of the authorities and responsibilities of the Government personnel involved with the contract.

(c) The Contracting Officer shall use program, technical, and other personnel for assistance and advice in monitoring the contractor's performance and in other areas of post-award administration. The Contracting Officer shall ensure that these individuals understand and carry out their assigned responsibilities. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract is to assist and advise the Contracting Officer, and act as the COTR when so designated by the Contracting Officer. COTR activities include—

(i) Providing technical monitoring during contract performance and advising the Contracting Officer relating to delivery, acceptance, or rejection of deliverables in accordance with the terms of the contract;

(ii) Assessing contractor performance;

(iii) Recommending necessary changes to the schedule of work and period of performance to accomplish the objectives of the contract (The COTR shall provide the Contracting Officer a written request along with an appropriate justification and a funding document, if additional funds are needed.);

(iv) Reviewing invoices/vouchers and recommending approval/disapproval by the Contracting Officer, including providing comments regarding anything unusual discovered in the review (*Note:* If a contract contains the Salary Rate Limitation clause specified in *352.231–70,* the Contracting Officer, in conjunction with the COTR, shall monitor the contractor's invoices to ensure that the contractor is billing salaries, including those of subcontractors, at rates no higher than the Federal Executive Schedule salary rate limitation in effect on the date(s) the expense(s) was/were incurred.);

(v) Reviewing and recommending approval or disapproval of subcontractors, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The roles of the contract administrator, auditor, cost analyst, and property administrator are to assist or advise the Contracting Officer in post-award administration. Such activities include—

(i) Evaluating contractor systems and procedures, including accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, *etc.;*

(ii) Processing disputes under the Disputes clause and any resultant appeals;

(iii) Modifying or terminating the contract; and

(iv) Determining the allowability of: costs charged in incentive or cost- reimbursement type contracts, and progress payments under fixed-price contracts. This is important for awards to new organizations or those with financial weaknesses.

(d) The Contracting Officer shall ensure that contractor performance and contract monitoring conform with contract terms and conditions. If performance is not satisfactory or if problems

are anticipated, the Contracting Officer shall take immediate action to protect the Government's rights under the contract. The Contracting Officer shall notify appropriate officials of problems that cannot be resolved within contract limitations and whenever the contractor is not meeting contract or program objectives. The notification shall include a statement of corrective actions that the Contracting Officer is taking.

342.7002 Procedures to be followed when a contractor fails to perform.

(a) The Contracting Officer shall initiate immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting terms of the contract. Compliance with the reporting terms includes those reports the contractor is required to submit directly to the payment office. The payment office shall notify the Contracting Officer promptly when the contractor does not submit such a report on time.

(b) When the contract contains a termination for default clause, the contractor's failure to submit any report, perform services, or deliver work when required by the contract is considered a default in performance. The Contracting Officer shall immediately issue a formal 10-day cure notice pursuant to *FAR 49.607*. The notice shall include a statement to the effect that payments will be withheld if the default is not cured within the time period specified in the notice or if the default is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the Contracting Officer shall consider a contractor's failure to submit any required report, perform services, or deliver work when required by the contract a failure to perform. The Contracting Officer shall immediately issue a written notice to the contractor that: specifies the failure, and provides a 10-day period (or longer period if the Contracting Officer deems it necessary) within which the contractor shall either cure the failure or provide reasons for an excusable delay. The notice shall include a statement to the effect that payments will be withheld, if the default is not cured within the time period specified in the notice or if the default is not determined to be excusable.

(1) If the contractor cures the failure or the Contracting Officer determines it to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the Contracting Officer does not determine the failure excusable or the contractor does not provide a response within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The Contracting Officer shall consult *FAR subpart 49.4* for further guidance before taking any of the actions described in this section.

342.7003 Withholding of contract payments.

342.7003–1 Solicitation provisions and contract clauses.

(a) The Contracting Officer shall insert the clause in *352.242–73*, Withholding of Contract Payments, and the clause in *FAR 52.249–14*, Excusable Delays, in solicitations and contracts when a cost-reimbursement, time-and-materials, or labor-hour contract is contemplated.

(b) The Contracting Officer shall insert the clause in *352.242–74*, Final Decisions on Audit Findings, in solicitations and contracts when a cost-reimbursement contract is contemplated, except for those contracts with:

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization that the HCA determines would not be appropriate.

342.7003–2 Procedures to be followed when withholding payments.

(a) When appropriate, the Contracting Officer shall withhold any contract payment when a required report is overdue or the contractor fails to perform or deliver required work or services. When making the determination to withhold contract payments in accordance with the Withholding of Contract Payments clause, the Contracting Officer shall immediately notify the servicing finance office in writing of the determination to withhold payments. The notice of suspension shall contain all information necessary for the finance office to identify the contract—*i.e.*, contract number, task/delivery order number, and contractor name and address.

(b) The Contracting Officer shall immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the Contracting Officer shall immediately notify, in writing, all recipients of the notice of withholding that the withholding is to be lifted and contract payments are to be resumed.

(d) When taking any actions regarding the withholding of payments, the Contracting Officer shall not waive any of the Government's rights when corresponding with the contractor.

Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

This subpart sets forth the procedures to follow when a cost overrun is anticipated. A cost overrun occurs when the allowable actual cost of performing a cost-reimbursement type contract exceeds the total estimated cost specified in the contract.

342.7101 Contract administration.

342.7101–1 General.

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the Contracting Officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the Contracting Officer receives information from a source other than the contractor that a cost overrun is anticipated, the Contracting Officer shall verify the information with the contractor and remind the contractor of the notification requirements of the Limitation of Cost clause.

342.7101–2 Procedures.

(a) Upon notification that a cost overrun is anticipated, the Contracting Officer shall inform the contractor to submit a request for additional funds, which shall include the following:

(1) Name and address of contractor.

(2) Contract number and expiration date.

(3) Contract item(s) and amount(s) creating overrun.

(4) The elements of cost which changed from the original estimate—i.e., labor, material, travel, and overhead, to be furnished in the following format:

(i) Original estimate.

(ii) Costs incurred to date.

(iii) Estimated cost to completion.

(iv) Revised estimate.

(v) Amount of adjustment.

(5) The factors responsible for the increase (e.g., error in estimate, changed conditions).

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of a projected overrun, the Contracting Officer shall—

(1) Immediately advise the appropriate program office and furnish the office a copy of the notice and any other data received;

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and

(3) Maintain continuous communications with the program office to obtain: a timely written decision and justification to continue the contract with additional funds (including verification of funds availability); or a timely written decision and request to terminate the contract.

(c) After receiving the decision by the program office, the Contracting Officer shall promptly notify the contractor in writing of the following:

(1) The specified amount of additional funds allotted to the contract.

(2) Work shall be discontinued when the allotted funds are exhausted, and any work performed after that date is at the contractor's risk.

(3) The Government is considering whether to allot additional funds to the contract and will notify the contractor as soon as possible, but that any work performed after the currently allotted funds are exhausted is at the contractor's risk. (Timely, formal notification of the Government's intention is essential to preclude loss of contractual rights in the event of dispute, termination, or litigation.)

(d) If the program office permits, the Contracting Officer shall refrain from issuing any contractual documents that require new work or an extension of time, pending resolution of the projected overrun.

342.7102 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either—

(1) A provision which: Increases the estimated or ceiling amount in the Limitation of Cost clause of the contract; and states that such clause will thereafter apply to the increased amount; or

(2) A provision stating that the estimated or ceiling amount in the Limitation of Cost clause is not changed by the modification.

(b) The Contracting Officer shall not change a fixed-fee in a contract when funding a cost overrun. The Contracting Officer shall make changes in fixed-fee only to reflect changes in the SOW/PWS that justify an increase or decrease in fee.

SUBCHAPTER H—CLAUSES AND FORMS

PART 352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 352.1—Instructions for Using Provisions and Clauses

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Subpart 352.2—Texts of Provisions and Clauses

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352.242–74 Final decisions on audit findings.
352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.
352.270–2 Indian preference.
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352.270–4 Protection of human subjects.
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352.270–6 Restriction on use of human subjects.
352.270–7 Conference sponsorship request and conference materials disclaimer.
352.270–8 Prostitution and related activities.
352.270–9 Non-discrimination for conscience.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 352.1—Instructions for Using Provisions and Clauses

352.100 Scope of subpart.

This subpart provides guidance for applying HHS provisions and clauses in solicitations, contracts, and orders.

352.101–70 Application of provisions and clauses.

(a) Unless otherwise qualified (e.g., by the type of contract contemplated, the nature of the requirement, or dollar amount) in a prescription for a solicitation provision or contract clause specified in Part 352 or elsewhere in the HHSAR, the term ''contract'' means—

(1) An award, including modifications thereunder, that exceeds the simplified acquisition threshold, including a task order or delivery order, whether placed under a GSA FSS contract, an IDIQ contract, a GWAC, or a BPA, and a purchase order placed under the authority of *FAR subpart 13.5*); and

(2) A bilateral award—*i.e.*, when both the Contracting Officer and the contractor sign the award document, that exceeds the micro-purchase threshold but which does not exceed the simplified acquisition threshold.

(b) When the term ''order'' is specified in a prescription for a solicitation provision or order clause, it means an order that exceeds the micro-purchase

threshold but which does not exceed the simplified acquisition threshold, except those bilateral awards specified in (a)(2) above.

(c) If a clause is included in the master instrument (e.g., in an IDIQ contract or a BPA), it is not necessary to also include the clause in a task order or delivery order thereunder.

(d) When a dollar amount or dollar threshold is specified (e.g., $25 million or simplified acquisition threshold), the dollar amount of the award (contract or order) includes any options thereunder.

Subpart 352.2—Texts of Provisions and Clauses

352.201–70 Paperwork Reduction Act.

As prescribed in *301.106(b)*, the Contracting Officer shall insert the following clause:

PAPERWORK REDUCTION ACT (JANUARY 2006)

(a) This contract involves a requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is outside the scope of their employment, for use by the Federal government or disclosure to third parties; therefore, the *Paperwork Reduction Act of 1995* (44 U.S.C. 3501 *et seq.*) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single time) may be used without the Office of Management and Budget (OMB) first providing clearance. Contractors and the Contracting Officer's Technical Representative shall be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer to determine the procedures for acquiring OMB clearance.

(b) The Contractor shall not expend any funds or begin any data collection until OMB Clearance is received. Once OMB Clearance is received from the Contracting Officer's Technical Representative, the Contracting Officer shall provide the Contractor with written notification authorizing the expenditure of funds and the collection of data. The Contractor shall allow at least 120 days for OMB clearance. The Contracting Officer will consider excessive delays caused by the Government which arise out of causes beyond the control and without the fault or negligence of the Contractor in accordance with the Excusable Delays or Default clause of this contract.

(End of clause)

352.202–1 Definitions.

As prescribed in *FAR 2.201*, the Contracting Officer shall insert the clause in *FAR 52.202–1*, Definitions, as revised by *302.201:*

DEFINITIONS (JANUARY 2006)

(a) In accordance with *52.202–1(a)(1)*, substitute the following as paragraph (a):

''(a) The term ''Secretary'' or ''Head of the Agency'' (also called ''Agency Head'') means the Secretary, Deputy Secretary, or any Assistant Secretary, Administrator or Commissioner of the Department of Health and Human Services; and the term ''his/her duly authorized representative'' means any person, persons, or board authorized to act for the Secretary.''

(b) In accordance with *52.202–1(a)(1)*, add the following paragraph (h):

''(h) The term ''Contracting Officer's Technical Representative'' means the person who monitors the technical aspects of contract performance. The Contracting Officer's Technical Representative is not authorized to issue any instructions or directions which cause any increase or decrease in the Statement of Work/Performance Work Statement/Specifications which would result in the increase or decrease in the price of this contract, or changes in the delivery schedule or period of performance of this contract. If applicable, the Contracting Officer's Technical Representative is not authorized to receive or act upon any notification or revised cost estimate provided by the Contractor in accordance with the Limitation of Cost or Limitation of Funds clauses of this contract.''

352.203–70 Anti-lobbying.

As prescribed in *303.808–70*, the Contracting Officer shall insert the following clause:

ANTI-LOBBYING (JANUARY 2006)

Pursuant to the current HHS annual appropriations act, except for normal and recognized executive-legislative relationships, the Contractor shall not use any HHS contract funds for (i) publicity or propaganda purposes; (ii) the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television or video presentation designed to support or defeat legislation pending before the Congress or any State

legislature, except in presentation to the Congress or any State legislature itself; or (iii) payment of salary or expenses of the Contractor, or any agent acting for the Contractor, related to any activity designed to influence legislation or appropriations pending before the Congress or any State legislature.

(End of clause)

352.215–1 Instructions to offerors—competitive acquisition.

As prescribed in *315.209*, the Contracting Officer shall insert the following paragraph (e) in the provision in *FAR 52.215–1*, Instructions to Offerors—Competitive Acquisition:

(e) *Restriction on disclosure and use of data.*

(1) The proposal submitted in response to this request may contain data (trade secrets; business data (e.g., commercial information, financial information, cost and pricing data); and technical data) which the offeror, including its prospective subcontractor(s), does not want used or disclosed for any purpose other than for evaluation of the proposal. The use and disclosure of any data may be so restricted; provided, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following statements, specifying the particular portions of the proposal which are to be restricted:

''Unless disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, as amended, (the Act) as determined by Freedom of Information (FOI) officials of the Department of Health and Human Services (HHS), data contained in the portions of this proposal which the offeror has specifically identified by page number, paragraph, *etc.* as containing restricted information shall not be used or disclosed except for evaluation purposes.

The offeror acknowledges that HHS may not be able to withhold a record (e.g., data, document, *etc.*) nor deny access to a record requested pursuant to the Act and that the HHS' FOI officials must make that determination. The offeror hereby agrees that the Government is not liable for disclosure if HHS has determined that disclosure is required by the Act.

If a contract is awarded to the offeror as a result of, or in connection with, the submission of this proposal, the Government shall have the right to use or disclose the data to the extent provided in the contract. Proposals not resulting in a contract remain subject to the Act.

The offeror also agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under the Act. The data subject to this restriction are contained in pages (insert page numbers, paragraph designations, *etc.* or other identification).''

(2) In addition, the offeror must mark each page of data it wishes to restrict with the following statement

''Use or disclosure of data contained on this page is subject to the restriction on the cover sheet of this proposal or quotation.''

(3) Offerors are cautioned that proposals submitted with restrictive statements or statements differing in substance from those cited above may not be considered for award. The Government reserves the right to reject any proposal submitted with nonconforming statement(s).

352.215–70 Late proposals and revisions.

As prescribed in *315.208*, the Contracting Officer shall insert the following provision:

LATE PROPOSALS AND REVISIONS (JANUARY 2006)

Notwithstanding the procedures contained in *FAR 52.215–1(c)(3)* of the provision of this solicitation entitled Instructions to Offerors—Competitive Acquisition, the Government may consider a proposal received after the date specified for receipt if it appears to offer the best value to the Government and it was received before proposals were distributed for evaluation, or within 5 calendar days after the exact time specified for receipt, whichever is earlier.

(End of provision)

352.216–70 Additional cost principles.

As prescribed in *316.307(j)*, the Contracting Officer shall insert the following clause:

ADDITIONAL COST PRINCIPLES (JANUARY 2006)

(a) *Bid and proposal (B & P) costs.* (1) B & P costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal contracts, grants, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications.

(2) B & P costs of the current accounting period are allowable as indirect costs.

(3) B & P costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable.

(4) B & P costs do not include independent research and development (IR & D) costs covered by the following paragraph, or pre-award costs covered by paragraph 36 of Attachment B to *OMB Circular A–122*.

(b) *IR & D costs*. (1) IR & D is research and development conducted by an organization which is not sponsored by Federal or non-Federal contracts, grants, or other agreements.

(2) IR & D shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to sponsored research and development.

(3) The cost of IR & D, including its proportionate share of indirect costs, is unallowable.

(End of clause)

352.219–70 Mentor-protégé program.

As prescribed in *319.270–1(a)*, the Contracting Officer shall insert the following provision:

MENTOR-PROTÉGÉ PROGRAM (JANUARY 2010)

(a) Large business prime contractors serving as mentors in the HHS Mentor-Protégé program are eligible for HHS subcontracting plan credit, and shall submit a copy of their HHS Office of Small and Disadvantaged Business Utilization (OSDBU)-approved mentor protégé agreements as part of their offers. The amount of credit provided by the Contracting Officer to a mentor firm for protégé firm developmental assistance costs shall be calculated on a dollar for dollar basis and reported by the mentor firm in the Summary Subcontract Report via the Electronic Subcontracting Reporting System (eSRS) at *http://www.esrs.gov*. The mentor firm and protégé firm shall submit to the Contracting Officer a signed joint statement agreeing on the dollar value of the developmental assistance the mentor firm provided. (For example, a mentor firm would report a $10,000 subcontract awarded to a protégé firm and provision of $5,000 of developmental assistance as $15,000 of developmental assistance.) The mentor firm may use this additional credit towards attaining its subcontracting plan participation goal under this contract.

(b) The program consists of—

(1) *Mentor firms*—large businesses that: (i) demonstrate the interest, commitment, and capability to provide developmental assistance to small business protégé firms; and (ii) have a Mentor-Protégé agreement approved by HHS' OSDBU;

(2) *Protégé firms*—firms that: (i) seek developmental assistance; (ii) qualify as small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, small disadvantaged businesses, or woman-owned businesses; and (iii) have a Mentor-Protégé agreement approved by HHS' OSDBU; and

(3) *Mentor-Protégé agreements*—joint agreements, approved by HHS' OSDBU, which detail the specific terms, conditions, and responsibilities of the mentor-protégé relationship.

(End of provision)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.219–71 Mentor-protégé program reporting requirements.

As prescribed in *319.270–1(b)*, the Contracting Officer shall insert the following clause:

MENTOR-PROTÉGÉ PROGRAM REPORTING REQUIREMENTS (JANUARY 2010)

The Contractor shall comply with all reporting requirements specified in its Mentor-Protégé agreement approved by HHS' OSDBU.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.222–70 Contractor cooperation in equal employment opportunity investigations.

As prescribed in *322.810(h)*, the Contracting Officer shall insert the following clause:

CONTRACTOR COOPERATION IN EQUAL EMPLOYMENT OPPORTUNITY INVESTIGATIONS (JANUARY 2010)

(a) In addition to complying with the clause in FAR 52.222–26, Equal Opportunity, the Contractor shall, in good faith, cooperate with the Department of Health and Human Services (Agency) in investigations of Equal Employment Opportunity (EEO) complaints processed pursuant to 29 CFR Part 1614. For purposes of this clause, the following definitions apply:

(1) ''Complaint'' means a formal or informal complaint that has been lodged with Agency management, Agency EEO officials, the Equal Employment Opportunity Commission (EEOC), or a court of competent jurisdiction.

(2) ''Contractor employee'' means all current Contractor employees who work or worked under this contract. The term also includes current employees of subcontractors who work or worked under this contract. In the case of Contractor and subcontractor employees, who worked under this contract, but who are no longer employed by

the Contractor or subcontractor, or who have been assigned to another entity within the Contractor's or subcontractor's organization, the Contractor shall provide the Agency with that employee's last known mailing address, e-mail address, and telephone number, if that employee has been identified as a witness in an EEO complaint or investigation.

(3) ''Good faith cooperation'' cited in paragraph (a) includes, but is not limited to, making Contractor employees available for: (i) Formal and informal interviews by EEO counselors or other Agency officials processing EEO complaints; (ii) formal or informal interviews by EEO investigators charged with investigating complaints of unlawful discrimination filed by Federal employees; (iii) reviewing and signing appropriate affidavits or declarations summarizing statements provided by such Contractor employees during the course of EEO investigations; (iv) producing documents requested by EEO counselors, EEO investigators, Agency employees, or the EEOC in connection with a pending EEO complaint; and (v) preparing for and providing testimony in hearings before the EEOC and U.S. District Court.

(b) The Contractor shall include the provisions of this clause in all subcontract solicitations and subcontracts awarded at any tier under this contract.

(c) Failure on the part of the Contractor or its subcontractors to comply with the terms of this clause may be grounds for the Contracting Officer to terminate this contract for default.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.223–70 Safety and health.

As prescribed in *323.7002*, the Contracting Officer shall insert the following clause:

SAFETY AND HEALTH (JANUARY 2006)

(a) To help ensure the protection of the life and health of all persons, and to help prevent damage to property, the Contractor shall comply with all Federal, State, and local laws and regulations applicable to the work being performed under this contract. These laws are implemented or enforced by the Environmental Protection Agency, Occupational Safety and Health Administration (OSHA) and other regulatory/enforcement agencies at the Federal, State, and local levels.

(1) In addition, the Contractor shall comply with the following regulations when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects:

(i) 29 CFR 1910.1030, Bloodborne pathogens; 29 CFR 1910.1450, Occupational exposure to hazardous chemicals in laboratories; and other applicable occupational health and safety standards issued by OSHA and included in 29 CFR Part 1910. These regulations are available at *http://www.osha.gov*.

(ii) Nuclear Regulatory Commission Standards and Regulations, pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*). The Contractor may obtain copies from the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

(2) The following Government guidelines are recommended for developing and implementing health and safety operating procedures and practices for both personnel and facilities:

(i) Biosafety in Microbiological and Biomedical Laboratories, CDC. This publication is available at *http://www.cdc.gov/OD/ohs/biosfty/bmbl4/bmbl4toc.htm*.

(ii) Prudent Practices for Safety in Laboratories (1995), National Research Council, National Academy Press, 500 Fifth Street, NW., Lockbox 285, Washington, DC 20055 (ISBN 0–309–05229–7). This publication is available at *http://www.nap.edu/catalog/4911.html*.

(b) Further, the Contractor shall take or cause to be taken additional safety measures as the Contracting Officer, in conjunction with the Contracting Officer's Technical Representative or other appropriate officials, determines to be reasonably necessary. If compliance with these additional safety measures results in an increase or decrease in the cost or time required for performance of any part of work under this contract, the Contracting Officer will make an equitable adjustment in accordance with the applicable ''Changes'' clause set forth in this contract.

(c) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials or hazardous operations; the injury or death of any person; or damage to property incidental to work performed under the contract and all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency. The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by

the Federal, State or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(d) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any stop work order shall be subject to a claim for extension of time or costs or damages by the Contractor.

(e) The Contractor shall insert the substance of this clause in each subcontract involving toxic substances, hazardous materials, or hazardous operations. The Contractor is responsible for the compliance of its subcontractors with the provisions of this clause.

(End of clause)

352.224–70 Privacy Act.

As prescribed in *324.103(b)(2)*, the Contracting Officer shall insert the following clause:

PRIVACY ACT (JANUARY 2006)

This contract requires the Contractor to perform one or more of the following: (a) Design; (b) develop; or (c) operate a Federal agency system of records to accomplish an agency function in accordance with the Privacy Act of 1974 (Act) (5 U.S.C. 552a(m)(1)) and applicable agency regulations. The term ''system of records'' means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. Violations of the Act by the Contractor and/or its employees may result in the imposition of criminal penalties (5 U.S.C. 552a(i)). The Contractor shall ensure that each of its employees knows the prescribed rules of conduct and that each employee is aware that he/she is subject to criminal penalties for violation of the Act to the same extent as Department of Health and Human Services employees. These provisions also apply to all subcontracts the Contractor awards under this contract which require the design, development or operation of the designated system(s) of records [5 U.S.C. 552a(m)(1)]. The contract work statement: (a) identifies the system(s) of records and the design, development, or operation work the Contractor is to perform; and (b) specifies the disposition to be made of such records upon completion of contract performance.

(End of clause)

352.227–70 Publications and publicity.

As prescribed in *327.404–70*, the Contracting Officer shall insert the following clause:

PUBLICATIONS AND PUBLICITY (JANUARY 2006)

(a) Unless otherwise specified in this contract, the Government encourages the Contractor to publish the results of its work under this contract. A copy of each article the Contractor submits for publication shall be promptly sent to the Contracting Officer's Technical Representative. The Contractor shall also inform the Contracting Officer's Technical Representative when the article or other publication is published, and furnish a copy of it as finally published.

(b) Unless authorized by the Contracting Officer's Technical Representative, the Contractor shall not display the HHS logo on any publications.

(End of clause)

352.228–7 Insurance—liability to third persons.

As prescribed in *328.311–2*, the Contracting Officer shall insert the following clause and either Alternate I or II, as appropriate:

INSURANCE—LIABILITY TO THIRD PERSONS (DEC. 1991)

(a)(1) Except as provided in paragraph (a)(2) immediately following, or in paragraph (h) of this clause [if the clause has a paragraph (h)], the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.

(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection

with performance of this contract and for which the Contractor seeks reimbursement.

(c) Except as provided in paragraph (h) of this clause [if the clause has a paragraph (h)], the Contractor shall be reimbursed—

(1) For that portion of the reasonable cost of insurance allocable to this contract, and required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise within the funds available under the Limitation of Cost or the Limitation of Funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for—

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is limited to the amounts reflected in final judgments, or settlements approved in writing by the Government, but in no event to exceed the funds available under the Limitation of Cost or Limitation of Funds clause of this contract. Nothing in this contract shall be construed as implying that, at a later date, the Government will request, or the Congress will appropriate, funds sufficient to meet any deficiencies.

(e) The Government shall not reimburse the Contractor for liabilities (and expenses incidental to such liabilities)—

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of the Contractor's directors, officers, managers, superintendents, or other representatives who have supervision or direction of —

(i) All or substantially all of the Contractor's business;

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; provided, that such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall—

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by the bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

Alternate I (APR 1984). If the successful offeror represents in its offer that it is partially immune from tort liability as a State agency, the Contracting Officer shall add the following paragraph (h) to the basic clause:

(h) Notwithstanding paragraphs (a) and (c) of this clause—

(1) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract; and

(2) The Contractor need not provide or maintain insurance coverage as required by paragraph (a) of this clause; provided, that the Contractor may obtain any insurance coverage deemed necessary, subject to approval by the Contracting Officer as to form, amount, and duration. The Contractor shall be reimbursed for the cost of such insurance and, to the extent provided in paragraph (c) of this clause, for liabilities to third persons for which the Contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount.

(End of clause)

Alternate II (APR 1984). If the successful offeror represents in its offer that it is totally immune from tort liability as a State agency, the Contracting Officer shall substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract.

(b) If any suit or action is filed, or if any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, the Contractor shall immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received by the Contractor. The Contractor shall, if Government requires, authorize Government representatives to settle or defend the claim and to represent the Contractor in or take charge of any litigation. The Contractor may, at its own expense, be associated with the Government representatives in any such claims or litigation.

(End of clause)

352.231–70 Salary rate limitation.

As prescribed in *331.101–70*, the Contracting Officer shall insert the following clause:

SALARY RATE LIMITATION (JANUARY 2010)

(a) Pursuant to the current and applicable prior HHS appropriations acts, the Contractor shall not use contract funds to pay the direct salary of an individual at a rate in excess of the Federal Executive Schedule Level I in effect on the date an expense is incurred.

(b) For purposes of the salary rate limitation, the terms ''direct salary,'' ''salary,'' and ''institutional base salary'' have the same meaning and are collectively referred to as ''direct salary'' in this clause. An individual's direct salary is the annual compensation that the Contractor pays for an individual's direct effort (costs) under the contract. Direct salary excludes any income that an individual may be permitted to earn outside of duties to the Contractor. Direct salary also excludes fringe benefits, overhead, and general and administrative expenses (also referred to as indirect costs or facilities and administrative [F&A] costs).

NOTE: The salary rate limitation does not restrict the salary that an organization may pay an individual working under an HHS contract or order; it merely limits the portion of that salary that may be paid with Federal funds.

(c) The salary rate limitation also applies to individuals under subcontracts. If this is a multiple-year contract or order, it may be subject to unilateral modification by the Contracting Officer to ensure that an individual is not paid at a rate that exceeds the salary rate limitation provision established in the HHS appropriations act in effect when the expense is incurred regardless of the rate initially used to establish contract or order funding.

(d) *See* the salaries and wages pay tables on the U.S. Office of Personnel Management Web site for Federal Executive Schedule salary levels that apply to the current and prior periods.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.231–71 Pricing of adjustments.

As prescribed in *331.102–70*, the Contracting Officer shall insert the following clause:

PRICING OF ADJUSTMENTS (JANUARY 2001)

When costs are a factor in determination of a contract price adjustment pursuant to the ''Changes'' clause or any provision of this contract, the applicable cost principles and procedures set forth below shall form the basis for determining such costs:

Principles	Types of organizations
(a) Subpart 31.2 of the Federal Acquisition Regulation	Commercial.
(b) Subpart 31.3 of the Federal Acquisition Regulation	Educational.
(c) Subpart 31.6 of the Federal Acquisition Regulation	State, local, and Federally recognized Indian Tribal governments.
(d) 45 CFR Part 74 Appendix E	Hospitals (performing research and development contracts only).
(e) Subpart 31.7 of the Federal Acquisition Regulation	Other nonprofit organizations.

(End of clause)

352.233–70 Choice of law (overseas).

As prescribed in *333.215–70(a)*, the Contracting Officer shall insert the following clause:

CHOICE OF LAW (OVERSEAS) (JANUARY 2010)

This contract shall be construed in accordance with the substantive laws of the United States of America. By the execution of this contract, the Contractor expressly agrees to waive any rights to invoke the jurisdiction of local national courts where this contract is performed and agrees to accept the exclusive jurisdiction of the Civilian Board of Contract Appeals and the United States Court of Federal Claims for hearing and determination of any and all disputes that may arise under the Disputes clause of this contract.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.233–71 Litigation and claims.

As prescribed in *333.215–70(b)*, the Contracting Officer shall insert the following clause:

LITIGATION AND CLAIMS (JANUARY 2006)

(a) The Contractor shall provide written notification immediately to the Contracting Officer of any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any subcontract hereunder; and any claim against the Contractor the cost and expense of which is allowable under the clause entitled ''Allowable Cost and Payment.''

(b) Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action.

(c) If the Government undertakes a settlement or defense of an action or claim, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law or regulation or by written direction of the Contracting Officer, but which the Contractor failed to secure through its own fault or negligence. In any event, unless otherwise expressly provided in this contract, the Government shall not reimburse or indemnify the Contractor for any liability loss, cost, or expense, which the Contractor may incur or be subject to by reason of any loss, injury or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

352.234–1 Notice of earned value management system—pre-award Integrated Baseline Review.

As prescribed in *334.203–70(a)*, the Contracting Officer shall insert the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM—PRE-AWARD INTEGRATED BASELINE REVIEW (OCTOBER 2008)

The offeror shall provide documentation that its proposed Earned Value Management System (EVMS) complies with the EVMS guidelines in ANSI/EIA Standard-748 (current version at time of solicitation).

(a) If the offeror proposes to use a system that currently does not meet the requirements of paragraph (a) of this provision, the offeror shall submit a comprehensive plan for compliance with the guidelines.

(1) The plan shall—

(i) Describe the EVMS the offeror intends to use in performance of the contract;

(ii) Distinguish between the offeror's existing management system and modifications proposed to meet the guidelines;

(iii) Describe the management system and its application in terms of the EVMS guidelines;

(iv) Describe the proposed procedure for application of the EVMS requirements to subcontractors;

(v) Provide documentation describing the process and results, including Government participation if applicable, of any third-party evaluation or self-evaluation of the

system's compliance with the EVMS guidelines; and

(vi) Provide a schedule of events leading up to formal validation and Government acceptance of the offeror's EVMS, if the value of the offeror's proposal, including options, is $25 million or more.

(2) The offeror shall provide information and assistance, as required by the Contracting Officer, to support review of the plan.

(3) The Contracting Officer will review the offeror's EVMS implementation plan prior to contract award.

(4) The offeror's EVMS plan must provide milestones indicating when the offeror anticipates that the EVMS will be compliant with the ANSI/EIS Standard-748 guidelines.

(b) The offeror shall identify in its offer the subcontractors, or subcontracted effort if subcontractors have not been identified, to which the requirements of EVMS will be applied. Prior to contract award, the offeror and HHS shall agree on the subcontractors, or subcontracted effort, subject to the EVMS requirement.

(c) HHS will conduct an Integrated Baseline Review (IBR) prior to contract award. The offeror shall be compensated as set forth elsewhere in this solicitation for its preparation for and participation in the IBR.

(End of provision)

352.234–2 Notice of earned value management system—post-award Integrated Baseline Review.

As prescribed in *334.203–70(b)*, the Contracting Officer shall insert the following provision:

NOTICE OF EARNED VALUE MANAGEMENT SYSTEM—POST-AWARD INTEGRATED BASELINE REVIEW (OCTOBER 2008)

(a) The offeror shall provide documentation that its proposed Earned Value Management System (EVMS) complies with the EVMS guidelines in ANSI/EIA Standard-748 (current version in effect at time of solicitation).

(b) If the offeror proposes to use a system that currently does not meet the requirements of paragraph (a) of this provision, the offeror shall submit a comprehensive plan for compliance with the guidelines.

(1) The plan shall—

(i) Describe the EVMS the offeror intends to use in performance of the contract;

(ii) Distinguish between the offeror's existing management system and modifications proposed to meet the guidelines;

(iii) Describe the management system and its application in terms of the EVMS guidelines;

(iv) Describe the proposed procedure for application of the EVMS requirements to subcontractors;

(v) Provide documentation describing the process and results, including Government participation if applicable, of any third-party evaluation or self-evaluation of the system's compliance with the EVMS guidelines; and

(vi) Provide a schedule of events leading up to formal validation and Government acceptance of the offeror's EVMS, if the value of the offeror's proposal, including options, is $25 million or more.

(2) The offeror shall provide information and assistance, as required by the Contracting Officer, to support review of the plan.

(3) The Contracting Officer will review the offeror's EVMS implementation plan prior to contract award.

(4) The offeror's EVMS plan must provide milestones indicating when the offeror anticipates that the EVM system will be compliant with the ANSI/EIA Standard-748 guidelines.

(c) The offeror shall identify in its offer the subcontractors, or subcontracted effort if subcontractors have not been identified, to which the requirements of EVMS will be applied. Prior to contract award, the offeror and HHS shall agree on the subcontractors, or subcontracted effort, subject to the EVMS requirement.

(d) HHS will conduct an Integrated Baseline Review after contract award.

(End of provision)

352.234–3 Full earned value management system.

As prescribed in *334.203–70(c)*, the Contracting Officer shall insert the following clause:

FULL EARNED VALUE MANAGEMENT SYSTEM (OCTOBER 2008)

(a) The Contractor shall use an Earned Value Management System (EVMS) that has been validated and accepted by the Cognizant Federal Agency (CFA) as being compliant with the guidelines in ANSI/EIA Standard-748 (current version at the time of award) to manage this contract. If the Contractor's current EVMS has not been validated and accepted by the CFA at the time of award, *see* paragraph (b) of this clause. The Contractor shall submit EVM reports in accordance with the requirements of this contract.

(b) If, at the time of award, the Contractor's EVM system has not been validated and accepted by the CFA as complying with EVMS guidelines in ANSI/EIA Standard-748 (current version at time of award), the Contractor shall—

(1) Apply the current system to the contract; and

(2) Take necessary and timely actions to meet the milestones in the Contractor's EVMS plan approved by the Contracting Officer.

(c) HHS requires the Contractor to obtain validation and acceptance of its EVM system by the CFA during the base period of performance of this contract. The Contracting Officer or designee will conduct a Compliance Review to assess the Contractor's compliance with its approved plan. If the Contractor does not follow the approved implementation schedule or correct all resulting system deficiencies noted during the Compliance Review within a reasonable time, the Contracting Officer may take remedial action, which may include, but is not limited to, suspension of or reduction in progress payments, or a reduction in fee.

(d) HHS will conduct an Integrated Baseline Review (IBR). If a pre-award IBR has not been conducted, a post-award IBR will be conducted by HHS as early as practicable, but no later than 90 days after contract award. The Contracting Officer may also require an IBR as part of the exercise of an option or the incorporation of a major modification.

(e) Unless a waiver is granted by the CFA, Contractor-proposed EVMS changes require approval of the CFA prior to implementation. The CFA will advise the Contractor of the acceptability of such changes within 30 calendar days after receipt of the notice of proposed changes from the Contractor. If the advance approval requirements are waived by the CFA, the Contractor shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(f) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or a duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS conforms, and continues to conform, with the requirements referenced in paragraph (a) of this clause.

(g) The Contractor shall require the subcontractors specified below to comply with the requirements of the clause: (*Insert list of applicable subcontractors.*)

_____

_____

_____

(End of clause)

(ALTERNATE I) (OCTOBER 2008)

As prescribed in *334.203–70(c)*, the Contracting Officer shall substitute the following paragraphs (a), (b), and (c) for paragraphs (a), (b), and (c) of the basic clause and delete paragraph (e) of the basic clause:

(a) The Contractor shall use an Earned Value Management System (EVMS) that is compliant with the guidelines in ANSI/EIA Standard-748 (current version at the time of award) to manage this contract. If the Contractor's current EVMS is not compliant at the time of award, *see* paragraph (b) of this clause. The Contractor shall submit EVM reports in accordance with the requirements of this contract.

(b) If, at the time of award, the Contractor's EVM system is not in compliance with the EVMS guidelines in ANSI/EIA Standard-748 (current version at time of award), the Contractor shall—

(1) Apply the current system to the contract; and

(2) Take necessary and timely actions to meet the milestones in the Contractor's EVMS plan approved by the Contracting Officer.

(c) HHS will not formally validate or accept the Contractor's EVMS with respect to this contract. The use of the Contractor's EVMS for this contract does not imply HHS acceptance of the Contractor's EVMS for application to future contracts. The Contracting Officer or designee will conduct a Compliance Review to assess the Contractor's compliance with its approved plan. If the Contractor does not follow the approved implementation schedule or correct all resulting system deficiencies noted during the Compliance Review within a reasonable time, the Contracting Officer may take remedial action that may include, but is not limited to, suspension of or reduction in progress payments, or a reduction in fee.

352.234–4 Partial earned value management system.

As prescribed in *334.203–70(d)*, the Contracting Officer shall insert the following clause:

PARTIAL EARNED VALUE MANAGEMENT SYSTEM (OCTOBER 2008)

(a) The Contractor shall use an Earned Value Management System (EVMS) that has been validated and accepted by the Cognizant Federal Agency (CFA) as being compliant with the schedule-related guidelines in ANSI/EIA Standard-748 (current version at the time of award) to manage this contract. If the Contractor's current EVMS has not been validated and accepted by the CFA at the time of award, *see* paragraph (b) of this clause. The Contractor shall submit EVM reports in accordance with the requirements of this contract.

(b) If, at the time of award, the Contractor's EVM system has not been validated and accepted by the CFA as complying with the

schedule-related EVMS guidelines in ANSI/EIA Standard-748 (current version at time of award), the Contractor shall—

(1) Apply the current system to the contract; and

(2) Take necessary and timely actions to meet the milestones in the Contractor's EVMS plan approved by the Contracting Officer.

(c) HHS requires the Contractor to obtain validation and acceptance of the schedule-related portions of its EVM system by the CFA during the base period of performance of this contract. The Contracting Officer or designee will conduct a Compliance Review to assess the Contractor's compliance with its approved plan. If the Contractor does not follow the approved implementation schedule or correct all resulting system deficiencies noted during the Compliance Review within a reasonable time, the Contracting Officer may take remedial action, which may include, but is not limited to, suspension of or reduction in progress payments, or a reduction in fee.

(d) HHS will conduct an Integrated Baseline Review (IBR). If a pre-award IBR has not been conducted, a post-award IBR will be conducted by HHS as early as practicable, but no later than 90 days after contract award. The Contracting Officer may also require an IBR as part of the exercise of an option or the incorporation of a major modification.

(e) Unless a waiver is granted by the CFA, Contractor-proposed EVMS changes require approval of the CFA prior to implementation. The CFA will advise the Contractor of the acceptability of such changes within 30 calendar days after receipt of the notice of proposed changes from the Contractor. If the advance approval requirements are waived by the CFA, the Contractor shall disclose EVMS changes to the CFA at least 14 calendar days prior to the effective date of implementation.

(f) The Contractor shall provide access to all pertinent records and data requested by the Contracting Officer or a duly authorized representative as necessary to permit Government surveillance to ensure that the EVMS conforms, and continues to conform, with the requirements referenced in paragraph (a) of this clause.

(g) The Contractor shall require the subcontractors specified below to comply with the requirements of the clause: (*Insert list of applicable subcontractors.*)

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(End of clause)

(ALTERNATE I) (OCTOBER 2008)

As prescribed in *334.203–70(d)*, the Contracting Officer shall substitute the following paragraphs (a), (b), and (c) for paragraphs (a), (b), and (c) of the basic clause and delete paragraph (e) of the basic clause:

(a) The Contractor shall use an Earned Value Management System (EVMS) that is compliant with the schedule-related guidelines in ANSI/EIA Standard-748 (current version at the time of award) to manage this contract. If the Contractor's current EVMS is not compliant at the time of award, *see* paragraph (b) of this clause. The Contractor shall submit EVM reports in accordance with the requirements of this contract.

(b) If, at the time of award, the Contractor's schedule-related EVM system is not in compliance with the schedule-related EVMS guidelines in ANSI/EIA Standard-748 (current version at time of award), or the Contractor does not have an existing schedule control system that is compliant with such guidelines, the Contractor shall—

(1) Apply the current system to the contract; and

(2) Take necessary and timely actions to meet the milestones in the Contractor's EVMS plan approved by the Contracting Officer.

(c) HHS will not formally validate or accept the Contractor's schedule-related EVMS with respect to this contract. The use of the Contractor's EVMS for this contract does not imply HHS acceptance of the Contractor's EVMS for application to future contracts. The Contracting Officer or designee will conduct a Compliance Review to assess the Contractor's compliance with its approved plan. If the Contractor does not follow the approved implementation schedule or correct all resulting system deficiencies noted during the Compliance Review within a reasonable time, the Contracting Officer may take remedial action that may include, but is not limited to, suspension of or reduction in progress payments, or a reduction in fee.

352.237–70 Pro-Children Act.

As prescribed in *337.103–70(a)*, the Contracting Officer shall insert the following clause:

PRO-CHILDREN ACT (JANUARY 2006)

(a) Public Law 103–227, Title X, Part C, also known as the *Pro-Children Act of 1994* (Act), 20 U.S.C. 7183, imposes restrictions on smoking in facilities where certain Federally funded children's services are provided. The

Act prohibits smoking within any indoor facility (or portion thereof), whether owned, leased, or contracted for, that is used for the routine or regular provision of (i) kindergarten, elementary, or secondary education or library services or (ii) health or day care services that are provided to children under the age of 18. The statutory prohibition also applies to indoor facilities that are constructed, operated, or maintained with Federal funds.

(b) By acceptance of this contract or order, the Contractor agrees to comply with the requirements of the Act. The Act also applies to all subcontracts awarded under this contract for the specified children's services. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understand, and comply with the provisions of the Act. Failure to comply with the Act may result in the imposition of a civil monetary penalty in an amount not to exceed $1,000 for each violation and/or the imposition of an administrative compliance order on the responsible entity. Each day a violation continues constitutes a separate violation.

(End of clause)

352.237–71 Crime Control Act—reporting of child abuse.

As prescribed in *337.103–70(b)*, the Contracting Officer shall insert the following clause:

CRIME CONTROL ACT OF 1990—REPORTING OF CHILD ABUSE (JANUARY 2006)

(a) *Public Law 101–647, also known as the Crime Control Act of 1990 (Act)*, imposes responsibilities on certain individuals who, while engaged in a professional capacity or activity, as defined in the Act, on Federal land or in a Federally-operated (or contracted) facility, learn of facts that give the individual reason to suspect that a child has suffered an incident of child abuse.

(b) The Act designates ''covered professionals'' as those persons engaged in professions and activities in eight different categories including, but not limited to, physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, alcohol or drug treatment personnel, psychologists, psychiatrists, mental health professionals, child care workers and administrators, and commercial film and photo processors. The Act defines the term ''child abuse'' as the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.

(c) Accordingly, any person engaged in a covered profession or activity under an HHS contract or subcontract, regardless of the purpose of the contract or subcontract, shall immediately report a suspected child abuse incident in accordance with the provisions of the Act. If a child is suspected of being harmed, the appropriate State Child Abuse Hotline, local child protective services (CPS), or law enforcement agency shall be contacted. For more information about where and how to file a report, the Childhelp USA, National Child Abuse Hotline (1–800–4–A–CHILD) shall be called. Any covered professional failing to make a timely report of such incident shall be guilty of a Class B misdemeanor.

(d) By acceptance of this contract or order, the Contractor agrees to comply with the requirements of the Act. The Act also applies to all applicable subcontracts awarded under this contract. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understand, and comply with the provisions of the Act.

(End of clause)

352.237–72 Crime Control Act—requirement for background checks.

As prescribed in *337.103–70(c)*, the Contracting Officer shall insert the following clause:

CRIME CONTROL ACT OF 1990—REQUIREMENT FOR BACKGROUND CHECKS (JANUARY 2006)

(a) *Public Law 101–647, also known as the Crime Control Act of 1990 (Act)*, requires that all individuals involved with the provision of child care services to children under the age of 18 undergo a criminal background check. ''Child care services'' include, but are not limited to, social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), and rehabilitative programs. Any conviction for a sex crime, an offense involving a child victim, or a drug felony, may be grounds for denying employment or for dismissal of an employee providing any of the services listed above.

(b) The Contracting Officer will provide the necessary information to the Contractor regarding the process for obtaining the background check. The Contractor may hire a staff person provisionally prior to the completion of a background check, if at all times prior to the receipt of the background check during which children are in the care of the newly-hired person, the person is within the sight and under the supervision of a previously investigated staff person.

(c) By acceptance of this contract or order, the Contractor agrees to comply with the requirements of the Act. The Act also applies to all applicable subcontracts awarded under this contract. Accordingly, the Contractor

shall ensure that each of its employees, and any subcontractor staff, is made aware of, understand, and comply with the provisions of the Act.

(End of clause)

352.239–70 Standard for security configurations.

As prescribed in *339.101(d)(1)*, the Contracting Officer shall insert the following clause:

STANDARD FOR SECURITY CONFIGURATIONS (JANUARY 2010)

(a) The Contractor shall configure its computers that contain HHS data with the applicable Federal Desktop Core Configuration (FDCC) (*see http://nvd.nist.gov/fdcc/index.cfm*) and ensure that its computers have and maintain the latest operating system patch level and anti-virus software level.

NOTE: FDCC is applicable to all computing systems using Windows XP™ and Windows Vista™, including desktops and laptops—regardless of function—but not including servers.

(b) The Contractor shall apply approved security configurations to information technology (IT) that is used to process information on behalf of HHS. The following security configuration requirements apply:

NOTE: The Contracting Officer shall specify applicable security configuration requirements in solicitations and contracts based on information provided by the Project Officer, who shall consult with the OPDIV/STAFFDIV Chief Information Security Officer.

(c) The Contractor shall ensure IT applications operated on behalf of HHS are fully functional and operate correctly on systems configured in accordance with the above configuration requirements. The Contractor shall use Security Content Automation Protocol (SCAP)-validated tools with FDCC Scanner capability to ensure its products operate correctly with FDCC configurations and do not alter FDCC settings—*see http://nvd.nist.gov/validation.cfm*. The Contractor shall test applicable product versions with all relevant and current updates and patches installed. The Contractor shall ensure currently supported versions of information technology products meet the latest FDCC major version and subsequent major versions.

(d) The Contractor shall ensure IT applications designed for end users run in the standard user context without requiring elevated administrative privileges.

(e) The Contractor shall ensure hardware and software installation, operation, maintenance, update, and patching will not alter the configuration settings or requirements specified above.

(f) The Contractor shall (1) include Federal Information Processing Standard (FIPS) 201-compliant (*see http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf*), Homeland Security Presidential Directive 12 (HSPD–12) card readers with the purchase of servers, desktops, and laptops; and (2) comply with FAR Subpart 4.13, *Personal Identity Verification*.

(g) The Contractor shall ensure that its subcontractors (at all tiers) which perform work under this contract comply with the requirements contained in this clause.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.239–71 Standard for encryption language.

As prescribed in *339.101(d)(2)*, the Contracting Officer shall insert the following clause:

STANDARD FOR ENCRYPTION LANGUAGE (JANUARY 2010)

(a) The Contractor shall use Federal Information Processing Standard (FIPS) 140–2-compliant encryption (Security Requirements for Cryptographic Module, as amended) to protect all instances of HHS sensitive information during storage and transmission. (NOTE: The Government has determined that HHS information under this contract is considered ''sensitive'' in accordance with FIPS 199, Standards for Security Categorization of Federal Information and Information Systems, dated February 2004.)

(b) The Contractor shall verify that the selected encryption product has been validated under the Cryptographic Module Validation Program (*see http://csrc.nist.gov/cryptval/*) to confirm compliance with FIPS 140–2 (as amended). The Contractor shall provide a written copy of the validation documentation to the Contracting Officer and the Contracting Officer's Technical Representative.

(c) The Contractor shall use the Key Management Key (*see* FIPS 201, Chapter 4, as amended) on the HHS personal identification verification (PIV) card; or alternatively, the Contractor shall establish and use a key recovery mechanism to ensure the ability for authorized personnel to decrypt and recover all encrypted information (*see http://csrc.nist.gov/drivers/documents/ombencryption-guidance.pdf*). The Contractor shall notify the Contracting Officer and the Contracting Officer's Technical Representative of personnel authorized to decrypt and recover all encrypted information.

(d) The Contractor shall securely generate and manage encryption keys to prevent unauthorized decryption of information in accordance with FIPS 140–2 (as amended).

(e) The Contractor shall ensure that this standard is incorporated into the Contractor's property management/control system or establish a separate procedure to account for all laptop computers, desktop computers, and other mobile devices and portable media that store or process sensitive HHS information.

(f) The Contractor shall ensure that its subcontractors (at all tiers) which perform work under this contract comply with the requirements contained in this clause.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.239–72 Security requirements for Federal information technology resources.

As prescribed in *339.7103*, the Contracting Officer shall insert the following clause:

SECURITY REQUIREMENTS FOR FEDERAL INFORMATION TECHNOLOGY RESOURCES (JANUARY 2010)

(a) *Applicability*. This clause applies whether the entire contract or order (hereafter ''contract''), or portion thereof, includes information technology resources or services in which the Contractor has physical or logical (electronic) access to, or operates a Department of Health and Human Services (HHS) system containing, information that directly supports HHS' mission. The term ''information technology (IT)'', as used in this clause, includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services) and related resources. This clause does not apply to national security systems as defined in FISMA.

(b) *Contractor responsibilities*. The Contractor is responsible for the following:

(1) Protecting Federal information and Federal information systems in order to ensure their—

(i) *Integrity*, which means guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity;

(ii) *Confidentiality*, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and.

(iii) *Availability*, which means ensuring timely and reliable access to and use of information.

(2) Providing security of any Contractor systems, and information contained therein, connected to an HHS network or operated by the Contractor, regardless of location, on behalf of HHS.

(3) Adopting, and implementing, at a minimum, the policies, procedures, controls, and standards of the HHS Information Security Program to ensure the integrity, confidentiality, and availability of Federal information and Federal information systems for which the Contractor is responsible under this contract or to which it may otherwise have access under this contract. The HHS Information Security Program is outlined in the HHS Information Security Program Policy, which is available on the HHS Office of the Chief Information Officer's (OCIO) Web site.

(c) *Contractor security deliverables*. In accordance with the timeframes specified, the Contractor shall prepare and submit the following security documents to the Contracting Officer for review, comment, and acceptance:

(1) *IT Security Plan (IT–SP)—due within 30 days after contract award*. The IT–SP shall be consistent with, and further detail the approach to, IT security contained in the Contractor's bid or proposal that resulted in the award of this contract. The IT–SP shall describe the processes and procedures that the Contractor will follow to ensure appropriate security of IT resources that are developed, processed, or used under this contract. If the IT–SP only applies to a portion of the contract, the Contractor shall specify those parts of the contract to which the IT–SP applies.

(i) The Contractor's IT–SP shall comply with applicable Federal laws that include, but are not limited to, the Federal Information Security Management Act (FISMA) of 2002 (Title III of the E-Government Act of 2002, Public Law 107–347), and the following Federal and HHS policies and procedures:

(A) Office of Management and Budget (OMB) Circular A–130, Management of Federal Information Resources, Appendix III, Security of Federal Automated Information Resources.

(B) National Institute of Standards and Technology (NIST) Special Publication (SP) 800–18, Guide for Developing Security Plans for Federal Information Systems, in form and content, and with any pertinent contract Statement of Work/Performance Work Statement (SOW/PWS) requirements. The IT–SP shall identify and document appropriate IT security controls consistent with the sensitivity of the information and the requirements of Federal Information Processing Standard (FIPS) 200, Recommended Security Controls for Federal Information

Systems. The Contractor shall review and update the IT–SP in accordance with NIST SP 800–26, Security Self-Assessment Guide for Information Technology Systems and FIPS 200, on an annual basis.

(C) HHS–OCIO Information Systems Security and Privacy Policy.

(ii) After resolution of any comments provided by the Government on the draft IT–SP, the Contracting Officer shall accept the IT–SP and incorporate the Contractor's final version into the contract for Contractor implementation and maintenance. On an annual basis, the Contractor shall provide to the Contracting Officer verification that the IT–SP remains valid.

(2) *IT Risk Assessment (IT–RA)—due within 30 days after contract award.* The IT–RA shall be consistent, in form and content, with NIST SP 800–30, Risk Management Guide for Information Technology Systems, and any additions or augmentations described in the HHS–OCIO Information Systems Security and Privacy Policy. After resolution of any comments provided by the Government on the draft IT–RA, the Contracting Officer shall accept the IT–RA and incorporate the Contractor's final version into the contract for Contractor implementation and maintenance. The Contractor shall update the IT–RA on an annual basis.

(3) *FIPS 199 Standards for Security Categorization of Federal Information and Information Systems Assessment (FIPS 199 Assessment)—due within 30 days after contract award.* The FIPS 199 Assessment shall be consistent with the cited NIST standard. After resolution of any comments by the Government on the draft FIPS 199 Assessment, the Contracting Officer shall accept the FIPS 199 Assessment and incorporate the Contractor's final version into the contract.

(4) *IT Security Certification and Accreditation (IT–SC&A)—due within 3 months after contract award.* The Contractor shall submit written proof to the Contracting Officer that an IT–SC&A was performed for applicable information systems—*see* paragraph (a) of this clause. The Contractor shall perform the IT–SC&A in accordance with the HHS Chief Information Security Officer's Certification and Accreditation Checklist; NIST SP 800–37, Guide for the Security Certification and Accreditation of Federal Information Systems; and NIST SP 800–53, Recommended Security Controls for Federal Information Systems. An authorized senior management official shall sign the draft IT–SC&A and provide it to the Contracting Officer for review, comment, and acceptance.

(i) After resolution of any comments provided by the Government on the draft IT–SC&A, the Contracting Officer shall accept the IT–SC&A and incorporate the Contractor's final version into the contract as a compliance requirement.

(ii) The Contractor shall also perform an annual security control assessment and provide to the Contracting Officer verification that the IT–SC&A remains valid. Evidence of a valid system accreditation includes written results of:

(A) Annual testing of the system contingency plan; and

(B) The performance of security control testing and evaluation.

(d) *Personal identity verification.* The Contractor shall identify its employees with access to systems operated by the Contractor for HHS or connected to HHS systems and networks. The Contracting Officer's Technical Representative (COTR) shall identify, for those identified employees, position sensitivity levels that are commensurate with the responsibilities and risks associated with their assigned positions. The Contractor shall comply with the HSPD–12 requirements contained in ''HHS–Controlled Facilities and Information Systems Security'' requirements specified in the SOW/PWS of this contract.

(e) *Contractor and subcontractor employee training.* The Contractor shall ensure that its employees, and those of its subcontractors, performing under this contract complete HHS-furnished initial and refresher security and privacy education and awareness training before being granted access to systems operated by the Contractor on behalf of HHS or access to HHS systems and networks. The Contractor shall provide documentation to the COTR evidencing that Contractor employees have completed the required training.

(f) *Government access for IT inspection.* The Contractor shall afford the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases, and personnel used in performance of this contract to the extent required to carry out a program of IT inspection (to include vulnerability testing), investigation, and audit to safeguard against threats and hazards to the integrity, confidentiality, and availability, of HHS data or to the protection of information systems operated on behalf of HHS.

(g) *Subcontracts.* The Contractor shall incorporate the substance of this clause in all subcontracts that require protection of Federal information and Federal information systems as described in paragraph (a) of this clause, including those subcontracts that—

(1) Have physical or electronic access to HHS' computer systems, networks, or IT infrastructure; or

(2) Use information systems to generate, store, process, or exchange data with HHS or on behalf of HHS, regardless of whether the data resides on a HHS or the Contractor's information system.

(h) *Contractor employment notice*. The Contractor shall immediately notify the Contracting Officer when an employee either begins or terminates employment (or is no longer assigned to the HHS project under this contract), if that employee has, or had, access to HHS information systems or data.

(i) *Document information*. The Contractor shall contact the Contracting Officer for any documents, information, or forms necessary to comply with the requirements of this clause.

(j) *Contractor responsibilities upon physical completion of the contract*. The Contractor shall return all HHS information and IT resources provided to the Contractor during contract performance and certify that all HHS information has been purged from Contractor-owned systems used in contract performance.

(k) *Failure to comply*. Failure on the part of the Contractor or its subcontractors to comply with the terms of this clause shall be grounds for the Contracting Officer to terminate this contract.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21511, Apr. 26, 2010]

352.239–73 Electronic information and technology accessibility.

(a) As prescribed in *339.201–70(a)*, the Contracting Officer shall insert the following provision:

ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY (JANUARY 2010)

(a) Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998, and the Architectural and Transportation Barriers Compliance Board Electronic and Information (EIT) Accessibility Standards (36 CFR Part 1194), require that, unless an exception applies, all EIT products and services developed, acquired, maintained, or used by any Federal department or agency permit—

(1) Federal employees with disabilities to have access to and use information and data that is comparable to the access and use of information and data by Federal employees who are not individuals with disabilities; and

(2) Members of the public with disabilities seeking information or services from a Federal agency to have access to and use of information and data that is comparable to the access and use of information and data by members of the public who are not individuals with disabilities.

(b) Accordingly, any vendor submitting a proposal/quotation/bid in response to this solicitation must demonstrate compliance with the established EIT accessibility standards. Information about Section 508 is available at *http://www.section508.gov/*. The complete text of Section 508 Final Provisions can be accessed at *http://www.access-board.gov/sec508/provisions.htm*.

(c) The Section 508 accessibility standards applicable to this solicitation are identified in the Statement of Work/Specification/Performance Work Statement. In order to facilitate the Government's evaluation to determine whether EIT products and services proposed meet applicable Section 508 accessibility standards, offerors must prepare an HHS Section 508 Product Assessment Template, in accordance with its completion instructions, and provide a binding statement of conformance. The purpose of the template is to assist HHS acquisition and program officials in determining that EIT products and services proposed support applicable Section 508 accessibility standards. The template allows vendors or developers to self-evaluate their products or services and document in detail how they do or do not conform to a specific Section 508 accessibility standard. Instructions for preparing the HHS Section 508 Evaluation Template may be found under Section 508 policy on the HHS Office on Disability Web site (*http://www.hhs.gov/od*).

(d) Respondents to this solicitation must also provide any additional detailed information necessary for determining applicable Section 508 accessibility standards conformance, as well as for documenting EIT products or services that are incidental to the project, which would constitute an exception to Section 508 requirements. If a vendor claims its products or services, including EIT deliverables such as electronic documents and reports, meet applicable Section 508 accessibility standards in its completed HHS Section 508 Product Assessment Template, and it is later determined by the Government—*i.e.*, after award of a contract/order, that products or services delivered do not conform to the described accessibility standards in the Product Assessment Template, remediation of the products or services to the level of conformance specified in the vendor's Product Assessment Template will be the responsibility of the Contractor and at its expense.

(End of provision)

(b) As prescribed in *339.201–70(b)*, the Contracting Officer shall insert the following clause:

ELECTRONIC AND INFORMATION TECHNOLOGY ACCESSIBILITY (JANUARY 2010)

(a) Pursuant to Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), as amended by the Workforce Investment Act of 1998, all electronic and information technology

(EIT) products and services developed, acquired, maintained, or used under this contract/order must comply with the ''Electronic and Information Technology Accessibility Provisions'' set forth by the Architectural and Transportation Barriers Compliance Board (also referred to as the ''Access Board'') in 36 CFR part 1194. Information about Section 508 is available at *http://www.section508.gov/*. The complete text of Section 508 Final Provisions can be accessed at *http://www.access-board.gov/sec508/provisions.htm*.

(b) The Section 508 accessibility standards applicable to this contract/order are identified in the Statement of Work/Specification/Performance Work Statement. The Contractor must provide a written Section 508 conformance certification due at the end of each contract/order exceeding $100,000 when the contract/order duration is one year or less. If it is determined by the Government that EIT products and services provided by the Contractor do not conform to the described accessibility standards in the Product Assessment Template, remediation of the products or services to the level of conformance specified in the Contractor's Product Assessment Template will be the responsibility of the Contractor at its own expense.

(c) In the event of a modification(s) to this contract/order, which adds new EIT products or services or revises the type of, or specifications for, products or services the Contractor is to provide, including EIT deliverables such as electronic documents and reports, the Contracting Officer may require that the contractor submit a completed HHS Section 508 Product Assessment Template to assist the Government in determining that the EIT products or services support Section 508 accessibility standards. Instructions for documenting accessibility via the HHS Section 508 Product Assessment Template may be found under Section 508 policy on the HHS Office on Disability Web site (*http://www.hhs.gov/od*).

(c) As prescribed in *339.201–70(c)*, the Contracting Officer shall add the following paragraph to the end of clause *352.239–73(b):*

Prior to the Contracting Officer exercising an option for a subsequent performance period/additional quantity or adding funding for a subsequent performance period under this contract, as applicable, the Contractor must provide a Section 508 Annual Report to the Contracting Officer and Project Officer. Unless otherwise directed by the Contracting Officer in writing, the Contractor shall provide the cited report in accordance with the following schedule. Instructions for completing the report are available in the Section 508 policy on the HHS Office on Disability Web site under the heading Vendor Information and Documents. The Contractor's failure to submit a timely and properly completed report may jeopardize the Contracting Officer's exercising an option or adding funding, as applicable.

SCHEDULE FOR CONTRACTOR SUBMISSION OF SECTION 508 ANNUAL REPORT

(To be completed by the Contracting Officer at time of contract/order award.)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21512, Apr. 26, 2010]

352.242–70 Key personnel.

As prescribed in *342.302(c)(2)*, the Contracting Officer shall insert the following clause:

KEY PERSONNEL (JANUARY 2006)

The key personnel specified in this contract are considered to be essential to work performance. At least 30 days prior to diverting any of the specified individuals to other programs or contracts (or as soon as possible, if an individual must be replaced, for example, as a result of leaving the employ of the Contractor), the Contractor shall notify the Contracting Officer and shall submit comprehensive justification for the diversion or replacement request (including proposed substitutions for key personnel) to permit evaluation by the Government of the impact on performance under this contract. The Contractor shall not divert or otherwise replace any key personnel without the written consent of the Contracting Officer. The Government may modify the contract to add or delete key personnel at the request of the contractor or Government.

(End of clause)

352.242–71 Tobacco-free facilities.

As prescribed in *342.302(c)(3)*, the Contracting Officer shall insert the following clause:

TOBACCO-FREE FACILITIES (JANUARY 2006)

In accordance with Department of Health and Human Services (HHS) policy, the Contractor and its staff are prohibited from using tobacco products of any kind (e.g., cigarettes, cigars, pipes, and smokeless tobacco) while on any HHS property, including use in personal or company vehicles operated by Contractor employees while on an HHS property. This policy also applies to all subcontracts awarded under the contract or order. The term ''HHS properties'' includes all properties owned, controlled and/or leased by HHS when totally occupied by HHS, including all indoor and outdoor areas of such properties. Where HHS only partially occupies such properties, it includes all HHS-

occupied interior space. Where HHS leases space in a multi-occupant building or complex, the tobacco-free HHS policy will apply to the maximum area permitted by both law and current lease agreements. The Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understand, and comply with this policy.

(End of clause)

352.242–72 Native American Graves Protection and Repatriation Act.

As prescribed in *342.302(c)(4)*, the Contracting Officer shall insert the following clause:

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (JANUARY 2006)

(a) Public Law 101–601, dated November 16, 1990, also known as the *Native American Graves Protection and Repatriation Act* (Act), imposes certain responsibilities on individuals and organizations when they discover Native American cultural items (including human remains) on Federal or Tribal lands.

(b) In the event the Contractor discovers Native American cultural items (including human remains, associated funerary objects, unassociated funerary objects, sacred objects and cultural patrimony), as defined in the Act during contract performance, the Contractor shall—

(i) Immediately cease activity in the area of the discovery;

(ii) Notify the Contracting Officer of the discovery; and

(iii) Make a reasonable effort to protect the items discovered before resuming such activity. Upon receipt of the Contractor's discovery notice, the Contracting Officer will notify the appropriate authorities as required by the Act.

(c) Unless otherwise specified by the Contracting Officer, the Contractor may resume activity in the area on the 31st calendar day following the date that the appropriate authorities certify receipt of the discovery notice. The Contracting Officer shall provide to the Contractor the date that the appropriate authorities certify receipt of the discovery notice and the date on which the Contractor may resume activities.

(End of clause)

352.242–73 Withholding of contract payments.

As prescribed in *342.7003–1(a)*, the Contracting Officer shall insert the following clause:

WITHHOLDING OF CONTRACT PAYMENTS (JANUARY 2006)

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, may result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and without the fault or negligence of the Contractor as defined by the clause entitled ''Excusable Delays'' or ''Default,'' as applicable. The Government will immediately notify the Contractor of its intention to withhold payment of any invoice or voucher submitted.

(End of clause)

352.242–74 Final decisions on audit findings.

As prescribed in *342.7003–1(b)*, the Contracting Officer shall insert the following clause:

FINAL DECISIONS ON AUDIT FINDINGS (APRIL 1984)

For the purpose of issuing final decisions under the Disputes clause of this contract concerning monetary audit findings, the Contracting Officer is the individual authorized to make such decisions.

(End of clause)

352.270–1 Accessibility of meetings, conferences, and seminars to persons with disabilities.

As prescribed in *370.102*, the Contracting Officer shall insert the following clause:

ACCESSIBILITY OF MEETINGS, CONFERENCES, AND SEMINARS TO PERSONS WITH DISABILITIES (JANUARY 2001)

The Contractor agrees as follows:

(a) *Planning*. The Contractor shall develop a plan to assure that any meeting, conference, or seminar held pursuant to this contract will meet or exceed the minimum accessibility standards set forth in 28 CFR 36.101–36.500 and Appendix A: ADA Accessibility Guidelines (ADAAG). The Contractor shall submit the plan to the Contracting Officer's Technical Representative for approval prior to initiating action. (The Contractor may submit a consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars in lieu of separate plans.)

(b) *Facilities*. Any facility the Contractor intends to utilize for meetings, conferences, or seminars in performance of this contract shall be in compliance with 28 CFR 36.101–

36.500 and Appendix A. The Contractor shall determine, by an on-site inspection, that the facility meets these requirements. (1) *Parking*. Parking shall be in compliance with 228 CFR 36.101–36.500 and Appendix A.

(2) *Entrances*. Entrances shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(3) *Meeting Rooms*. Meeting rooms, including seating arrangements, shall be in compliance with 28 CFR 36.101–36.500 and Appendix A. In addition, stages, speaker platforms, *etc.* which are to be used by persons in wheelchairs must be accessible by ramps or lifts. When used, the ramp may not necessarily be independently negotiable if space does not permit. However, the Contracting Officer's Technical Representative must approve any slope over 1:12, and the Contractor must provide assistance to negotiate access to the stage or platform.

(4) *Restrooms*. Restrooms shall be in compliance with 28 CFR 36.101–36.500 and Appendix A.

(5) *Eating Facilities*. Eating facilities in the meeting facility must also comply with 28 CFR 36.101–36.500 and Appendix A.

(6) *Overnight Facilities*. If overnight accommodations are required, the facility providing the overnight accommodations shall also comply with 28 CFR 36.101–36.500 and Appendix A.

(7) *Water Fountains*. Water fountains shall comply with 28 CFR 36.101–36.500 and Appendix A.

(8) *Telephones*. Public telephones shall comply with 28 CFR 36.101–36.500 and Appendix A.

(c) Provisions of Services for Attendees with Sensory Impairments.

(1) The Contractor, in planning the meeting, conference, or seminar, shall include in all announcements and other materials pertaining to the meeting, conference, or seminar a notice indicating that services will be made available to persons with sensory impairments attending the meeting, if requested within five (5) days of the date of the meeting, conference, or seminar. The announcement(s) and other material(s) shall indicate that persons with sensory impairments may contact a specific person(s), at a specific address and phone number(s), to make their service requirements known. The phone number(s) shall include a telecommunication device for the deaf (TDD).

(2) The Contractor shall provide, at no additional cost to the individual, those services required by persons with sensory impairments to ensure their complete participation in the meeting, conference, or seminar.

(3) At a minimum, when requested in advance, the Contractor shall provide the following services:

(i) For persons with hearing impairments, qualified interpreters. Also, the meeting rooms shall be adequately illuminated so signing by interpreters can be easily seen.

(ii) For persons with vision impairments, readers and/or cassette materials, as necessary, to enable full participation. Also, meeting rooms shall be adequately illuminated.

(iii) Agenda and other conference material(s) shall be translated into a usable form for persons with sensory impairments. Readers, Braille translations, large print text, and/or tape recordings are all acceptable. These materials shall be available to individuals with sensory impairments upon their arrival.

(4) The Contractor shall make a reasonable effort to ascertain the number of individuals with sensory impairments who plan to attend the meeting, conference, or seminar. However, if the Contractor can determine that there will be no person with sensory impairment in attendance, the provision of those services under paragraph (c) of this clause for the non-represented group, or groups, is not required.

(End of clause)

352.270–2 Indian preference.

As prescribed in *370.202(a)*, the Contracting Officer shall insert the following clause:

INDIAN PREFERENCE (APRIL 1984)

(a) The Contractor agrees to give preference in employment opportunities under this contract to Indians who can perform required work, regardless of age (subject to existing laws and regulations), sex, religion, or Tribal affiliation. To the extent feasible and consistent with the efficient performance of this contract, the Contractor further agrees to give preference in employment and training opportunities under this contract to Indians who are not fully qualified to perform regardless of age (subject to existing laws and regulations), sex, religion, or Tribal affiliation. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts to the extent feasible and consistent with the efficient performance of this contract. The Contractor shall maintain statistical records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause, the Contractor shall provide opportunities for training incident to such employment. Such training shall include on-the-job, classroom or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its employment and training opportunities after

giving full consideration to Indians as required by this clause, the Contractor may satisfy those needs by selecting persons other than Indians in accordance with the clause of this contract entitled ''Equal Opportunity.''

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small businesses; HUBZone small businesses; service-disabled, veteran-owned small businesses; 8(a) small businesses; veteran-owned small businesses; women-owned small businesses; or small disadvantaged businesses.

(e) As used in this clause,

(1) ''Indian'' means a person who is a member of an Indian Tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within 30 days from the Tribe concerned that the person is a member of the Tribe.

(2) ''Indian Tribe'' means an Indian Tribe, pueblo, band, nation, or other organized group or community, including Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) ''Indian organization'' means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451).

(4) ''Indian-owned economic enterprise'' means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control of the enterprise.

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f) of this clause, in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–3 Indian preference program.

As prescribed in *370.202(b)*, the Contracting Officer shall insert the following clause:

INDIAN PREFERENCE PROGRAM (JANUARY 2006)

(a) In addition to the requirements of the clause of this contract entitled ''Indian Preference,'' the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this connection, the Contractor shall perform the following:

(1) Designate a liaison officer who will maintain liaison with the Government and the Tribe(s) on Indian preference matters; supervise compliance with the provisions of this clause; and administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

(3) Not more than 20 calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed that sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice of existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals

only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including—

(i) A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms;

(ii) A statement indicating that preference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Public Law 93–638 [88 Stat. 2205; 25 U.S.C. 450e(b)];

(iii) Definitions for the terms ''Indian organization'' and ''Indian-owned economic enterprise'' as prescribed under the ''Indian Preference'' clause of this contract;

(iv) A statement to be completed by the bidder or offeror that it is an Indian organization or Indian-owned economic enterprise; and

(v) A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, no responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract. If one or more responsible bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the ''Indian Preference'' clause of this contract.

(5) Maintain written records under this contract which indicate—

(i) The numbers of Indians seeking employment for each employment position available under this contract;

(ii) The number and types of positions filled by Indians and non-Indians;

(iii) The total number of Indians employed under this contract;

(iv) For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected;

(v) Actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract;

(vi) Reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and

(vii) The number of Indian organizations and Indian-owned economic enterprises contacted, and the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and non-Indians, and the dollar amounts of all subcontracts awarded to Indian organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government for one year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms ''Indian,'' ''Indian Tribe,'' ''Indian Organization,'' and ''Indian-owned economic enterprise'' are defined in the clause of this contract entitled ''Indian Preference.''

(2) ''Indian reservation'' includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the *Alaska Native Claims Settlement Act* (85 Stat. 688; 43 U.S.C. 1601 *et seq.*)

(3) ''On or near an Indian Reservation'' means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270–4 Protection of human subjects.

(a) As prescribed in *370.303(a)*, the Contracting Officer shall insert the following provision:

NOTICE TO OFFERORS OF REQUIREMENTS OF 45 CFR PART 46, PROTECTION OF HUMAN SUBJECTS (JANUARY 2006)

(a) Copies of the Department of Health and Human Services (HHS) regulations for the protection of human subjects, 45 CFR Part 46, are available from the Office for Human Research Protections (OHRP), Bethesda, Maryland 20892. The regulations provide a systematic means, based on established ethical principles, to safeguard the rights and welfare of individuals who participate as subjects in research activities supported or conducted by HHS.

(b) The regulations define a human subject as a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The regulations extend to the use of human organs, tissue, and body fluids from individually identifiable human subjects as well as to graphic, written, or recorded information derived from individually identifiable human subjects. The use of autopsy materials is governed by applicable State and local law and is not directly regulated by 45 CFR Part 46.

(c) Activities in which the only involvement of human subjects will be in one or more of the categories set forth in 45 CFR 46.101(b)(1–6) are exempt from coverage.

(d) Inappropriate designations of the noninvolvement of human subjects or of exempt categories of research in a project may result in delays in the review of a proposal. The Government's Project Officer will make a final determination of whether the proposed activities are covered by the regulations or are in an exempt category, based on the information provided in the proposal. In doubtful cases, the Project Officer will consult with OHRP.

(e) In accordance with 45 CFR Part 46, offerors being considered for award shall file with OHRP an acceptable Assurance of Compliance with the regulations, specifying review procedures and assigning responsibilities for the protection of human subjects. The initial and continuing review of a research project by an institutional review board shall ensure that: the rights and welfare of the human subjects involved are adequately protected; the risks to the subjects are reasonable in relation to both the potential benefits, if any, to the subjects and the importance of the knowledge to be gained; and informed consent will be obtained by methods that are adequate and appropriate. HHS regulations for the protection of human subjects (45 CFR Part 46), information regarding OHRP registration and assurance requirements/processes, and OHRP contact information can be accessed at the OHRP Web site (at *http://www.hhs.gov/ohrp/*).

(f) Offerors may consult with OHRP for advice or guidance concerning either regulatory requirements or ethical issues pertaining to research involving human subjects.

(End of provision)

(b) As prescribed in *370.304(a)*, the Contracting Officer shall insert the following clause:

PROTECTION OF HUMAN SUBJECTS (JANUARY 2006)

(a) The Contractor agrees that the rights and welfare of human subjects involved in research under this contract shall be protected in accordance with 45 CFR Part 46 and with the Contractor's current Assurance of Compliance on file with the Office for Human Research Protections (OHRP), Department of Health and Human Services. The Contractor further agrees to provide certification at least annually that the Institutional Review Board has reviewed and approved the procedures, which involve human subjects in accordance with 45 CFR Part 46 and the Assurance of Compliance.

(b) The Contractor shall bear full responsibility for the performance of all work and services involving the use of human subjects under this contract and shall ensure that work is conducted in a proper manner and as safely as is feasible. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. The Contractor shall not deem anything in this contract to constitute the Contractor or any subcontractor, agent or employee of the Contractor, or any other person, organization, institution, or group of any kind whatsoever, as the agent or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgment or otherwise, as an independent contractor without imputing liability on the part of the Government for the acts of the Contractor or its employees.

(c) If at any time during the performance of this contract, the Contracting Officer determines, in consultation with OHRP that the Contractor is not in compliance with any of the requirements and/or standards stated in paragraphs (a) and (b) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. The Contracting Officer may communicate the notice of suspension by telephone with confirmation in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, after consultation with OHRP, terminate this contract in whole or in part, and the Contractor's name may be removed from the list of those contractors with approved Human Subject Assurances.

(End of clause)

352.270–5 Care of laboratory animals.

(a) As prescribed in *370.403(a)*, the Contracting Officer shall insert the following provision:

NOTICE TO OFFERORS OF REQUIREMENT FOR COMPLIANCE WITH THE PUBLIC HEALTH SERVICE POLICY ON HUMANE CARE AND USE OF LABORATORY ANIMALS (JANUARY 2006)

The Public Health Service (PHS) Policy on Humane Care and Use of Laboratory Animals (PHS Policy) establishes a number of requirements for research activities involving animals. Before award may be made to an applicant organization, the organization shall file, with the Office of Laboratory Animal Welfare (OLAW), National Institutes of Health (NIH), a written Animal Welfare Assurance (Assurance) which commits the organization to comply with the provisions of the PHS Policy, the Animal Welfare Act, and the Guide for the Care and Use of Laboratory Animals (National Academy Press, Washington, DC). In accordance with the PHS Policy, applicant organizations must establish an Institutional Animal Care & Use Committee (IACUC), qualified through the experience and expertise of its members, to oversee the institution's animal program, facilities and procedures. Applicant organizations are required to provide verification of IACUC approval prior to release of an award involving live vertebrate animals. No award involving the use of animals shall be made unless OLAW approves the Assurance and verification of IACUC approval for the proposed animal activities has been provided to the Contracting Officer. Prior to award, the Contracting Officer will notify Contractor(s) selected for projects that involve live vertebrate animals that an Assurance and verification of IACUC approval are required. The Contracting Officer will request that OLAW negotiate an acceptable Assurance with those Contractor(s) and request verification of IACUC approval. For further information, contact OLAW at NIH, 6705 Rockledge Drive, RKL1, Suite 360, MSC 7982 Bethesda, Maryland 20892–7982 (E-mail: *olaw@od.nih.gov*; Phone: 301–496–7163).

(End of provision)

(b) As prescribed in *370.404*, the Contracting Officer shall insert the following clause:

CARE OF LIVE VERTEBRATE ANIMALS (OCTOBER 2009)

(a) Before undertaking performance of any contract involving animal-related activities where the species is regulated by USDA, the Contractor shall register with the Secretary of Agriculture of the United States in accordance with 7 U.S.C. 2136 and 9 CFR sections 2.25 through 2.28. The Contractor shall furnish evidence of the registration to the Contracting Officer.

(b) The Contractor shall acquire vertebrate animals used in research from a dealer licensed by the Secretary of Agriculture under 7 U.S.C. 2133 and 9 CFR Sections 2.1–2.11, or from a source that is exempt from licensing under those sections.

(c) The Contractor agrees that the care, use and intended use of any live vertebrate animals in the performance of this contract shall conform with the Public Health Service (PHS) Policy on Humane Care of Use of Laboratory Animals (PHS Policy), the current Animal Welfare Assurance (Assurance), the Guide for the Care and Use of Laboratory Animals (National Academy Press, Washington, DC) and the pertinent laws and regulations of the United States Department of Agriculture (*see* 7 U.S.C. 2131 *et seq*. and 9 CFR Subchapter A, Parts 1–4). In case of conflict between standards, the more stringent standard shall govern.

(d) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office of Laboratory Animal Welfare (OLAW), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements and standards stated in paragraphs (a) through (c) above, the Contracting Officer may immediately suspend, in whole or in part, work and further payments under this contract until the Contractor corrects the noncompliance. Notice of the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OLAW, NIH, terminate

this contract in whole or in part, and the Contractor's name may be removed from the list of those contractors with approved Assurances.

NOTE: The Contractor may request registration of its facility and a current listing of licensed dealers from the Regional Office of the Animal and Plant Health Inspection Service (APHIS), USDA, for the region in which its research facility is located. The location of the appropriate APHIS Regional Office, as well as information concerning this program may be obtained by contacting the Animal Care Staff, USDA/APHIS, 4700 River Road, Riverdale, Maryland 20737 (E-mail: *ace@aphis.usda.gov*; Web site: (*http://www.aphis.usda.gov/animal_welfare*).

(End of clause)

352.270–6 Restriction on use of human subjects.

As prescribed in *370–304(b)*, the Contracting Officer shall insert the following clause:

RESTRICTION ON USE OF HUMAN SUBJECTS (JANUARY 2006)

Pursuant to 45 CFR part 46, *Protection of Human Research Subjects*, the Contractor shall not expend funds under this award for research involving human subjects or engage in any human subjects research activity prior to the Contracting Officer's receipt of a certification that the research has been reviewed and approved by the Institutional Review Board (IRB) designated under the Contractor's Federal-wide assurance of compliance. This restriction applies to all collaborating sites, whether domestic or foreign, and subcontractors. The Contractor must ensure compliance by collaborators and subcontractors.

(End of clause)

352.270–7 Conference sponsorship request and conference materials disclaimer.

As prescribed in *370.602*, the Contracting Officer shall insert the following clause:

CONFERENCE SPONSORSHIP REQUEST AND CONFERENCE MATERIALS DISCLAIMER (JANUARY 2010)

(a) If HHS is not the sole provider of funding under this conference contract, then prior to the Contractor claiming HHS conference sponsorship, the Contractor shall submit a written request (including rationale) to the Contracting Officer for permission to claim such HHS sponsorship.

(b) Whether or not HHS is the conference sponsor, the Contractor shall include the following statement on conference materials, including promotional materials, agendas, and Web sites:

''This conference was funded, in whole or in part, through a contract (insert contract number) with the Department of Health and Human Services (HHS) (insert name of OPDIV/STAFFDIV). The views expressed in written conference materials and by speakers and moderators at this conference, do not necessarily reflect the official policies of HHS, nor does mention of trade names, commercial practices, or organizations imply endorsement by the U.S. Government.''

(c) Unless authorized by the Contracting Officer's Technical Representative, the Contractor shall not display the HHS logo on any conference materials.

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21512, Apr. 26, 2010]

352.270–8 Prostitution and related activities.

As prescribed in *370.701*, the Contracting Officer shall insert the following clause:

PROSTITUTION AND RELATED ACTIVITIES (JANUARY 2010)

(a) The U.S. Government is opposed to prostitution and related activities, which are inherently harmful and dehumanizing and contribute to the phenomenon of trafficking in persons.

(b) Neither the Contractor nor any subcontractor(s) shall use Government funds provided under this contract to promote or advocate the legalization or practice of prostitution or sex trafficking. (NOTE: The term ''contract'' includes ''order'' wherever it appears in this clause.) The Contractor shall not construe anything in the preceding sentence to preclude providing individuals with palliative care, treatment, or post-exposure pharmaceutical prophylaxis, and necessary pharmaceuticals and commodities, including test kits, condoms, and, when proven effective, microbicides.

(c) The Government does not require the Contractor to endorse or utilize a multisectoral approach to combating HIV/AIDS, or endorse, utilize, or participate in a prevention method or treatment program to which it has a religious or moral objection. Any information the Contractor provides about the use of condoms as part of projects or activities that are funded in connection with this contract shall be medically accurate and shall include the public health benefits and failure rates of such use.

(d) In addition, the Contractor shall have a policy explicitly opposing prostitution and sex trafficking. The preceding sentence shall

not apply to any ''exempt organizations'' (*i.e.*, the Global Fund to Fight AIDS, Tuberculosis and Malaria; the World Health Organization; the International AIDS Vaccine Initiative; and any United Nations agency), or to any contractors that are awarded ''specified types of commercial contracts'' as set forth below.

(e) The following definitions apply for purposes of this clause:

(1) ''Commercial sex act'' means any sex act on account of which anything of value is given to or received by any person.

(2) ''Prostitution'' means procuring or providing any commercial sex act.

(3) ''Sex trafficking'' means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act [22 U.S.C. 7102(9)].

(4) ''Specified types of commercial contracts'' means contracts awarded for commercial items and services as defined in Federal Acquisition Regulation (FAR) 2.101, such as pharmaceuticals, medical supplies, logistics support, data management, and freight forwarding. Notwithstanding the preceding definition of ''specified types of commercial contracts,'' contracts for the purposes specified in paragraphs (e)(4)(i) through (iii) of this clause, that are awarded to implement HIV/AIDS programs, require that the Contractor have a policy explicitly opposing prostitution and sex trafficking—

(i) Supplies or services provided directly to the final populations receiving such supplies or services in host countries;

(ii) Technical assistance and training furnished directly to host country individuals or entities for the provision of supplies or services to the final populations receiving such supplies and services; or

(iii) The types of services listed in FAR 37.203(b)(1)-(6) that involve giving advice about substantive policies of a recipient, giving advice regarding the activities referenced in paragraphs (e)(4)(i) and (ii) of this clause, or making decisions or functioning in a recipient's chain of command (e.g., providing managerial or supervisory services; approving financial transactions, personnel actions, *etc.*).

(f) The Contractor must have and maintain ''objective integrity and independence'' from any organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking. HHS will consider the Contractor to have objective integrity and independence from such an organization if the—

(1) Organization is a legally separate entity;

(2) Organization receives no transfer of Leadership Act funds, and Leadership Act funds do not subsidize activities inconsistent with a policy opposing prostitution and sex trafficking; and

(3) Contractor is physically and financially separate from the organization. Mere bookkeeping separation of Leadership Act funds from other funds is not sufficient. HHS will determine, on a case-by-case basis, and based on the totality of the facts, whether sufficient physical and financial separation exists. The presence or absence of any one factor below will not be determinative. Factors relevant to this determination shall include, but not be limited to, the following:

(i) The existence of separate personnel, management, and governance.

(ii) The existence of separate accounts, accounting records, and timekeeping records.

(iii) The degree of separation from facilities, equipment, and supplies used by the organization to conduct activities inconsistent with a policy opposing prostitution and sex trafficking, and the extent of such activities by the organization.

(iv) The extent to which—

(A) Signs and other forms of identification that distinguish the Contractor from the organization are present, and

(B) Signs and materials that could be associated with the organization or activities inconsistent with a policy opposing prostitution and sex trafficking are absent.

(v) The extent to which the U.S. Government, HHS, and the project name are protected from public association with an organization and its activities that are inconsistent with a policy opposing prostitution and sex trafficking in materials, such as publications, conferences, and press or public statements.

(g) The Contractor shall include, as express terms and conditions, the applicable provisions of this clause in all subcontract solicitations and subcontracts awarded under this contract. The Contractor agrees that HHS may, at any reasonable time, inspect the documents and materials the Contractor maintains or prepares in the usual course of its operations that relate to the Contractor's compliance with this clause.

(h) As a prerequisite to award and payment of any Government funds under this contract, the Contractor shall certify compliance with this clause for the performance period funded by the contract. The Contractor shall provide the three following compliance certifications in a written statement addressed to the Contracting Officer:

(1) Organizational Integrity Certification:

''I certify that (*insert Contractor's name*), which will be the recipient of Government funds made available through this contract, has objective integrity and independence from any organization that engages in activities inconsistent with a policy opposing prostitution and sex trafficking.''

(2) Subcontractor Compliance Certification:

''I certify that (*insert Contractor's name*) will include the Organizational Integrity

certification in any subcontract awarded under this contract and will require such subcontractor to provide the same certification that the Contractor provided.''

(3) Acknowledgment Certification:

''I certify that (*insert Contractor's name*) acknowledges that these certifications are a prerequisite to receipt of Government funds in connection with this contract, and that any violation of these certifications by the Contractor or subcontractor(s) at any level shall be grounds for termination of the contract by HHS in accordance with the Federal Acquisition Regulation, Part 49, as well as any other remedies provided by law.''

NOTE: In the case of existing contracts, the Contracting Officer shall add the certification requirements whenever the contract is modified to extend the period of performance or add funds, including any options that may be exercised. In so doing, the Contracting Officer shall delete in paragraph (h) the language ''As a prerequisite to award and payment of any Government funds under this contract,'' and replace it with: ''As a prerequisite to continuation of this contract and payment of any Government funds under it,''.

(i) A person(s) authorized to bind the Contractor and any subcontractor(s) shall execute the certifications. The Contractor shall provide its certifications to the Contracting Officer. A subcontractor(s) shall provide its certifications to the Contractor. The Contracting Officer may request that the Contractor provide any subcontractor certifications. In addition, the Contractor and any subcontractors shall provide *renewed* certifications for any modification that extends the contract period of performance or adds funds to the contract, including any options that may be exercised.

(j) This clause does not affect the applicability of the FAR clause at 52.222–50 entitled, ''Combating Trafficking in Persons.''

(End of clause)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21512, Apr. 26, 2010]

352.270–9 Non-discrimination for conscience.

As prescribed in *370.702*, the Contracting Officer shall insert the following provision:

NON-DISCRIMINATION FOR CONSCIENCE (JANUARY 2010)

(a) Section 301(d) of the *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, as amended,* provides that an organization, including a faith-based organization, that is otherwise eligible to receive assistance under section 104A of the Foreign Assistance Act of 1961, under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, or under any amendment to the foregoing Acts for HIV/AIDS prevention, treatment, or care—

(1) Shall not be required, as a condition of receiving such assistance, to—

(i) Endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or

(ii) Endorse, utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection.

(2) Shall not be discriminated against under the provisions of law in subparagraph (a) for refusing to meet any requirement described in paragraph (a)(1) in this solicitation.

(b) Accordingly, an offeror who believes this solicitation contains work requirements that would require it to endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS, or to endorse, utilize, make referral to, become integrated with, or otherwise participate in a program or activity to which it has a religious or moral objection, shall identify those work requirements it has excluded in its technical proposal.

(c) The Government acknowledges that an offeror has specific rights, as cited in paragraph (b) of this provision, to exclude certain work requirements in this solicitation from its proposal. However, the Government reserves the right to not make an award to an offeror whose proposal does not comply with the salient work requirements of the solicitation. Any exercise of that Government right will be made by the Head of the Contracting Activity.

(End of provision)

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21512, Apr. 26, 2010]

PART 353—FORMS

Subpart 353.3—Illustrations of Forms

Sec.
353.370–674 Form HHS 674, Structured Approach Profit/Fee Objective.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 353.3—Illustrations of Forms

353.370–674 Form HHS 674, Structured Approach Profit/Fee Objective.

This form is available from local cost advisory personnel or PSC.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SUBCHAPTERS I–L [RESERVED]

PARTS 354–369 [RESERVED]

SUBCHAPTER M—HHS SUPPLEMENTATIONS

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 74 FR 62398, Nov. 27, 2009, unless otherwise noted.

Subpart 370.1—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities

370.101 Policy.

(a) It is HHS policy that all meetings, conferences, and seminars be accessible to persons with disabilities. For the purpose of this policy, accessibility is defined as both physical access to meeting, conference, and seminar sites, and aids and services to enable individuals with sensory disabilities to fully participate in meetings, conferences, and seminars.

(b) In regard to acquisition, the policy is applicable to all contracts where the SOW/PWS requires the contractor to conduct meetings, conferences, or seminars that are open to the public or involve HHS personnel, but not to ad hoc meetings that may be necessary or incidental to contract performance.

370.102 Responsibilities.

(a) The Contracting Officer shall insert the clause in 352.270–1, Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities, in solicitations, contracts, and orders when the SOW/PWS requires the contractor to conduct meetings, conferences, or seminars in accordance with 370.101(b).

(b) The COTR shall obtain, review, and approve the contractor's plan, which is to be submitted in response to paragraph (a) of the contract clause in 352.270–1. A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars is acceptable. The COTR, prior to approving the plan, shall consult with the OPDIV or other designated organization responsible for monitoring compliance with the Architectural Barriers Act of 1968 and the Americans with Disabilities Act of 1990, to ensure that the contractor's plan meets the accessibility requirements of the contract

clause. The COTR shall request the responsible organization to review, and determine the adequacy of, the contractor's plan, and respond to the COTR, in writing, within 10 working days of receiving the request from the COTR.

Subpart 370.2—Indian Preference in Employment, Training, and Subcontracting Opportunities

370.201 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, 88 Stat. 2205, 25 U.S.C. 450e(b), requires:

''Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible:

(1) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) Preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).''

370.202 Applicability.

The Indian Preference clause set forth in *352.270–2* and the Indian Preference Program clause set forth in *352.270–3* implement section 7(b) of Public Law 93–638 for all HHS activities. Contracting activities shall use the clauses as follows, except that solicitations issued and contracts awarded pursuant to Title I of Public Law 93–638 (25 U.S.C. 450 *et seq.*) are exempted:

(a) The Contracting Officer shall insert the clause in *352.270–2*, Indian Preference, in solicitations, contracts, and orders when—

(1) The award is (or will be) made pursuant to an act specifically authorizing such awards with Indian organizations; or

(2) The work to be performed is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise accrue to the general public.

(b) The Contracting Officer shall insert the clause in *352.270–3*, Indian Preference Program, in solicitations, contracts, and orders when—

(1) The dollar amount of the acquisition is expected to equal or exceed $50,000 for nonconstruction work or $100,000 for construction work;

(2) The Indian Preference clause is included in the solicitation, contract, or order; and

(3) The Contracting Officer makes the determination, prior to solicitation, that performance will take place in whole or in substantial part on or near an Indian reservation(s). In addition, the Contracting Officer may insert the Indian Preference Program clause in solicitations, contracts, and orders below the $50,000 or $100,000 level for nonconstruction or construction contracts, respectively, but which meet the requirements of paragraphs (b)(2) and (3) of this section *370.202*, and, in the opinion of the Contracting Officer, offer substantial opportunities for Indian employment, training, and subcontracting.

370.203 Definitions.

For purposes of this Subpart *370.2*, the following definitions shall apply:

(a) *Indian* means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual to provide evidence within 30 days from the Tribe concerned that the person is a member of the Tribe.

(b) *Indian Tribe* means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native Village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(c) *Indian organization* means the governing body of any Indian Tribe, or entity established or recognized by such governing body, in accordance with the Indian Financing Act of 1974 (88 Stat. 77, 25 U.S.C. 1451).

(d) *Indian-owned economic enterprise* means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and the ownership shall encompass active operation and control of the enterprise.

(e) *Indian reservation* includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688, 43 U.S.C. 1601 *et seq.*)

(f) *On or near an Indian Reservation* means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

370.204 Compliance enforcement.

(a) The contracting activity shall conduct periodic reviews to ensure contractor compliance with the requirements of the clauses in *352.270–2* and *352.270–3*. The Indian Tribe(s) concerned may assist in the conduct of these reviews.

(b) The Contracting Officer shall promptly investigate and resolve complaints of noncompliance with the requirements of the clauses in *352.270–2* and *352.270–3* that are filed in writing with the contracting activity.

370.205 Tribal preference requirements.

(a) When the contractor will perform work under a contract on an Indian reservation, the Contracting Officer may supplement the clause in *352.270–3* by adding specific Indian preference requirements of the Tribe on whose reservation the work is to be performed. The contracting activity and the Tribe shall jointly develop supplemental requirements for the contract. Supplemental preference requirements shall represent a further implementation of the requirements of section 7(b) of Public Law 93–638 and require the approval of the affected program director and OGC–GLD, or a regional attorney, before the Contracting Officer adds them to a solicitation and resultant contract. Any supplemental preference requirements the Contracting Officer adds to the clause in *352.270–3* shall also be part of the solicitation and clearly identified, to ensure uniform understanding of the additional requirements by all prospective bidders or offerors.

(b) Nothing in this part shall preclude tribes from independently developing and enforcing their own Tribal preference requirements. Such independently developed Tribal preference requirements shall not, except as provided in paragraph (a) of this section, become a requirement in contracts covered under this *370.2*, and shall not conflict with any Federal statutory or regulatory requirement concerning the award and administration of contracts.

Subpart 370.3—Acquisitions Involving Human Subjects

370.300 Scope of subpart.

This subpart applies to all R & D activities involving human subjects conducted under contract—*see* 45 CFR 46.102(d) and (f).

370.301 Policy.

It is HHS policy that the Contracting Officer shall not award a contract involving human subjects until a prospective contractor has provided acceptable assurance that the activity will be subject to initial and continuing review by an appropriate Institutional Review Board (IRB) as described in HHS regulations at 45 CFR 46.103. The Contracting Officer shall require an applicable Federal-wide assurance (FWA), approved by the HHS Office for Human Research Protections (OHRP), of each contractor, subcontractor, or cooperating institution having responsibility for human subjects involved in performance of a contract. OHRP is responsible for negotiating assurances covering all HHS-supported or HHS-conducted activities involving

human subjects. OHRP shall provide guidance to Contracting Officers regarding non-award or termination of a contract due to inadequate assurance or breach of assurance for protection of human subjects.

370.302 Types of assurances.

(a) If an institution does not currently hold an FWA, it should submit one. An FWA listed in OHRP's current ''List of Registered Institutional Review Boards (IRBs)/Independent Ethics Committees (IECs) and Approved Assurances'' is acceptable for the purposes of this policy.

(b) The OHRP Web site includes links to instructions and the forms for submitting both a domestic and international FWA at: *http://www.hhs.gov/ohrp/assurances/assurances_index.html*. To expedite approval of a FWA, as well as any update/renewal, the institution shall use the OHRP Electronic Submission System. Once the institution ''submits'' an electronic file to OHRP, the institution must fax or mail (but not both) a copy of the signature page to initiate the review process. The institution shall mail the FWA to the OHRP, U.S. Department of Health and Human Services, 1101 Wootton Parkway, Suite 200, Rockville, Maryland 20852, or fax it to OHRP at 240–453–8202 (but not both).

370.303 Notice to offerors.

(a) The Contracting Officer shall insert the provision in *352.270–4(a)*, Notice to Offerors of Requirements of 45 CFR Part 46, Protection of Human Subjects, in solicitations that involve human subjects.

(b) Institutions having an OHRP-approved FWA shall certify IRB approval of submitted proposals in the manner required by instructions for completion of the contract proposal; by completion of an OMB Form No. 0990–0263, ''Protection of Human Subjects Assurance Identification/IRB Certification/Declaration of Exemption (Common Rule); or by letter indicating the institution's OHRP-assigned FWA number, the date of IRB review and approval, and the type of review (convened or expedited). The date of IRB approval must not be more than 12 months prior to the deadline for proposal submission.

(c) The Contracting Officer generally will not request FWAs for contractors, subcontractors, or cooperating institutions prior to determination that a contract proposal has been selected for negotiation. When a contractor submits an FWA, it provides certification for the initial contract period. No additional documentation is required. If the contract provides for additional years to complete the project, the contractor shall certify the noncompetitive renewal proposal in the manner described in the preceding paragraph.

370.304 Contract clauses.

(a) The Contracting Officer shall insert the clause in *352.270–4(b)*, Protection of Human Subjects, in solicitations, contracts, and orders that involve human subjects.

(b) The Contracting Officer shall insert the clause in *352.270–6*, Restriction on Use of Human Subjects, in contracts and orders if the contractor has an approved Federal-wide assurance of compliance in place, but cannot certify prior to award that the research has been reviewed and approved by the IRB designated under the contractor's Federal-wide assurance of compliance, because definite plans for involvement of human subjects are not set forth in the proposal (e.g., projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds). Under these conditions, the Contracting Officer may make the award without the requisite certification, as long as the Contracting Officer includes appropriate conditions in the contract or order.

Subpart 370.4—Acquisitions Involving the Use of Laboratory Animals

370.400 Scope of subpart.

This subpart applies to all R & D, research training, biological testing, housing and maintenance, and other activities involving live vertebrate animals conducted under contract (*see*

Public Health Service Policy on Humane Care and Use of Laboratory Animals (PHS Policy), Rev. 1986, Repr. 1996).

[75 FR 21512, Apr. 26, 2010]

370.401 Policy.

(a) It is HHS policy that contracting activities shall not award a contract involving live vertebrate animals until the contractor has given acceptable assurance that the work under the contract will be subject to initial and continuing review by an appropriate Institutional Animal Care and Use Committee (IACUC) as described in the PHS Policy at IV.B.6. and 7. The Contracting Officer shall require an applicable Full Animal Welfare Assurance or Inter-institutional Agreement/Assurance, approved by the Office of Laboratory Animal Welfare (OLAW), NIH, of each contractor, subcontractor, or cooperating institution having responsibility for animal care and use involved in performance of the contract—*see* PHS Policy II., IV.A., and V.B.

(b) The OLAW, NIH, is responsible for negotiating assurances covering all HHS/PHS-supported or HHS/PHS-conducted activities involving the care and use of live vertebrate animals. OLAW shall provide guidance to Contracting Officers regarding adequate animal care, and use, approval, disapproval, restriction, or withdrawal of approval of assurances—*see* PHS Policy V.A.

370.402 Assurances.

(a) Assurances may be one of two following types:

(1) *Full Animal Welfare Assurance (AWA)*. An AWA describes the institution's complete program for the care and use of animals, including but not limited to the facilities, occupational health, training, veterinary care, IACUC procedures and lines of authority and responsibility. An AWA listed in OLAW's list of institutions which have an approved full AWA is acceptable for purposes of this policy.

(2) *Inter-institutional Agreement/Assurance (IAA)*. An IAA describes the arrangements between an offeror and usually a subcontractor where animal activities will occur. An IAA is limited to the specific award or single project.

(b) The Contracting Officer shall forward copies of proposals selected for negotiation and requiring an assurance to the Assurance Branch, Office of Laboratory Animal Welfare, NIH MSC 7507, 6100 Executive Blvd., Room 3B01, Rockville, Maryland 20892, as early as possible to secure the necessary assurances.

(c) A contractor providing animal care services at an assured entity, such as a Government-owned, contractor-operated (GOCO) site, does not need a separate assurance. GOCO site assurances normally cover such contractor services.

370.403 Notice to offerors.

(a) The Contracting Officer shall insert the provision in 352.270–5(a), Notice to Offerors of Requirement for Compliance with the Public Health Service Policy on Humane Care and Use of Laboratory Animals, in solicitations that involve live vertebrate animals.

(b) Offerors having a full AWA on file with OLAW shall submit IACUC approval of the use of animals in the manner required by instructions for completion of the contract proposal, but prior to the technical review of the proposal. The date of IACUC approval must not be more than 36 months prior to the deadline for proposal submission.

(c) It is not necessary for non-assured offerors to submit assurances or IACUC approval with proposals. OLAW shall contact contractors, subcontractors and cooperating institutions to negotiate necessary assurances and verify IACUC approvals when requested by the Contracting Officer.

[74 FR 62398, Nov. 27, 2009, as amended at 75 FR 21512, Apr. 26, 2010]

370.404 Contract clause.

The Contracting Officer shall insert the clause in 352.270–5(b), Care of Live Vertebrate Animals, in solicitations, contracts, and orders that involve live vertebrate animals.

[75 FR 21512, Apr. 26, 2010]

Subpart 370.5—Acquisitions Under the Buy Indian Act

370.500 Scope of subpart.

This subpart sets forth the policy on preferential acquisition from Indians under the negotiation authority of the Buy Indian Act. This subpart applies only to acquisitions made by or on behalf of IHS.

370.501 Policy.

(a) The IHS shall utilize the negotiation authority of the Buy Indian Act to give preference to Indians whenever the use of that authority is authorized and is practicable. The Buy Indian Act, 25 U.S.C. 47, prescribes the application of the advertising requirements of section 3709 of the Revised Statutes to the acquisition of Indian supplies. As specified in 25 U.S.C. 47, the Buy Indian Act provides that, so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

(b) Due to the transfer of authority from the Department of the Interior to HHS, the Secretary of HHS is authorized to use the Buy Indian Act in the acquisition of products of Indian industry, in connection with the maintenance and operation of hospital and health facilities for Indians, and for the conservation of the health of Indians. This authority has been delegated exclusively to IHS and is not available for use by any other HHS component (unless that component is making an acquisition on behalf of IHS). However, the Buy Indian Act itself does not exempt IHS from meeting the statutorily mandated small business goals.

(c) Subsequent legislation, particularly Public Law 94–437 and Public Law 96–537, have emphasized the use of the Buy Indian Act negotiation authority.

370.502 Definitions.

(a) *Buy Indian contract* means any contract involving activities covered by the Buy Indian Act that is negotiated under the provisions of 41 U.S.C. 252(c) and 25 U.S.C. 47 between an Indian firm and a Contracting Officer representing IHS.

(b) *Indian* means a member of any Tribe, pueblo, band, group, village or community that is recognized by the Secretary of the Interior as being Indian or any individual or group of individuals that is recognized by the Secretary of the Interior or the Secretary of HHS. The Secretary of HHS in making determinations may take into account the determination of the Tribe with which affiliation is claimed.

(c) *Indian firm* means a sole enterprise, partnership, corporation, or other type of business organization owned, controlled, and operated by one or more Indians (including, for the purpose of sections 301 and 302 of Public Law 94–437, former or currently Federally recognized Indian tribes in the State of New York) or by an Indian firm; or a nonprofit firm organized for the benefit of Indians and controlled by Indians (*see 370.503(a)*).

(d) *Product of Indian industry* means anything produced by Indians through either physical labor or intellectual effort involving the use and application of their skills.

370.503 Requirements.

(a) *Indian ownership.* The degree of Indian ownership of an Indian firm shall be at least 51 percent during the period covered by a Buy Indian contract.

(b) *Joint ventures.* An Indian firm may enter into a joint venture with other entities for specific projects as long as the Indian firm is the managing partner. However, the Contracting Officer shall approve the joint venture prior to the award of a contract under the Buy Indian Act.

(c) *Bonds.* In the case of contracts for the construction, alteration, or repair of public buildings or public works, the Miller Act (40 U.S.C. 270a–270f) and *FAR part 28* require performance and payment bonds. Bonds are not required in the case of contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian Tribe. However, bonds are required when dealing with private business entities that are owned by an Indian Tribe or members of an Indian

Tribe. The Contracting Officer may require bonds of private business entities that are joint ventures with, or subcontractors of, an Indian Tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian Tribe. A bid guarantee or bid bond is required only when a performance or payment bond is required.

(d) *Indian preference in employment, training and subcontracting.* Contracts awarded under the Buy Indian Act are subject to the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act 25 U.S.C. 450e, which requires that preference be given to Indians in employment, training, and subcontracting. The Contracting Officer shall include the Indian Preference clause specified in 352.270–2 in all Buy Indian solicitations and resultant contracts. The Contracting Officer shall use the Indian Preference Program clause specified in 352.270–3 as prescribed in 370.202(b). The Contracting Officer shall follow all requirements specified in subpart 370.2 which are applicable to a Buy Indian acquisition (e.g., sections 370.204 and 370.205).

(e) *Subcontracting.* A contractor shall not subcontract to other than Indian firms more than 50 percent of the work under a prime contract awarded pursuant to the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment.

(f) *Wage rates.* The Contracting Officer shall include a determination of the minimum wage rates by the Secretary of Labor as required by the Davis-Bacon Act (40 U.S.C. 276a) in all contracts awarded under the Buy Indian Act for over $2,000 for construction, alteration, or repair, including painting and decorating, of public buildings and public works, except contracts with Indian tribes or public nonprofit organizations serving as governmental instrumentalities of an Indian Tribe. The Contracting Officer shall include the wage rate determination in contracts with private business entities, even if they are owned by an Indian Tribe or a member of an Indian Tribe and in connection with joint ventures with, or subcontractors of, an Indian Tribe or a public nonprofit organization serving as a governmental instrumentality of an Indian Tribe.

370.504 Competition.

(a) Contracts awarded under the Buy Indian Act are subject to competition among Indians or Indian concerns to the maximum extent practicable. When the Contracting Officer determines that competition is not practicable, a JOFOC is required in accordance with *306.303*.

(b) The Contracting Officer shall: synopsize and publicize solicitations in FedBizOpps and provide copies of the synopses to the Tribal office of the Indian Tribal government directly concerned with the proposed acquisition as well as to Indian concerns and others having a legitimate interest. The synopses shall state that the acquisitions are restricted to Indian firms under the Buy Indian Act.

370.505 Responsibility determinations.

(a) The Contracting Officer may award a contract under the Buy Indian Act only if the Contracting Officer determines that the project or function to be contracted is likely to be: satisfactorily performed under that contract; and properly completed or maintained under that contract.

(b) The Contracting Officer shall make the determination specified in paragraph (a) of this section in writing prior to the award of a contract. The determination shall reflect an analysis of the standards set forth in *FAR9.104–1*.

Subpart 370.6—Conference Funding and Sponsorship

370.600 Policy.

It is HHS policy that the conferences it funds or sponsors shall: be consistent with HHS missions, objectives, and policies; represent an efficient and effective use of taxpayer funds; and be able to withstand public scrutiny.

370.601 Funding and sponsorship.

Funding a conference through an HHS contract does not automatically imply HHS (OPDIV/STAFFDIV) conference sponsorship, unless the conference is funded entirely by HHS.

Also, HHS staff attendance or participation at a conference does not imply HHS conference sponsorship. Accordingly, for other than conference contracts funded entirely by HHS, prior to a contractor claiming HHS conference sponsorship, the contractor must provide to the Contracting Officer a written request for permission to claim HHS as the conference sponsor—*see 370.602*. The OPDIV/STAFFDIV head, or designee, shall approve such requests.

370.602 Contract clause.

To ensure that a contractor:

(a) Properly requests approval to claim HHS as the conference sponsor, where HHS is not the sole provider of conference funding; and

(b) Includes an appropriate Federal funding disclosure and content disclaimer statement on conference materials, the Contracting Officer shall include the clause in *352.270–7*, Conference Sponsorship Request and Conference Materials Disclaimer, in solicitations, contracts, and orders that provide funding, in whole or in part, to support a conference.

Subpart 370.7—Acquisitions Under the Leadership Act

370.700 Scope of subpart.

This subpart sets forth the acquisition requirements regarding implementation of HIV/AIDS programs under the President's Emergency Plan for AIDS Relief under the Leadership Act of 2003, and under the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 (Emergency Plan reauthorization legislation), which was signed by the President on July 30, 2008.

370.701 Contract clause.

The Contracting Officer shall insert the clause in *352.270–8*, Prostitution and Related Activities, in solicitations, contracts, and orders, and in existing contracts and orders (whenever they are modified to extend the period of performance or add funds, including any options that may be exercised): in connection with the implementation of HIV/AIDS programs under the President's Emergency Plan for AIDS Relief; or where the contractor will receive funding under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003. (*Note: See 370.702* and *352.270–9* for the ''Non-discrimination for Conscience'' provision that must also be included in applicable solicitations.) In resolving any issues/complaints that offerors/contractors may raise about meeting the requirements specified in the clause, the Contracting Officer shall consult with the Office of Global Health Affairs, Office of the General Counsel, the Project Officer, and other HHS officials, as appropriate.

370.702 Solicitation provision.

The Contracting Officer shall insert the provision in *352.270–9*, Non-discrimination for Conscience, in solicitations valued at more than the micro-purchase threshold: in connection with the implementation of HIV/AIDS programs under the President's Emergency Plan for AIDS Relief; or where the contractor will receive funding under the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003. (*Note: See 370.701* and *352.270–8* for the ''Prostitution and Related Activities'' clause that must also be included in applicable solicitations, contracts, and orders.) In resolving any issues/complaints that offerors may raise about meeting the requirements specified in the provision, the Contracting Officer shall consult with the Office of Global Health Affairs, Office of the General Counsel, the Project Officer, and other HHS officials, as appropriate.

CHAPTER 4—DEPARTMENT OF AGRICULTURE

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SUBCHAPTER A—GENERAL

PART 401—AGRICULTURE ACQUISITION REGULATION SYSTEM

Sec.
401.000 Scope of part.

Subpart 401.1—Purpose, Authority, Issuance

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AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

401.000 Scope of part.

This part presents basic policies and general information about the Department of Agriculture's (USDA) Acquisition Regulation, subsequently referred to as the AGAR. The AGAR is an integral part of the Federal Acquisition Regulations System.

Subpart 401.1—Purpose, Authority, Issuance

401.101 Purpose.

(a) The AGAR provides for the codification and publication of uniform policies and procedures for acquisitions by contracting activities within USDA.

(b) The purpose of the AGAR is to implement the Federal Acquisition Regulation (FAR), where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The AGAR is not by itself a complete document, as it must be used in conjunction with the FAR.

401.103 Authority.

The AGAR and amendments thereto are issued under 5 U.S.C. 301 and 40 U.S.C. 486(c). The Senior Procurement Executive (SPE) has the delegated authority to promulgate Departmental acquisition regulations.

401.104 Applicability.

The FAR and AGAR apply to all USDA acquisitions of supplies and services (including construction) which obligate appropriated funds, unless otherwise specified in this chapter or excepted by law.

401.105 Issuance.

401.105–1 Publication and code arrangement.

(a) The AGAR is codified in the Code of Federal Regulations (CFR) as Chapter 4 of Title 48, Federal Acquisition Regulations System, to implement and supplement Chapter 1 which constitutes the FAR. Parts 400 through 499 have been assigned to USDA by the Office of the Federal Register.

(b) The AGAR and its subsequent changes are published in:

(1) Daily issues of the FEDERAL REGISTER,

(2) Cumulative form in the CFR, and,

(3) Electronic form on the USDA Departmental Administration Procurement Homepage (see 401.170).

(c) Section 553(a)(2) of the Administrative Procedure Act, 5 U.S.C. 553, provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. In 1971, Secretary of Agriculture Hardin announced a voluntary partial waiver from the Administrative Procedure Act exception, and USDA agencies generally are required to provide notice and an opportunity for public comment on proposed rules (36 FR 13804, July 24, 1971). The AGAR has been promulgated and may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act. The USDA also is required to publish for public comment procurement regulations in the FEDERAL REGISTER, pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 418b), and FAR 1.301.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 44, Jan. 3, 2005]

401.105–2 Arrangement of regulations.

AGAR coverage parallels the FAR in format, arrangement, and numbering system. However, subdivisions below the section and subsection levels may not always correlate directly to FAR designated paragraphs and subparagraphs.

401.105–3 Copies.

Copies of the AGAR published in CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Requests should reference Chapter 4 of Title 48 CFR.

401.106 OMB approval under the Paperwork Reduction Act.

The following OMB control numbers apply to USDA solicitations and specified information collections within the AGAR:

AGAR segment	OMB Control No.
411.170	0505–0014
415.2	0505–0013
436.575	0505–0011
437.110	0505–0015
437.270	0505–0016
452.211–1	0505–0014
452.215–71	0505–0013
452.236–75	0505–0011
452.237–74	0505–0015
452.237–76	0505–0016

[61 FR 53646, Oct. 15, 1996, as amended at 64 FR 52674, Sept. 30, 1999]

401.170 Electronic access to regulatory information.

The USDA Departmental Administration Procurement Homepage provides access to the AGAR, AGAR amendments (circulars), AGAR Advisories, and other USDA procurement policy and guidance in electronic form. The Internet address for the Procurement Homepage is URL *http://www.usda.gov/procurement/*.

[63 FR 26994, May 15, 1998, as amended at 70 FR 44, Jan. 3, 2005]

Subpart 401.2—Administration

401.201 Maintenance of the FAR.

401.201–1 The two councils.

(a) USDA's representative on the Civilian Agency Acquisition Council is designated by the SPE.

(b) The Procurement Policy Division will coordinate proposed FAR revisions within USDA.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 44, Jan. 3, 2005]

Subpart 401.3—Agency Acquisition Regulations

401.301 Policy.

(a) The SPE, subject to the authorities in 401.103 and FAR 1.301, may issue and publish Departmental regulations, that together with the FAR, constitute Department-wide policies, procedures, solicitation provisions, and contract clauses governing the contracting process or otherwise controlling the relationship between USDA (including any of its contracting activities) and contractors or prospective contractors.

(b) Each designated head of a contracting activity (HCA) is authorized to issue or authorize the issuance of, at any organizational level, internal guidance which does not have a significant effect beyond the internal operating procedures of the activity, or a significant cost or administrative impact on offerors or contractors. Internal guidance issued by contracting activities will not be published in the FEDERAL REGISTER. HCA's shall ensure that the guidance, procedures, or instructions issued—

(1) Are consistent with the policies and procedures contained in this chapter;

(2) Follow the format, arrangement, and numbering system of this chapter to the extent practicable;

(3) Contain no material which duplicates, paraphrases, or is inconsistent with this chapter; and

(4) Are numbered and identified by use of alphabetical suffixes to the chapter number as follows:

4A [Reserved]
4B Agricultural Research Service.
4C Farm Service Agency.
4D Rural Development (mission area).
4E Food Safety and Inspection Service.
4F [Reserved]
4G Forest Service.
4H [Reserved]
4I Natural Resources Conservation Service.
4J [Reserved]
4K Food and Nutrition Service.
4L Animal and Plant Health Inspection Service.
4M [Reserved]
4N Departmental Administration.
4O–4P [Reserved]
4R Office of Inspector General.
4S [Reserved]

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 44, Jan. 3, 2005]

401.304 Agency control and compliance procedures.

(a) The AGAR System is under the direct oversight and control of the SPE, who is responsible for review and issuance of all Department-wide acquisition regulations published in the FEDERAL REGISTER to assure compliance with FAR part 1.

(b) The SPE is also responsible for review and issuance of unpublished, Department-wide internal guidance under the AGAR System.

(c) HCA's are responsible for establishment and implementation of formal procedures for oversight and control of unpublished internal guidance issued within the contracting activity to implement FAR or AGAR requirements. These procedures shall be subject to the review and approval by the SPE.

(d) The SPE is responsible for evaluating coverage under the AGAR System to determine applicability to other agencies and for recommending coverage to the FAR Secretariat for inclusion in the FAR.

(e) Recommendations for revision of existing FAR coverage or new FAR coverage shall be submitted by the HCA to the SPE for further action.

401.370 Exclusions.

Subject to the policies of FAR subpart 1.3, certain USDA acquisition policies and procedures may be excluded from the AGAR under appropriately justified circumstances, such as:

(a) Subject matter which is effective for a period less than 12 months.

(b) Subject matter which is instituted on an experimental basis for a reasonable period.

(c) Acquisition procedures instituted on an interim basis to comply with the requirements of statute, regulation, Executive Order, OMB Circular, or OFPP Policy Letter.

401.371 AGAR Advisories.

The SPE may issue AGAR Advisories, consistent with the policies of the FAR and the AGAR, for the following purposes:

(a) To communicate Department-wide policy and/or procedural guidance to contracting activities;

(b) To delegate to procurement officials authority to make determinations or to take action to implement the policies of the FAR or the AGAR; and,

(c) To establish internal policy and procedures on an interim basis, prior to incorporation in the AGAR or in a Departmental Directive.

(d) AGAR Advisories are only available in electronic format on the USDA

Procurement Web site at *http://www.usda.gov/procurement/*.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 44, Jan. 3, 2005]

401.372 Departmental directives.

Subject to the policies of FAR 1.3, USDA from time to time may issue internal directives to establish procedures, standards, guidance, or methods of performing duties, functions, or operations. Such directives include Departmental Regulations (DR's), Departmental Notices, and Secretary's Memoranda.

Subpart 401.4—Deviations From the FAR and AGAR

401.402 Policy.

Requests for authority to deviate from the provisions of the FAR or the AGAR shall be submitted in writing as far in advance as the exigencies of the situation will permit. Each request for deviation shall contain the following:

(a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FAR and AGAR;

(b) The reason why the deviation is considered necessary or would be in the best interest of the Government;

(c) If applicable, the name of the contractor and identification of the contract affected;

(d) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;

(e) A description of the intended effect of the deviation;

(f) A statement of the period of time for which the deviation is needed; and

(g) Any pertinent background information which will contribute to a full understanding of the desired deviation.

401.403 Individual deviations.

In individual cases, deviations from either the FAR or the AGAR will be authorized only when essential to effect a necessary acquisition or where special circumstances make such deviations clearly in the best interest of the Government. Except for cost principles, HCA's may approve individual deviations from the AGAR, after coordinating with the General Counsel and the SPE. No deviations from the FAR or AGAR may be authorized at the contracting office level. A copy of each deviation and its supporting documentation shall be provided to the SPE. Deviations from the FAR shall not be made unless such action is authorized by the SPE after consultation with the Office of the General Counsel and any other appropriate office, on the basis of a written justification stating clearly the special circumstances involved.

401.404 Class deviations.

Where deviations from the FAR or AGAR are considered necessary for classes of contracts, requests for authority to deviate shall be submitted in writing to the SPE for approval. The SPE may authorize class deviations from the FAR without consulting the Chairperson of the Civilian Agency Acquisition Council where urgency precludes consultation. The SPE shall subsequently inform the Chairperson of the Civilian Agency Acquisition Council of the deviation including the circumstances under which it was required.

Subpart 401.6—Contracting Authority and Responsibilities

401.601 General.

(a) The authority and responsibility vested in the Secretary to manage USDA's acquisition function is delegated through the Assistant Secretary for Administration to the SPE. This broad authority includes, but is not limited to, the following responsibilities:

(1) Prescribing and publishing Departmental acquisition policies, regulations, and procedures.

(2) Taking any necessary actions consistent with policies, regulations, and procedures with respect to purchases, contracts, leases, and other transactions.

(3) Designating contracting officers.

(4) Establishing clear lines of contracting authority.

(5) Evaluating and monitoring the performance of USDA's acquisition system.

(6) Managing and enhancing career development of the contracting work force.

(7) Participating in the development of Government-wide acquisition policies, regulations, and standards; and determining specific areas where government-wide performance standards should be established and applied.

(8) Determining areas of Department-unique standards and developing unique Department-wide standards.

(9) Certifying to the Secretary that the acquisition system meets approved standards.

(b) The SPE may delegate contracting authority to the Heads of Contracting Activities (HCA's) and the responsibility to manage their acquisition function.

(c) Unless prohibited by the FAR, the AGAR, or by other applicable statutes and regulations, the SPE may redelegate to HCA's the authority to make determinations as the agency head in order to implement the policies and procedures of the FAR. Such delegations shall be in writing, but need not be published.

(d) Unless prohibited by the FAR, the AGAR, or by other applicable statutes or regulations, each HCA may designate one individual from the contracting activity to carry out the functions of the HCA (HCAD). The HCAD may exercise all authority delegated to the HCA.

401.602 Contracting officers.

401.602–3 Ratification of unauthorized commitments.

(a) *Definitions. Ratification*, as used in this section, means the signed, documented action taken by an authorized official to approve and sanction a previously unauthorized commitment.

Unauthorized commitment, as used in this section, means an agreement made by a Government representative who lacked the authority to enter into a contract on behalf of the Government.

(b) *Policy*. The HCA may delegate ratification authority to the chief of the contracting office.

(c) *Procedure*. Whenever an official of the cognizant contracting activity who is authorized to ratify unauthorized commitments learns that a person or firm has assumed work as a result of an unauthorized commitment, that official shall take the following actions:

(1) Immediately inform any person who is performing work as a result of an unauthorized commitment that the work is being performed at that person's risk;

(2) Inform the individual who made the unauthorized commitment of the seriousness of the act and the possible consequences;

(3) Ensure that the individual who made the unauthorized commitment furnishes all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to: a statement as to why a contracting officer was not used; why the vendor was selected and a list of sources considered; a description of work to be performed or products to be furnished; the estimated or agreed price; whether an appropriation is available for the work; and whether performance has begun. Under exceptional circumstances, such as when the individual who made the unauthorized commitment is no longer available to attest to the circumstances of the unauthorized commitment, the ratifying official may waive these requirements; and

(4) Decide whether ratification is proper and proceed as follows:

(i) If ratification is not justifiable, provide the cognizant program office, contracting office, and the unauthorized contractor with an explanation of the decision not to ratify.

(ii) If ratification appears adequately justified, ratify the action and retain or assign the contract to a successor contracting officer if necessary.

(iii) Maintain related approval, decisional, and background documents in the contract file for audit purposes.

(iv) Notify the cognizant program supervisor or line officer about the final disposition of the case; the notification may include a recommendation that the unauthorized commitment should be further considered a violation of USDA's employee conduct regulations.

401.603 Selection, appointment, and termination of appointment.

401.603–1 General.

An HCA may delegate contracting authority to the extent authorized by the SPE in a general delegation of acquisition authority, by appointing qualified individuals as contracting officers, in accordance with the USDA Contracting Officer Warrant System, Departmental Regulation 5001–1.

PART 402—DEFINITIONS OF WORDS AND TERMS

Sec.
402.000 Scope of part.

Subpart 402.1—Definitions

402.101 Definitions.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

402.000 Scope of part.

As used throughout this chapter, the following words and terms are used as defined in this subpart unless the context in which they are used clearly requires a different meaning, or a different definition is prescribed for a particular part or portion of a part.

Subpart 402.1—Definitions

402.101 Definitions.

Acquisition official means an individual who has been delegated authority to manage or to exercise acquisition functions and responsibilities.

Agency head or *Head of the Agency* means the Secretary of Agriculture, Deputy Secretary, or the Assistant Secretary for Administration.

Head of the contracting activity (HCA) means the official who has overall responsibility for managing the contracting activity (*i.e.*, Chief, Forest Service; Administrator, Agricultural Research Service; etc.), or the individual designated by such an official to carry out the functions of the HCA.

Senior Procurement Executive (SPE) means the agency official appointed as such by the head of the agency pursuant to Executive Order 12931. The Director, Office of Procurement and Property Management, has been designated as the USDA SPE.

[61 FR 53646, Oct. 15, 1996, as amended at 63 FR 26994, May 15, 1998]

PART 403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 403.1—Safeguards

Sec.
403.101 Standards of conduct.
403.101–3 Agency regulations.
403.104 Procurement integrity.
403.104–5 [Reserved]
403.104–7 Violations or possible violations.

Subpart 403.2—Contractor Gratuities to Government Personnel

403.203 Reporting suspected violations of the gratuities clause.
403.204 Treatment of violations.

Subpart 403.3—Reports of Suspected Antitrust Violations

403.303 Reporting suspected antitrust violations.

Subpart 403.4—Contingent Fees

403.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 403.5—Other Improper Business Practices

403.502 Subcontractor kickbacks.

Subpart 403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

403.602 Exceptions.
403.603 Responsibilities of the contracting officer.

Subpart 403.8—Limitation on the Payment of Funds To Influence Federal Transactions

403.806 Processing suspected violations

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 403.1—Safeguards

403.101 Standards of conduct.

403.101–3 Agency regulations.

(a) The standards of conduct for USDA procurement officials are the uniform standards established by the Office of Government Ethics in 5 CFR Part 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*, and FAR 3.104, *Procurement integrity*.

(b) Procurement officials and other employees who require advice concerning the application of standards of conduct to any acquisition issue shall obtain ethics advisory opinions from ethics advisory officials in their agency personnel offices.

403.104 Procurement integrity.

403.104–5 [Reserved]

403.104–7 Violations or possible violations.

The contracting officer shall forward information concerning any violation or possible violation of the Procurement Integrity Act (41 U.S.C. 423) to the chief of the contracting office.

[61 FR 53646, Oct. 15, 1996, as amended at 63 FR 26995, May 15, 1998. Redesignated and amended at 70 FR 44, Jan. 3, 2005]

Subpart 403.2—Contractor Gratuities to Government Personnel

403.203 Reporting suspected violations of the gratuities clause.

A suspected violation of the contract clause, FAR 52.203–3, Gratuities, shall be reported immediately to the cognizant contracting officer in writing, stating the circumstances surrounding the incident(s), the date(s), and names of all parties involved. The contracting officer shall review the report for completeness, add any additional information deemed necessary and a recommendation for action, and submit the report to the HCA.

403.204 Treatment of violations.

The HCA shall review the report and consult with the Offices of General Counsel and Inspector General to determine whether further action should be pursued. If it is found that the facts and circumstances warrant further action, the HCA shall give the contractor a formal written notice which summarizes the reported violation and affords the contractor the opportunity to make a written or oral response within a reasonable, specified period after receipt of the notice. The notice shall be sent by certified mail with return receipt requested. Oral presentations shall follow the procedures outlined in FAR 3.204(b). The HCA shall furnish copies of any adverse determination to the contracting officer and the Department Debarring Officer for their subsequent considerations under FAR 3.204(c)(1) and (2), respectively.

Subpart 403.3—Reports of Suspected Antitrust Violations

403.303 Reporting suspected antitrust violations.

Contracting officers shall report the circumstances of suspected violations of antitrust laws to the Office of Inspector General in accordance with procedures in Departmental Regulations (1700 series).

Subpart 403.4—Contingent Fees

403.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) A suspected misrepresentation or violation of the Covenant Against Contingent Fees shall be documented in writing by the contracting officer and reported immediately to the chief of the contracting office. The chief of the contracting office shall determine if a violation has occurred and report any violation to the Office of Inspector General. The chief of the contracting office shall take action in accordance with FAR 3.405(b).

(b) If the chief of the contracting office decides to refer the case to the Department of Justice, it should be referred through the Office of Inspector General with a copy of the report and referral submitted through the HCA to the Senior Procurement Executive.

[61 FR 53646, Oct. 15, 1996. Redesignated and amended at 70 FR 44, Jan. 3, 2005]

Subpart 403.5—Other Improper Business Practices

403.502 Subcontractor kickbacks.

Contracting officers shall report the circumstances of suspected violations of the Anti-Kickback Act (41 U.S.C. 51–58) to the Office of Inspector General in accordance with procedures in Departmental Regulations (1700 series).

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 44, Jan. 3, 2005]

Subpart 403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

403.602 Exceptions.

The HCA is authorized to accept a contract from the policy in FAR 3.601.

403.603 Responsibilities of the contracting officer.

The contracting officer, when requesting authorization under 403.602, shall prepare a written determination and findings for the signature of the HCA. The determination shall document compliance with FAR 3.603, specifying the compelling reason(s) for award, and shall be placed in the contract file.

Subpart 403.8—Limitation on the Payment of Funds To Influence Federal Transactions

403.806 Processing suspected violations.

Suspected violations of the requirements of 31 U.S.C. 1352 shall be referred to the Office of Inspector General in accordance with procedures in Departmental Regulations (1700 series).

PART 404—ADMINISTRATIVE MATTERS

Subpart 404.2—Contract Distribution

Sec.

404.203 Taxpayer identification information.

Subpart 404.4—Safeguarding Classified Information Within Industry

404.403 Responsibilities of contracting officers.

Subpart 404.6—Contract Reporting

404.601 [Reserved]
404.602 Federal Procurement Data System.

Subpart 404.8—Government Contract Files

404.870 Document numbering system.

Subpart 404.11—Central Contractor Registration

404.1103 Procedures.

Subpart 404.70—Precontract Notices

404.7001 Solicitation provision.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 404.2—Contract Distribution

404.203 Taxpayer identification information.

(a) If the contractor furnishes taxpayer identification number (TIN) and type of organization information pursuant to solicitation provision 52.204–3 or 52.212–3, and the USDA Office of the Chief Financial Officer, Controller Operations Division, New Orleans will be the payment office, that information will be entered into the Foundation Financial Information System (FFIS) in accordance with FFIS Vendor Table Maintenance Procedures set forth in FFIS Bulletins issued by the Office of the Chief Financial Officer and AGAR Advisories issued by the Office of Procurement and Property Management.

(b) Separate submission of the TIN or type of organization information, in accordance with 52.204–3 or 52.212–3, is not required for contractors registered in the Central Contractor Registration (CCR) database.

[70 FR 44, Jan. 3, 2005]

Subpart 404.4—Safeguarding Classified Information Within Industry

404.403 Responsibilities of contracting officers.

When a proposed solicitation is likely to require access to classified information, the contracting officer shall consult with the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management, regarding the procedures that must be followed.

[70 FR 44, Jan. 3, 2005]

Subpart 404.6—Contract Reporting

404.601 [Reserved]

404.602 Federal Procurement Data System.

(a) Contracting activities shall report contract actions into the Federal Procurement Data System in accordance with the instructions issued or distributed by the SPE.

(b) The unique identifier for each contract action reported to the Federal Procurement Data System shall begin with the two-letter USDA Agency Prefix ''AG''.

[70 FR 44, Jan. 3, 2005]

Subpart 404.8—Government Contract Files

404.870 Document numbering system.

The SPE shall issue AGAR Advisories to establish and maintain a numbering system for USDA contracts, modifications, and delivery/task orders. USDA contracting offices shall number contracts, modifications, and orders in accordance with this numbering system.

[70 FR 44, Jan. 3, 2005]

Subpart 404.11—Central Contractor Registration

404.1103 Procedures.

(a) Contracting officers and other USDA employees shall not enter information into the Central Contractor Registration (CCR) database on behalf of prospective contractors. Prospective contractors who are unable to register on-line at the CCR Web site should be advised to submit a written application to CCR for registration into the CCR database. USDA employees may assist prospective contractors by downloading the registration template, CCR handbook, and other information from the CCR Web site and providing copies of that material to requesters. Written applications for registration may be submitted to Department of Defense Central Contractor Registration, 74 Washington Ave., Suite 7, Battle Creek, MI 49017–3084.

(b) Verification that the prospective contractor is registered in the CCR database shall be done via the CCR Internet Web site *http://www.ccr.gov*. This verification process using the CCR Web site applies both to acquisitions executed using USDA legacy procurement systems and the USDA Integrated Acquisition System.

(c) AGAR Advisories issued by the Office of Procurement and Property Management will address internal procedures for integration of contractor information in the CCR database with the USDA FFIS payment system.

[70 FR 44, Jan. 3, 2005]

Subpart 404.70—Precontract Notices

404.7001 Solicitation provision.

The contracting officer shall insert the provision at 452.204–70, Inquiries, in all solicitations.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 405—PUBLICIZING CONTRACT ACTIONS

Subpart 405.3—Synopses of Contract Awards

Sec.
405.303 Announcement of contract awards.

Subpart 405.4—Release of Information

405.403 Requests from Members of Congress.
405.404 Release of long-range acquisition estimates.
405.404–1 Release procedures.

Subpart 405.5—Paid Advertisements

405.502 Authority.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 405.3—Synopses of Contract Awards

405.303 Announcement of contract awards.

Contracting officers shall make information available on any contract award with an estimated total value over $1 million (including options) to their agency congressional liaison office in sufficient time for the agency to announce it by 5:00 p.m. Washington, DC time on the day of award. The agency congressional liaison office shall, concurrent with the public announcement, provide the award announcement information to the USDA Congressional Relations Office.

Subpart 405.4—Release of Information

405.403 Requests from Members of Congress.

The head of the contracting activity (HCA) is the agency head designee pursuant to FAR 5.403.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 45, Jan. 3, 2005]

405.404 Release of long-range acquisition estimates.

405.404–1 Release procedures.

(a) HCA's shall establish written procedures to control the release of long-range acquisition estimates, as authorized under FAR 5.404–1.

(b) Classified information shall not be released without the approval of the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management. Departmental Manuals and Regulations (3400 series) contain guidance on classified information.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 45, Jan. 3, 2005]

Subpart 405.5—Paid Advertisements

405.502 Authority.

(a) The authority vested in the agency head to authorize publication of paid advertisements in newspapers (44 U.S.C. 3702) is delegated, with power of redelegation, to HCA's. HCA redelegation of this authority shall be in writing.

(b) Policies and procedures regarding prior authorization required for media other than newspapers are contained in USDA Departmental Regulations 1400 series.

PART 406—COMPETITION REQUIREMENTS

Subpart 406.2—Full and Open Competition After Exclusion of Sources

Sec.
406.202 Establishing or maintaining alternative sources.

Subpart 406.3—Other Than Full and Open Competition

406.302 Circumstances permitting other than full and open competition.
406.302–70 Otherwise authorized by law.

Subpart 406.5—Competition Advocates

406.501 Requirements.

AUTHORITY: 5 U.S.C. and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 406.2—Full and Open Competition After Exclusion of Sources

406.202 Establishing or maintaining alternative sources.

The Senior Procurement Executive is authorized to make determinations pursuant to FAR 6.202(a) and sign the determination and findings required by FAR 6.202(b).

Subpart 406.3—Other Than Full and Open Competition

406.302 Circumstances permitting other than full and open competition.

406.302–70 Otherwise authorized by law.

(a) *Authority*. Section 1472 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. 3318) (the Act) authorizes the Secretary of Agriculture to award contracts, without competition, to further research, extension, or teaching programs in the food and agricultural sciences.

(b) *Limitations*. The use of this authority is limited to those instances where it can be determined that contracting without full and open competition is in the best interest of the Government and necessary to the accomplishment of the research, extension, or teaching program. Therefore:

(1) Contracts under the authority of the Act shall be awarded on a competitive basis to the maximum practicable extent.

(2) When full and open competition is not deemed appropriate, the contracting officer shall make a written justification on a case-by-case basis in accordance with procedures in FAR 6.303 and 6.304.

Subpart 406.5—Competition Advocates

406.501 Requirements.

(a) The Chief, Procurement Policy Division, Office of Procurement and Property Management, has been designated as the Competition Advocate for USDA.

(b) Each HCA shall designate a competition advocate for the contracting activity. The HCA shall forward a copy of the designation memorandum to the Competition Advocate for USDA.

[70 FR 45, Jan. 3, 2005]

PART 407—ACQUISITION PLANNING

Subpart 407.1—Acquisition Plans

Sec.
407.103 Agency-head responsibilities.
407.170 Advance acquisition plans.

Subpart 407.3 [Reserved]

Subpart 407.5—Inherently Governmental Functions

407.503 Policy.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C.

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 407.1—Acquisition Plans

407.103 Agency-head responsibilities.

Heads of Contracting Activities (HCA's) shall develop procedures to comply with FAR 7.103.

407.170 Advance acquisition plans.

Each HCA shall maintain an advance acquisition planning system.

[70 FR 45, Jan. 3, 2005]

Subpart 407.3 [Reserved]

Subpart 407.5—Inherently Governmental Functions

407.503 Policy.

(a) HCA's shall establish procedures to ensure that requesting activities

provide the written determination required by FAR 7.503(e), when submitting requests for procurement of services.

(b) In the event of a disagreement as to whether the functions to be performed are inherently governmental, the HCA may refer the matter to the Senior Procurement Executive (SPE) for resolution. When submitting disagreements to the SPE for resolution the HCA shall provide a summary of the areas of disagreement, supported by the following:

(1) The HCA's assessment of whether the services are ''inherently governmental'';

(2) The basis for that assessment (include references to the definition and policy in FAR subpart 7.5 and/or Office of Federal Procurement Policy letter 92–1);

(3) A copy of the statement of work; and,

(4) The requesting activity's written determination in accordance with FAR 7.503(e).

(c) Such disagreements shall be resolved prior to issuance of the solicitation.

[61 FR 53646, Oct. 15, 1996, as amended at 63 FR 26995, May 15, 1998]

PART 408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 408.4—Federal Supply Schedules

Sec.
408.404 Using schedules.
408.404–3 Requests for waivers.

Subpart 408.7—Acquisition From Nonprofit Agencies Employing People Who Are Blind or Severely Disabled

408.701 Definitions.
408.705 Procedures.
408.705–2 Direct order process.
408.705–3 Allocation process.
408.705–4 Compliance with orders.
408.706 Purchase exemptions.
408.707 Prices.
408.711 Quality complaints.
408.712 Specification changes.
408.714 Communications with the central nonprofit agencies and the Committee.

Subpart 408.8—Acquisition of Printing and Related Supplies

408.802 Policy.

Subpart 408.11—Leasing of Motor Vehicles

408.1103 Contract requirements.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 408.4—Federal Supply Schedules

408.404 Using schedules.

408.404–3 Requests for waivers.

A copy of the request for a waiver and the approval shall be placed in the contract file to support the acquisition of items off schedule.

Subpart 408.7—Acquisition From Nonprofit Agencies Employing People Who Are Blind or Severely Disabled

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to subpart 408.7 appear at 70 FR 45, Jan. 3, 2005.

408.701 Definitions.

Committee Member is the Presidential appointee representing USDA as a member of the Committee for Purchase from People Who Are Blind or Severely Disabled.

Organization head is the Under Secretary or Assistant Secretary of a mission area or the head of a USDA staff office.

[70 FR 45, Jan. 3, 2005]

408.705 Procedures.

(a) The organization head shall appoint one person as Javits-Wagner-O'Day Act (JWOD) Liaison to represent the organization and to coordinate the organization's actions with the Committee Member.

(b) JWOD advocates may represent more than one organization. Liaisons need not be acquisition officials.

(c) The organization head shall issue and maintain a performance plan to promote and enhance the organization's acquisitions from JWOD participating nonprofit agencies.

(d) The performance plan shall:

(1) Announce the organization's support for the JWOD Act;

(2) Establish a promotion program for the products and services provided by the JWOD participating nonprofit agencies;

(3) Provide for the JWOD Liaison's role in acquisition planning;

(4) Establish measurable program goals for growth or other accomplishment in the organization's JWOD program actions; and

(5) Establish an awards program for successful participation in the JWOD program.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 45, Jan. 3, 2005]

408.705–2 Direct order process.

(a) The chief of a contracting office may apply to a central nonprofit agency for authorization to order specific supplies or services directly from a JWOD participating nonprofit agency.

(b) A copy of the application should be provided to the JWOD Liaison who will inform the USDA Committee Member.

408.705–3 Allocation process.

(a) The chief of a contracting office may apply to a central nonprofit agency for a production allocation of specific supplies or services to a JWOD participating nonprofit agency.

(b) A copy of the application should be provided to the JWOD Liaison who will inform the USDA Committee Member.

408.705–4 Compliance with orders.

Prior to attempting to resolve a failure to perform by a participating nonprofit agency with the Committee, the chief of the contracting office should provide advance notice to the JWOD Liaison who will inform the USDA Committee Member.

408.706 Purchase exemptions.

Prior to applying to the Committee for a purchase exemption, the chief of the contracting office should provide advance notice to the JWOD Liaison who will inform the USDA Committee Member.

408.707 Prices.

Prior to applying for a price revision, the chief of the contracting office should provide advance notice to the JWOD Liaison who will inform the USDA Committee Member.

408.711 Quality complaints.

Prior to attempting to resolve a complaint regarding the quality of goods or services provided by participating nonprofit agency with the Committee, the chief of the contracting office should provide advance notice to the JWOD Liaison who will inform the USDA Committee Member.

408.712 Specification changes.

Prior to providing 90-days advance notification to the Committee on actions that affect supplies and services on the Procurement List, the chief of the contracting office should provide advance notice to the JWOD Liaison who will inform the USDA Committee Member.

408.714 Communications with the central nonprofit agencies and the Committee.

Any matter requiring referral to the Committee shall be provided to the JWOD Liaison who will coordinate the matter with the Committee Member.

Subpart 408.8—Acquisition of Printing and Related Supplies

408.802 Policy.

(a) The Director, Office of Communications (OC) has been designated as the central printing authority in USDA, with the authority to represent the USDA before the Joint Committee on Printing (JCP), the Government Printing Office, and other Federal and State agencies on all matters related to printing.

(b) Prior to contracting for any of the items defined in FAR 8.801, the contracting officer shall verify that the requisite approval has been received by the publication liaison officer or requisitioner.

(c) The approval from OC or the approval authority designated by OC shall be maintained in the contract file.

Subpart 408.11—Leasing of Motor Vehicles

408.1103 Contract requirements.

If the requirement includes the need for the vendor to provide operational maintenance such as fueling, lubrication, or other fluid changes or replenishment, the contracting officer shall include in the contract:

(1) A requirement for the use of fluids and lubricants containing the maximum available amounts of recovered materials, and alternative fuels whenever available; and

(2) A preference for retreaded tires meeting the Federal retread specifications, tires with the maximum recovered material content, or retreading services for the tires on the vehicle.

[70 FR 45, Jan. 3, 2005]

PART 409—CONTRACTOR QUALIFICATIONS

Subpart 409.4—Debarment, Suspension and Ineligibility

Sec.
409.403 Definitions.
409.404 List of parties excluded from Federal procurement and nonprocurement programs.
409.405 Effect of listing.
409.405–1 Continuation of current contracts.
409.405–2 Restrictions on subcontracting.
409.406 Debarment.
409.406–3 Procedures.
409.407 Suspension.
409.407–3 Procedures.

Subpart 409.5—Organizational and Consultant Conflicts of Interest

409.503 Waiver.

AUTHORITY: 40 U.S.C. 121, 41 U.S.C. 421.

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 409.4—Debarment, Suspension and Ineligibility

409.403 Definitions.

Debarring official. Pursuant to the Secretary's delegations of authority in 7 CFR 2.24, the Senior Procurement Executive (SPE) is designated as the debarring official (Department Debarring Officer) with the following exceptions:

(a) For commodity contracts awarded on behalf of the Commodity Credit Corporation (CCC), the Executive Vice President, CCC, or his designee is designated as the debarring official pursuant to 7 CFR part 1407.

(b) For contracts awarded under the School Lunch and Surplus Removal Programs (42 U.S.C. 1755 and 7 U.S.C. 612c), the Department Debarring Officer has delegated debarring authority to the Agricultural Marketing Service (AMS).

[63 FR 26995, May 15, 1998]

409.404 List of parties excluded from Federal procurement and nonprocurement programs.

The Department Debarring Officer is USDA's single point of contact with GSA for debarment and suspension actions taken under this subpart. The debarring official for AMS shall notify the Department Debarring Officer of each debarment and suspension action by promptly submitting a copy of the debarment or suspension notice and any later changes to the debarment or suspension status. The Department Debarring Officer will forward a copy of each notice to GSA for inclusion in the Government-wide list.

409.405 Effect of listing.

Compelling reasons are considered to be present where failure to contract with the debarred or suspended contractor would seriously harm the agency's programs and prevent accomplishment of mission requirements. The SPE is authorized to make the determinations under FAR 9.405. Requests for such determinations shall be submitted through the head of the contracting activity (HCA) to the SPE.

409.405–1 Continuation of current contracts.

The HCA is authorized to make the determinations under FAR 9.405–1.

409.405–2 Restrictions on subcontracting.

The HCA is authorized to approve subcontracts with debarred or suspended subcontractors under FAR 9.405–2.

409.406 Debarment.

409.406–3 Procedures.

(a) *Investigation and referral.* When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for debarment, the case shall be immediately referred through the HCA to the debarring official. The case must be accompanied by a complete statement of the facts (including a copy of any criminal indictments, if applicable) along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring to the debarring official.

(b) *Decision-making process.* If, after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate, the debarring official determines debarment is justified, the debarring official shall initiate the proposed debarment in accordance with FAR 9.406–3(c) and notify the HCA of the action taken.

(c) *Fact-finding proceeding.* For actions listed under FAR 9.406–3(b)(2), the contractor shall be given the opportunity to appear at an informal hearing. The hearing should be held at a location and time that is convenient to the parties concerned, if at all possible. The contractor and any specifically named affiliates may be represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have an opportunity to present all information considered pertinent to the proposed debarment. The contractor shall be provided a copy of a transcript of the proceedings under the conditions established in FAR 9.406–3(b)(2)(ii).

409.407 Suspension.

409.407–3 Procedures.

(a) *Investigation and referral.* When a contracting officer becomes aware of possible irregularities or any information which may be sufficient cause for suspension, the case shall be immediately referred through the HCA to the debarring official. The case must be accompanied by a complete statement of the facts along with a recommendation for action. Where the statement of facts indicates the irregularities to be possible criminal offenses, or for any other reason further investigation is considered necessary, the matter shall be referred to the HCA who should consult with the Office of Inspector General to determine if further investigation is required prior to referring it to the debarring official.

(b) *Decision-making process.* If, after reviewing the recommendations and consulting with the Office of Inspector General and Office of the General Counsel, as appropriate, the debarring official determines suspension is justified, the debarring official shall initiate the proposed suspension in accordance with FAR 9.407–3(c) and notify the HCA of the action taken.

(c) *Fact-finding proceedings.* For actions listed under FAR 9.407–3(b)(2), the contractor shall be given the opportunity to appear at an informal hearing, similar in nature to the hearing for debarments as discussed in 409.406–3(c).

Subpart 409.5—Organizational and Consultant Conflicts of Interest

409.503 Waiver.

(a) The HCA, on a non-delegable basis, is authorized to waive any general rule or procedure in FAR 9.5 when in the Government's interest.

(b) Each request for waiver shall include:

(1) The general rule or procedure proposed to be waived;

(2) An analysis of the potential conflict, including the benefits and detriments to the Government and prospective contractors;

(3) A discussion of why the conflict cannot be avoided, neutralized, or mitigated; and

(4) Advice of counsel obtained under FAR 9.504(b).

PART 410—MARKET RESEARCH

Sec.
410.001 Policy.
410.002 Procedures.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c)

SOURCE: 70 FR 45, Jan. 3, 2005, unless otherwise noted.

410.001 Policy.

In addition to those uses listed in FAR 10.001, agencies must use the results of market research to—

(a) Ensure the minimum use of hazardous or toxic materials;

(b) Ensure the maximum use of biobased products and biofuels; and

(c) Identify products and services on or eligible for addition to the Javits-Wagner-O'Day Act Procurement List in order to achieve USDA's goal to increase participation in this program.

410.002 Procedures.

Market research must include obtaining information on the commercial quality assurance practices as an alternative for Government inspection and testing prior to tender for acceptance.

PART 411—DESCRIBING AGENCY NEEDS

Subpart 411.1—Selecting and Developing Requirements Documents

Sec.
411.101 Order of precedence for requirements documents.
411.103 Market acceptance.
411.106 Purchase descriptions for service contracts.
411.170 Brand name or equal.
411.171 Solicitation provisions and contract clauses.

Subpart 411.2—Using and Maintaining Requirements Documents

411.202 Maintenance of standardization documents.

Subpart 411.4—Delivery or Performance Schedules

411.404 Contract clauses.

Subpart 411.6—Priorities and Allocations

411.600 Scope of subpart.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 411.1—Selecting and Developing Requirements Documents

411.101 Order of precedence for requirements documents.

(a) Office of Management and Budget (OMB) Circular A–119 establishes a Federal policy requiring the use of voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical.

(b) The HCA is authorized to submit the determination required by OMB Circular A–119 that a voluntary standard is inconsistent with law or otherwise impracticable. The HCA must submit the determination to OMB through the National Institute of Standards and Technology in accordance with the Circular with a copy provided to the SPE.

[70 FR 45, Jan. 3, 2005]

411.103 Market acceptance.

(a) The head of the contracting activity (HCA) may determine that offerors must demonstrate, in accordance with FAR 11.103(a), the market acceptability of their items to be offered.

(b) The contracting officer shall place a copy of this determination, signed by the HCA, in the solicitation file.

411.106 Purchase descriptions for service contracts.

When contract personnel are to be used, the requiring official shall record on the requisition his or her determination whether harm to the Government might occur should contractor

personnel fail to identify themselves as non-Government officials.

[61 FR 53646, Oct. 15, 1996. Redesignated at 70 FR 45, Jan. 3, 2005]

411.170 Brand name or equal.

(a) A ''brand name or equal'' purchase description shall include the following type of information:

(1) Identification of the item by generic description.

(2) Make, model number, catalog designation, or other description, and identification of a commercial catalog where it is listed.

(3) Name of manufacturer, producer, or distributor of the item and complete address.

(4) All salient characteristics of the ''brand name or equal'' product or products which have been determined by the requisitioner to be essential to the Government's minimum requirements.

(b) [Reserved]

411.171 Solicitation provisions and contract clauses.

(a) Contracting officers shall insert the provision at 452.211–70, Brand Name or Equal, in solicitations, other than those for construction, where ''brand name or equal'' purchase descriptions are used.

(b) Contracting officers shall insert the clause at 452.211–71, Equal Products Offered, in solicitations, other than those for construction, where the provision at 452.211–70 is included.

(c) Contracting officers shall insert the clause at 452.211–72, Statement of Work/Specifications, when the description (statement of work) or specification(s) is included in Section J of the solicitation.

(d) Contracting officers shall insert the clause at 452.211–73, Attachment to Statement of Work/Specifications, when there are attachments to the description (statement of work) or specifications.

[63 FR 26995, May 15, 1998]

Subpart 411.2—Using and Maintaining Requirements Documents

411.202 Maintenance of standardization documents.

Recommendations for changes to standardization documents are to be submitted through the Senior Procurement Executive, who will coordinate the submission of these recommendations to the cognizant preparing activity.

Subpart 411.4—Delivery or Performance Schedules

411.404 Contract clauses.

(a) The contracting officer shall insert the clause at 452.211–74, Period of Performance, when it is necessary to specify a period of performance, beginning on the date of award, date of receipt of notice of award, or a specified date.

(b) The contracting officer shall insert the clause at 452.211–75, Effective Period of the Contract, when it is necessary to specify the effective period of the contract.

[63 FR 26995, May 15, 1998]

Subpart 411.6—Priorities and Allocations

411.600 Scope of subpart.

The Defense Priorities and Allocation System (DPAS) excludes USDA activities (see 15 CFR 700.18(b)). USDA Contracting Officers are not authorized to place rated orders under DPAS.

PART 412—ACQUISITION OF COMMERCIAL ITEMS

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 412.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

412.302 Tailoring of provisions and clauses for the acquisition of commercial items.

The head of the contracting activity is authorized to approve waivers in accordance with FAR 12.302(c). The approved waiver may be either for an individual contract or for a class of contracts for the specific item. The approved waiver and supporting documentation shall be incorporated into the contract file.

[61 FR 53646, Oct. 15, 1996]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 413—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 413.3—Simplified Acquisition Methods

Sec.
413.301 Governmentwide commercial purchase card.
413.306 SF 44, Purchase Order-Invoice-Voucher.
413.307 Forms.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 64 FR 45895, Aug. 23, 1999, unless otherwise noted.

Subpart 413.3—Simplified Acquisition Methods

413.301 Governmentwide commercial purchase card.

USDA policy and procedures on use of the Governmentwide commercial purchase card are established in Departmental Regulation Series 5000.

413.306 SF 44, Purchase Order-Invoice-Voucher.

The Standard Form 44 (and the previously prescribed USDA Form AD–744) is not authorized for use within USDA.

413.307 Forms.

Form AD–838, Purchase Order, is prescribed for use by USDA in lieu of Optional Forms (OFs) 347 and 348 except that use of the OF 347 and OF 348 is authorized when utilizing the USDA Integrated Acquisition System.

[70 FR 45, Jan. 3, 2005]

PART 414—SEALED BIDDING

Subpart 414.2—Solicitation of Bids

Sec.
414.201 Preparation of invitations for bids.
414.201–6 Solicitation provision.

Subpart 414.4—Opening of Bids and Award of Contract

414.404 Rejection of bids.
414.404–1 Cancellation of invitations after opening.
414.407 Mistakes in bids.
414.407–3 Other mistakes disclosed before award.
414.407–4 Mistakes after award.
414.409 Information to bidders.
414.409–2 Award of classified contracts.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 414.2—Solicitation of Bids

414.201 Preparation of invitations for bids.

414.201–6 Solicitation provision.

The contracting officer shall insert the provision 452.214–70, Award by Lot, when multiple items are segregated into clearly identifiable lots and the contracting officer wants to reserve the right to award by item within a lot, if award in that manner would be advantageous to the Government.

Subpart 414.4—Opening of Bids and Award of Contract

414.404 Rejection of bids.

414.404–1 Cancellation of invitations after opening.

An acquisition official at a level above the contracting officer is authorized to make the determinations under FAR 14.404–1(c) and (e)(1).

414.407 Mistakes in bids.

414.407–3 Other mistakes disclosed before award.

The authority to make the determinations under FAR 14.407–3(a), (b), and (d) is delegated, without power of redelegation, to the head of the contracting activity. The authority to make the determination under FAR 14.407–3(c) is delegated to the contracting officer. Each determination pursuant to FAR 14.407–3 shall have the concurrence of the Office of the General Counsel (OGC).

414.407–4 Mistakes after award.

If a mistake in bid is disclosed after award, the contracting officer shall make a final determination in accordance with the provisions of FAR 14.407–4 (b) and (c) and shall coordinate each proposed determination with OGC. Such coordination shall, at a minimum, consist of the contracting officer providing the proposed determination and the case file to OGC for comment.

414.409 Information to bidders.

414.409–2 Award of classified contracts.

Disposition of classified information shall be in accordance with Departmental Regulation and Manual (3400 Series) and in accordance with direction issued by the Information Security Staff, Personnel and Document Security Division, Office of Procurement and Property Management.

[70 FR 45, Jan. 3, 2005]

PART 415—CONTRACTING BY NEGOTIATION

Subpart 415.2—Solicitation and Receipt of Proposals and Information

Sec.
415.204 Contract format.
415.207 Handling proposals and information.
415.209 Solicitation provisions and contract clauses.

Subpart 415.3—Source Selection

415.303 Responsibilities.
415.305 Proposal evaluation.

Subpart 415.4—Contract Pricing

415.404–4 Profit.

Subpart 415.5—Preaward, Award, and Postaward Notifications, Protests and Mistakes

415.570 Post-award conference.

Subpart 415.6—Unsolicited Proposals

415.604 Agency points of contact.
415.606 Agency procedures.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 64 FR 52674, Sept. 30, 1999, unless otherwise noted.

Subpart 415.2—Solicitation and Receipt of Proposals and Information

415.204 Contract format.

The Senior Procurement Executive is authorized to exempt contracts from the uniform contract format.

415.207 Handling proposals and information.

(a) Throughout the source selection process, agency personnel and non-Government evaluators with access to proposal information shall disclose neither the number of offerors nor their identity except as authorized by FAR subpart 15.5. (See also FAR 5.403.)

(b) The contracting officer shall obtain the following written agreement from the non-Government evaluator prior to the release of any proposal to that evaluator.

AGREEMENT GOVERNING THE USE AND DISCLOSURE OF PROPOSALS

RFP _____

Offeror _____

1. To the best of my knowledge and belief, no conflict of interest exists that may diminish my capacity to perform an impartial and objective review of the offeror's proposal, or may otherwise result in a biased opinion or an unfair advantage. If a potential conflict of interest arises or if I identify such a conflict, I agree to notify the Government promptly concerning the potential conflict. In determining whether any potential conflict of interest exists, I agree to review whether my or my employer's relationships with other persons or entities, including, but not limited to, ownership of stocks, bonds, other outstanding financial interests or commitments, employment arrangements (past, present, or under consideration), and, to the extent known by me, all financial interests and employment arrangements of my spouse, minor children, and other members of my immediate household, may place me in a position of conflict, real or apparent, with the evaluation proceedings.

2. I agree to use proposal information only for evaluation purposes. I understand that any authorized restriction on disclosure placed upon the proposal by the prospective contractor or subcontractor or by the Government shall be applied to any reproduction or abstracted information of the proposal. I agree to use my best effort to safeguard such information physically, and not to disclose the contents of, or release any information relating to, the proposal(s) to anyone outside of the Source Evaluation Board or other

panel assembled for this acquisition, the Contracting Officer, or other individuals designated by the Contracting Officer.

3. I agree to return to the Government all copies of proposals, as well as any abstracts, upon completion of the evaluation.

(Name and Organization)

(Date)

(End of provision)

(c) The release of a proposal to a non-Government evaluator for evaluation does not constitute the release of information for purposes of the Freedom of Information Act (5 U.S.C. 552).

(d) The contracting officer shall attach a cover page bearing the following notice: GOVERNMENT NOTICE FOR HANDLING PROPOSALS—This proposal shall be used and disclosed for evaluation purposes only. Attach a copy of this Government notice to every reproduction or abstract of the proposal. Any authorized restrictive notices which the submitter places on this proposal shall be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, FAR 3.104–4, FAR 15.207, and AGAR 415.207.

[64 FR 52674, Sept. 30, 1999; 64 FR 54963, Oct. 8, 1999, as amended at 70 FR 46, Jan. 3, 2005]

415.209 Solicitation provisions and contract clauses.

(a) The provision at 452.215–71, Instructions for the Preparation of Technical and Business Proposals, may be used when offerors will be required to submit technical and business proposals. Contracting officers should tailor the clause to reflect the degree of information required for the specific acquisition.

(b) The contracting officer shall insert the provision at 452.215–72, Amendments to Proposals, in solicitations which require the submittal of lengthy, complex technical proposals.

Subpart 415.3—Source Selection

415.303 Responsibilities.

The head of the contracting activity (HCA) is authorized to appoint an individual other than the contracting officer as the source selection authority.

415.305 Proposal evaluation.

HCAs are responsible for establishing procedures regarding the release of cost information to the members of the technical evaluation team.

Subpart 415.4—Contract Pricing

415.404–4 Profit.

(a)(1) USDA will use a structured approach to determine the profit or fee prenegotiation objective in acquisition actions when price negotiation is based on cost analysis.

(2) The following types of acquisitions are exempt from the requirements of the structured approach, but the contracting officer shall comply with FAR 15.404–4(d) when analyzing profit for these contracts or actions:

(i) Architect-engineer contracts;

(ii) Construction contracts;

(iii) Contracts primarily requiring delivery of material supplied by subcontractors;

(iv) Termination settlements; and

(v) Cost-plus-award-fee contracts;

(b) Unless otherwise restricted by contracting activity procedures, the Contracting Officer may use another Federal agency's structured approach if that approach has been formalized and is maintained as part of that Agency's acquisition regulations (*i.e.*, included in that Agency's assigned chapter of title 48 of the Code of Federal Regulations).

(c) The HCA is responsible for establishing procedures to ensure compliance with this subpart.

Subpart 415.5—Preaward, Award, and Postaward Notifications, Protests and Mistakes

415.570 Post-award conference.

If a postaward conference is necessary, the contracting officer shall insert clause 452.215–73, Post-Award Conference.

Subpart 415.6—Unsolicited Proposals

415.604 Agency points of contact.

HCAs are responsible for establishing procedures to ensure compliance with the requirements of FAR 15.604.

415.606 Agency procedures.

HCAs are responsible for establishing the procedures for control of unsolicited proposals required by FAR 15.606(a) and for identifying the contact points as required by FAR 15.606(b).

PART 416—TYPES OF CONTRACTS

Sec.
416.000 Scope of part.

Subpart 416.2—Fixed-Price Contracts

416.203 Fixed-price contracts with economic price adjustment.
416.203–4 Contract clauses.

Subpart 416.4—Incentive Contracts

416.405 Cost-reimbursement incentive contracts.
416.405–2 Cost-plus-award-fee contracts.
416.406 Contract clauses.
416.470 Solicitation provision.

Subpart 416.5—Indefinite-Delivery Contracts

416.505 Ordering.
416.506 Solicitation provision and contract clauses.

Subpart 416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

416.603 Letter contracts.
416.603–2 Application.
416.603–4 Contract clauses.
416.670 Contract clauses.

Subpart 416.7—Agreements

416.702 Basic agreements.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

416.000 Scope of part.

Heads of contracting activities (HCA's) are authorized to establish written procedures allowing the use of any contract type described in FAR part 16 for acquisitions made under simplified acquisition procedures in FAR part 13.

Subpart 416.2—Fixed-Price Contracts

416.203 Fixed-price contracts with economic price adjustment.

416.203–4 Contract clauses.

An economic price adjustment clause based on cost indexes of labor or material may be used under the conditions listed in FAR 16.203–4(d) after approval by the HCA and consultation with the Office of the General Counsel.

Subpart 416.4—Incentive Contracts

416.405 Cost-reimbursement incentive contracts.

416.405–2 Cost-plus-award-fee contracts.

The HCA may designate an acquisition official other than the contracting officer as the fee determination official (FDO) to make the final determination of the award fee. The designated official must have warranted contracting authority at the same level as the contracting officer or higher, and shall not have participated in preparing the contractor performance evaluation. If the HCA does not designate an FDO, the chief of the contracting office shall act as the FDO.

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26995, May 15, 1998.]

416.406 Contract clauses.

The contracting officer shall insert a clause substantially the same as the clause at 452.216–70, Award Fee, in solicitations and contracts which contemplate the award of cost-plus-award-fee contracts.

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26995, May 15, 1998.]

416.470 Solicitation provision.

The contracting officer shall insert the provision at 452.216–71, Base Fee and Award Fee Proposal, in solicitations which contemplate the award of a cost-plus-award-fee contract.

Subpart 416.5—Indefinite-Delivery Contracts

416.505 Ordering.

(a) The Chief, Procurement Policy Division, Office of Procurement and Property Management, has been designated as the Departmental Task Order Ombudsman.

(b) Each HCA shall designate a task order ombudsman for the contracting activity. The HCA shall forward a copy of the designation memorandum to the Departmental Task Order Ombudsman. Contracting activity ombudsmen shall review and resolve complaints from contractors concerning task or delivery orders placed by the contracting activity.

(c) Any contractor who is not satisfied with the resolution of a complaint by a contracting activity ombudsman may request the Departmental Task Order Ombudsman to review the complaint.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 46, Jan. 3, 2005]

416.506 Solicitation provision and contract clauses.

(a) The contracting officer shall insert a provision substantially the same as the provision at 452.216–72, Evaluation Quantities-Indefinite-Delivery Contract, in solicitations which contemplate the award of indefinite-quantity or requirements contracts to establish the basis on which offers will be evaluated.

(b) The contracting officer shall insert the clause at 452.216–73, Minimum and Maximum Contract Amounts, in indefinite-delivery, indefinite-quantity contracts when the clause at FAR 52.216–18 is used.

Subpart 416.6—Time-and-Materials, Labor-Hour, and Letter Contracts

416.603 Letter contracts.

416.603–2 Application.

The HCA is authorized to extend the period for defining a letter contract required by FAR 16.603–2(c) in extreme cases where it is determined in writing that such action is in the best interest of the Government.

416.603–4 Contract clauses.

The contracting officer shall insert the clause at 452.216–75, Letter Contract, in a definitive contract superseding a letter contract.

416.670 Contract clauses.

The contracting officer shall limit the Government's obligation under a time-and-materials or labor-hour contract by inserting the clause at 452.216–74, Ceiling Price.

Subpart 416.7—Agreements

416.702 Basic agreements.

Promptly after execution by the Government, the HCA shall furnish to the Senior Procurement Executive a copy of each basic agreement negotiated with contractors in accordance with FAR 16.702.

PART 417—SPECIAL CONTRACTING METHODS

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 417.2—Options

417.204 Contracts.

The head of the contracting activity is authorized to approve contracts which exceed the 5 year limitation in FAR 17.204(e).

[61 FR 53646, Oct. 15, 1996]

PART 418 [RESERVED]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 419—SMALL BUSINESS PROGRAMS

Subpart 419.2—Policies

Sec.
419.201 General policy.
419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).
419.201–71 Small business coordinators.
419.201–73 Reports.

Subpart 419.5—Set-Asides for Small Business

419.508 Solicitation provisions and contract clauses.

Subpart 419.6—Certificates of Competency and Determinations of Responsibility

419.602 Procedures.
419.602–1 Referral.
419.602–3 Resolving differences between the agency and the Small Business Administration.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 419.2—Policies

SOURCE: 70 FR 46, Jan. 3, 2005, unless otherwise noted.

419.201 General policy.

It is the policy of USDA to provide maximum practicable contracting and subcontracting opportunities to small business (SB), small disadvantaged business (SDB), HUBZone small business, women-owned business (WOB), veteran-owned small business (VOSB), and service-disabled veteran-owned small business (SDVOSB) concerns.

419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).

The Office of Small and Disadvantaged Business Utilization (OSDBU) develops rules, policy, procedures and guidelines for the effective administration of USDA's small business program that includes all categories named under 419.201.

419.201–71 Small business coordinators.

The head of the contracting activity (HCA) or a representative of the HCA shall designate in writing a small business coordinator in each contracting office. Supervisors of small business coordinators are encouraged to provide sufficient time for the coordinators to carry out their small business program duties. Coordinators' duties shall include, but not be limited to, the following:

(a) Reviewing each proposed acquisition expected to exceed the simplified acquisition threshold prior to its solicitation. The coordinator shall:

(1) Recommend section 8(a), HUBZone, or SDVOSB action and identify potential contractors, or

(2) Identify available SDB, WOB, and VOSB to be solicited by competitive procedures. Coordinators shall document the contract file with recommendations made and actions taken.

(b) Participating in goal-setting procedures and planning activities and establishing aggressive SDB, WOB, and SDVOSB goals based on the annual review of advance acquisition plans.

(c) Participating in the review of those contracts which require the successful offeror to submit written plans for the utilization of small businesses as subcontractors to include all preference program areas in 419.201.

(d) Ensuring that purchases exceeding $2,500 and not exceeding the simplified acquisition threshold are reserved exclusively for small businesses, including all preference program areas named in 419.201. This policy shall be implemented unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased.

(e) Maintaining comprehensive source listings of small businesses.

(f) Upon written request, providing small businesses (in the preference program areas named in 419.201) the bidders' mailing lists of individuals receiving solicitations which will contain the subcontracting clause entitled ''Utilization of Small Business Concerns'' (FAR 52.219–8). These lists may be limited to those supplies or services of major interest to the requesting firms.

(g) Developing a program of contacts with local and small (to include all preference program areas named in 419.201) trade, business, and professional associations and organizations and Indian tribal councils to apprise them of USDA's program needs and recurring contract requirements.

(h) Periodically meeting with program managers to discuss requirements of the small business preference program, to explore the feasibility of breaking large complex requirements into smaller lots suitable for participation by small firms, and to encourage program managers to meet with these firms so that their capabilities can be demonstrated.

(i) Establishing internal operating procedures which implement the requirements of the regulations as set forth in this part 419.

(j) Compiling data and preparing all reports pertaining to the small business program activities, and ensuring that these reports are accurate, complete and up-to-date.

(k) Assisting and counseling small business firms.

(l) Reviewing proposed large contract requirements that may be bundled to determine the potential for breaking out components suitable for purchase from small business firms.

(m) Ensuring that the SBA Resident Procurement Center Representative (PCR) is provided an opportunity and reasonable time to review any solicitation that meets the dollar threshold for small business (including all preference program areas named in 419.201) subcontracting plans.

419.201–73 Reports.

The Director, OSDBU, shall be responsible for submitting reports concerning USDA's progress and achievements in the procurement preference program.

Subpart 419.5—Set-Asides for Small Business

419.508 Solicitation provisions and contract clauses.

The contracting officer shall insert the provision at 452.219–70, Size Standard and NAICS Code Information, in solicitations that are set aside for small businesses.

[61 FR 53646, Oct. 15, 1996, as amended at 66 FR 49317, Sept. 27, 2001]

Subpart 419.6—Certificates of Competency and Determinations of Responsibility

419.602 Procedures.

419.602–1 Referral.

Contracting officers shall refer determinations of non-responsibility regarding small businesses directly to the SBA Regional Office servicing the location where the contractor's office (home) is located.

419.602–3 Resolving differences between the agency and the Small Business Administration.

The HCA is authorized to appeal the issuance of a COC to SBA Headquarters as provided by FAR 19.602–3(a).

[63 FR 26995, May 15, 1998]

PARTS 420–421 [RESERVED]

PART 422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 422.1—Basic Labor Policies

Sec.

422.103 Overtime.
422.103–4 Approvals.

Subpart 422.3—Contract Work Hours and Safety Standards Act

422.302 Liquidated damages and overtime pay.

Subpart 422.4—Labor Standards for Contracts Involving Construction

422.404 Davis-Bacon Act wage determinations.
422.404–6 Modifications of wage determinations.
422.406 Administration and enforcement.
422.406–8 Investigations.

Subpart 422.6—Walsh-Healey Public Contracts Act

422.604 Exemptions.
422.604–2 Regulatory exemptions.
422.608 [Reserved]

Subpart 422.8—Equal Employment Opportunity

422.803 Responsibilities.
422.804 Affirmative action programs.
422.804–2 Construction.
422.807 Exemptions.

Subpart 422.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

422.1305 Waivers.
422.1308 Complaint procedures.

Subpart 422.14—Employment of Workers With Disabilities

422.1403 Waivers.
422.1406 Complaint procedures.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 422.1—Basic Labor Policies

422.103 Overtime.

422.103–4 Approvals.

Requests for the use of overtime shall be approved by an acquisition official at a level above the contracting officer in accordance with the procedures in FAR 22.103–4 (a) and (b).

Subpart 422.3—Contract Work Hours and Safety Standards Act

422.302 Liquidated damages and overtime pay.

Heads of contracting activities (HCA's) are authorized to review determinations of liquidated damages due under section 104(c) of the Contract Work Hours and Safety Standards Act, and to take remedial action, if appropriate, in accordance with FAR 22.302(c). Contractors or subcontractors may request review of administrative determinations of liquidated damages by written notice to the contracting officer. The contracting officer shall promptly forward appeals of liquidated damages determinations to the HCA.

Subpart 422.4—Labor Standards for Contracts Involving Construction

422.404 Davis-Bacon Act wage determinations.

422.404–6 Modifications of wage determinations.

HCA's are authorized to request extension of the 90 day period for award after bid opening as provided in FAR 22.404–6(b)(6).

422.406 Administration and enforcement.

422.406.8 Investigations.

Reports of violations shall be forwarded to the HCA, who shall process such reports in accordance with FAR 22.406–8(d).

Subpart 422.6—Walsh-Healey Public Contracts Act

422.604 Exemptions.

422.604–2 Regulatory exemptions.

The Assistant Secretary for Administration can request the Secretary of Labor to exempt contracts from the Walsh-Healey Public Contracts Act pursuant to FAR 22.604–2(b). A written finding justifying the request for exemption shall be prepared for the Assistant Secretary's signature and submitted by the HCA to the Senior Procurement Executive (SPE) for referral to the Assistant Secretary.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 46, Jan. 3, 2005]

422.608 [Reserved]

Subpart 422.8—Equal Employment Opportunity

422.803 Responsibilities.

The contracting office shall submit questions involving the applicability of Executive Order 11246 and FAR subpart 22.8 through the HCA to the SPE for resolution.

422.804 Affirmative action programs.

422.804–2 Construction.

The HCA shall ensure that each contracting office, awarding nonexempt construction contracts, maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction trades.

422.807 Exemptions.

(a) The Assistant Secretary for Administration is authorized to make the determination in FAR 22.807(a)(1) that a contract is essential to the national security.

(b) The contracting officer shall submit requests for exemptions under FAR 22.807(a)(1), (a)(2), and (b)(5) through the HCA to the SPE for determination by the Assistant Secretary of Administration or referral to the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor, as appropriate.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 46, Jan. 3, 2005]

Subpart 422.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

SOURCE: 70 FR 46, Jan. 3, 2005, unless otherwise noted.

422.1305 Waivers.

(a) The Assistant Secretary for Administration is authorized to make the waiver determination in FAR 22.1305(b) that a contract is essential to the national security.

(b) The contracting officer shall submit requests for exemptions under FAR 22.1305(a) and (b) through the HCA to the SPE for determination by the Assistant Secretary for Administration or referral to the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor as appropriate.

422.1308 Complaint procedures.

The contracting officer shall forward complaints received about the administration of the Vietnam Era Veterans Readjustment Assistance Act directly to the Department of Labor as prescribed in FAR 22.1308.

Subpart 422.14—Employment of Workers With Disabilities

422.1403 Waivers.

(a) The Assistant Secretary for Administration is authorized to make the waiver determinations under FAR 22.1403(a) and (b) with the concurrence of the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor.

(b) The contracting officer shall submit requests for waivers through the HCA to the SPE for determination by the Assistant Secretary for Administration.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 46, Jan. 3, 2005]

422.1406 Complaint procedures.

The contracting officer shall forward complaints received about the administration of Section 503 of the Rehabilitation Act of 1973, as amended, directly to the OFCCP as prescribed in FAR 22.1406.

PART 423—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 423.1 [Reserved]

Subpart 423.2—Energy and Water Efficiency and Renewable Energy

Sec.
423.202 Policy.

Subpart 423.4—Use of Recovered Materials

423.400 Scope of subpart.
423.402 [Reserved]
423.403 Policy.
423.404 Agency affirmative procurement programs.
423.405 Procedures.

Subpart 423.5—Drug-Free Workplace

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

Subpart 423.6—Notice of Radioactive Material

423.601 Requirements.

Subpart 423.7—Contracting for Environmentally Preferable Products and Services

423.703 Policy.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 70 FR 47, Jan. 3, 2005, unless otherwise noted.

Subpart 423.1 [Reserved]

Subpart 423.2—Energy and Water Efficiency and Renewable Energy

423.202 Policy.

Information on Energy Star, energy efficient, water efficient, and low standby products covered by this policy is available via the Internet at *http://www.eere.energy.gov/femp/technologies/eeproducts.cfm.*

Subpart 423.4—Use of Recovered Materials

423.400 Scope of subpart.

This subpart implements and supplements FAR policies and procedures for acquiring products and services when preference is given to offers of products containing recovered materials. This subpart further supplements FAR subpart 23.4 by providing guidance for affirmative procurement programs in accordance with Executive Order 13101 and 42 U.S.C. 6962.

423.402 [Reserved]

423.403 Policy.

It is the policy of USDA to acquire and use Environmental Protection Agency (EPA) designated recycled content products.

423.404 Agency affirmative procurement programs.

The USDA affirmative procurement program (APP) policy applicable to all USDA agencies and staff offices is hereby established. The components of this APP include:

(a) *Recovered Materials Preference Program.* In accord with the requirements of Section 402(c) of Executive Order 13101, Greening the Government Through Recycling, Waste Prevention, and Federal Acquisition, USDA agencies will include, in all applicable solicitations and contracts, a preference for products and services which meet or exceed the EPA purchasing guidelines as contained in the EPA product Recovered Materials Advisory Notices (RMANs). Agencies may choose an evaluation factor preference, or other method of indicating preference in accord with their agency needs. Agencies will, as appropriate, eliminate virgin material requirements in contract specifications and replace them with a statement of preference for recycled materials.

(b) *Promotion program.* USDA agencies will actively promote a preference for recovered materials, environmentally preferable products, and biobased products in contacts with vendors, in written materials, and other appropriate opportunities.

(c) *Reasonable estimation of recovered materials used in the performance of contracts.* USDA agencies annually will provide in writing to the USDA Senior Procurement Executive, in response to a call for data for the Resource Conservation and Recovery report, reasonable estimates, certification, and verification of recovered material used in the performance of contracts.

(d) *Annual review and monitoring of effectiveness of the program.* USDA agencies will provide an annual assessment of the effectiveness of their affirmative

procurement program actions in increasing the purchase and use of EPA designated products.

(e) *Purchase of EPA designated products.* USDA agencies will require that 100% of purchases of EPA-designated products contain recovered material, unless the item cannot be acquired—

(1) Competitively within a reasonable time frame;

(2) Meeting appropriate performance standards; or

(3) At a reasonable price.

(f) The 100% purchase requirement of paragraph (e) of this section applies to all USDA agency purchases, including those at or below the micro-purchase threshold.

423.405 Procedures.

(a) The threshold of purchase for EPA designated items is $10,000 per year at the USDA departmental, not individual agency, level. Therefore, the APP requirements above, including the 100% purchase requirement, apply at the individual agency and staff office level.

(b) Contracting officers should refer to EPA's list of designated products and products identified as recycled content when purchasing supplies or services. Information on EPA designated products is available at: *www.epa.gov/cpg/products.htm.*

(c) All agencies and USDA Contracting Officers must take necessary actions to carry out the provisions of the USDA APP policy described in this subpart.

Subpart 423.5—Drug-Free Workplace

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer may recommend waiver of the determination to suspend payments, to terminate a contract, or to debar or to suspend a contractor.

(b) The recommendation shall be submitted through the HCA to the SPE and shall include a full description of the disruption of USDA operations should the determination not be waived.

(c) The SPE will submit the request for a waiver to the Secretary with a recommendation for action.

Subpart 423.6—Notice of Radioactive Material

423.601 Requirements.

The HCA shall establish a system of instructions to identify the installation/facility radiation protection officer.

Subpart 423.7—Contracting for Environmentally Preferable Products and Services

423.703 Policy.

(a) USDA's Affirmative Procurement Program promotes energy-efficiency, water conservation, and the acquisition of environmentally preferable products and services. In its acquisitions, USDA will support federal ''green purchasing'' principles in the acquisition of products and services that are environmentally preferable or that are biobased content products and services.

(b) USDA agencies will actively promote this preference for environmentally preferable products and biobased products in contacts with vendors, in written materials, and other appropriate opportunities.

PART 424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 424.1—Protection of Individual Privacy

Sec.
424.103 Procedures.
424.104 Contract clauses.

Subpart 424.2—Freedom of Information Act

424.203 Policy.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 424.1—Protection of Individual Privacy

424.103 Procedures.

USDA regulations implementing the Privacy Act are found in 7 CFR, subtitle A, part 1, subpart G. Contracting officers shall follow these regulations when responding to requests for information or awarding contracts that will involve the design, development, or operation of a system of records on individuals to accomplish agency functions.

424.104 Contract clauses.

When applicable, the contracting officer shall insert the clause at 452.224–70, Confidentiality of Information, in contracts involving confidential information.

Subpart 424.2—Freedom of Information Act

424.203 Policy.

USDA regulations implementing the Freedom of Information Act are found in 7 CFR, Subtitle A, Part 1, Subpart A. Contracting officers shall follow these regulations when responding to requests for information.

[70 FR 48, Jan. 3, 2005]

PART 425—FOREIGN ACQUISITION

Subpart 425.1—Buy American Act—Supplies

Sec.

425.102 [Reserved]
425.103 Exceptions.
425.104 Nonavailable articles.
425.105 Determining reasonableness of cost.
425.108 [Reserved]

Subpart 425.2—Buy American Act—Construction Materials

425.202 Exceptions.
425.203–425.204 [Reserved]

Subparts 425.3–425.4 [Reserved]

Subpart 425.6—Trade Sanctions

425.602 Exceptions.

Subpart 425.9 [Reserved]

Subpart 425.10—Additional Foreign Acquisition Regulations

425.1001 Waiver of right to examination of records.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 425.1—Buy American Act—Supplies

SOURCE: 70 FR 48, Jan. 3, 2005, unless otherwise noted.

425.102 [Reserved]

425.103 Exceptions.

(a) The Senior Procurement Executive (SPE) shall make the determination prescribed in FAR 25.103(a).

(b) Copies of determinations of nonavailability in accordance with FAR 25.103(b)(2) or 25.202(a)(2), for articles, material or supplies not listed in FAR 25.104, may be submitted to the SPE for submission to the Civilian Agency Acquisition Council (CAAC).

425.104 Nonavailable articles.

Information required by FAR 25.104(b) shall be submitted to the SPE for submission to the CAAC.

425.105 Determining reasonableness of cost.

The SPE may make the determination prescribed in FAR 25.105(a). Requests for a determination by the SPE shall be submitted by the HCA, in writing, and shall provide a detailed justification supporting why evaluation factors higher than those listed in FAR 25.102(b)(1) and (2) should be applied to determine whether the offered price of a domestic end product is unreasonable.

425.108 [Reserved]

Subpart 425.2—Buy American Act—Construction Materials

425.202 Exceptions.

(a) The SPE shall make the determination prescribed in FAR 25.202(a)(1).

(b) If a contracting officer proposes that the use of a particular domestic

construction material should be waived for a contract on the grounds that its use would be impracticable, the contracting officer shall submit a proposed determination with supporting information through the HCA to the SPE for approval or disapproval.

[63 FR 26995, May 15, 1998, as amended at 70 FR 48, Jan. 3, 2005]

425.203–425.204 [Reserved]

Subparts 425.3–425.4 [Reserved]

Subpart 425.6—Trade Sanctions

425.602 Exceptions.

The Secretary, without power of redelegation, has the authority to make the necessary determination(s) and authorize award(s) of contract(s) in accordance with FAR 25.602(b).

[70 FR 48, Jan. 3, 2005]

Subpart 425.9 [Reserved]

Subpart 425.10—Additional Foreign Acquisition Regulations

425.1001 Waiver of right to examination of records.

The SPE shall make the determination under FAR 25.1001(a)(2)(iii).

[70 FR 48, Jan. 3, 2005]

PART 426—OTHER SOCIOECONOMIC PROGRAMS

Subpart 426.70 [Reserved]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 427—PATENTS, DATA, AND COPYRIGHTS

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 427.1—General

427.104 General guidance.

As used in FAR part 27, the agency head or agency head designee is the Senior Procurement Executive, except under FAR 27.306(a) and (b). Under FAR 27.306(a) and (b), the agency head is the Secretary without power of redelegation.

[61 FR 53646, Oct. 15, 1996]

PART 428—BONDS AND INSURANCE

Subpart 428.1—Bonds and Other Financial Protections

Sec.

428.101 Bid guarantees.
428.101–1 Policy on use.
428.106 Administration.
428.106–6 Furnishing information.

Subpart 428.2—Sureties and Other Security for Bonds

428.203 Acceptability of individual sureties.
428.204 Alternatives in lieu of corporate or individual sureties.
428.204–2 Certified or cashier's checks, bank drafts, money orders, or currency.

Subpart 428.3—Insurance

428.307 Insurance under cost-reimbursement contracts.
428.307–1 Group insurance plans.
428.310 Contract clause for work on a Government installation.
428.370 Government-owned vehicles operated in foreign countries.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 428.1—Bonds and Other Financial Protections

428.101 Bid guarantees.

428.101–1 Policy on use.

The Senior Procurement Executive may authorize class waivers of the requirement to obtain bid guarantees.

428.106 Administration.

428.106–6 Furnishing information.

Heads of contracting activities (HCA's) or their designees may furnish certified copies of bonds and the contracts for which they were given as provided by FAR 28.106–6(c). Requesters may be required to pay costs of certification and copying established by the Departmental Fee Schedule for records requests (7 CFR part 1, subpart A, appendix A).

Subpart 428.2—Sureties and Other Security for Bonds

428.203 Acceptability of individual sureties.

Evidence of possible criminal or fraudulent activities by an individual surety shall be reported to the Office of Inspector General in accordance with Departmental Regulations (1700 series).

428.204 Alternatives in lieu of corporate or individual sureties.

HCA's shall establish procedures to ensure protection and conveyance of deposited securities of the types listed in FAR 28.204–1 through 28.204–3.

428.204–2 Certified or cashier's checks, bank drafts, money orders, or currency.

The contracting officer shall insert the provision at 452.228–70, Alternative Forms of Security, in a solicitation if a bond is required.

Subpart 428.3—Insurance

428.307 Insurance under cost-reimbursement contracts.

428.307–1 Group insurance plans.

Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor shall submit the plan to the contracting officer for review. During review, the contracting officer shall use all sources of information available, such as audits, industry practice, or other sources of information, to determine whether acceptance of the plan submitted would be in the Government's best interest.

428.310 Contract clause for work on a Government installation.

The contracting officer shall insert the clause at 452.228–71, Insurance Coverage, in solicitations and contracts which include the clause at FAR 52.228–5, Insurance—Work on a Government Installation. If property liability insurance is required, the contracting officer shall use the clause with its Alternate I.

428.370 Government-owned vehicles operated in foreign countries.

USDA is authorized to obtain insurance to cover liability incurred by any of its employees while acting within the scope of their employment and operating a Government-owned vehicle in a foreign country. (7 U.S.C. 2262).

PART 429 [RESERVED]

PART 430—COST ACCOUNTING STANDARDS ADMINISTRATION

Sec.

430.070 Definitions.

Subpart 430.2—CAS Program Requirements

430.201 Contract requirements.
430.201–5 Waiver.
430.202 Disclosure requirements.
430.202–2 Impracticality of submission.
430.202–8 Subcontractor Disclosure Statements.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

430.070 Definitions.

ACO, as used in this part and in FAR part 30, means *administrative contracting officer* as described in FAR part 42.

Subpart 430.2—CAS Program Requirements

430.201 Contract requirements.

430.201–5 Waiver.

The Senior Procurement Executive (SPE), without the authority to further redelegate, is authorized to request the Cost Accounting Standards Board to waive the application of the Cost Accounting Standards (CAS). Contracting officers shall prepare waiver requests in accordance with 48 CFR chapter 99 (Appendix B, FAR loose-leaf edition), subsection 9903.201–5, and submit them to the SPE through the head of the contracting activity (HCA).

430.202 Disclosure requirements.

430.202–2 Impracticality of submission.

(a) The Secretary, without the power to delegate, is authorized to determine, in accordance with FAR part 99 (Appendix B), subsection 9903.202–2, that the Disclosure Statement is impractical to secure and to authorize award without obtaining the Disclosure Statement.

(b) The request for this determination is to be prepared in accordance with FAR part 99 (Appendix B), subsection 9903.202–2 and is to contain the proposed report to the CASB.

(c) Requests for a determination under paragraph (a) of this section shall be prepared by the contracting officer and submitted through the HCA to the SPE for concurrence and submittal to the Secretary.

430.202–8 Subcontractor Disclosure Statements.

(a) The Secretary, without the power to redelegate, is authorized to determine that the Disclosure Statement for a subcontractor is impractical to secure and to authorize award without obtaining the Disclosure Statement.

(b) Requests for this determination are to be prepared and forwarded as described in 430.202–2.

PART 431—CONTRACT COST PRINCIPLES AND PROCEDURES

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 431.1—Applicability

431.101 Objectives.

(a) The SPE is designated as the official authorized to give advance approval of an individual deviation concerning cost principles.

(b) The SPE is designated as the official authorized to give advance approval of a class deviation concerning cost principles after coordination with the Civilian Agency Acquisition Council.

(c) Requests for advance approval of class deviations concerning cost principles must be submitted to the SPE through the HCA.

[61 FR 53646, Oct. 15, 1996]

PART 432—CONTRACT FINANCING

Sec.
432.001 Definitions.
432.003 Simplified acquisition procedures financing.
432.006 Reduction or suspension of contract payments upon finding of fraud.
432.006–2 Definitions.
432.006–3 Responsibilities.
432.006–4 Procedures.
432.006–5 Reporting.
432.007 Contract financing payments.

Subpart 432.1—Non-Commercial Item Purchase Financing

432.102 Description of contract financing methods.
432.103 Progress payments under construction contracts.
432.111 Contract clauses for non-commercial purchases.
432.113 Customary contract financing.
432.114 Unusual contract financing.

Subpart 432.2—Commercial Item Purchase Financing

432.202 General.
432.202–1 Policy.
432.202–4 Security for Government financing.
432.206 Solicitation provisions and contract clauses.
432.207 Administration and payment of commercial financing payments.

Subpart 432.3—Loan Guarantees for Defense Production

432.301 Definitions.

Subpart 432.4—Advance Payments for Non-Commercial Items

432.402 General.
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432.904 Determining payment due dates.

Subpart 432.10—Performance-Based Payments

432.1007 Administration and payment of performance-based payments.

AUTHORITY: 40 U.S.C. 121, 41 U.S.C. 421.

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

432.001 Definitions.

The *agency contract finance office* is the office, other than the office of the requisitioner, providing funding or performing funding record keeping for the contract action.

Responsible fiscal authority is that officer in the agency contract finance office with the responsibility to ensure that adequate funds are available and usable for the intended purpose.

432.003 Simplified acquisition procedures financing.

(a) The chief of the contracting office may approve contract financing on a contract to be entered under the simplified acquisition procedures. Class approvals may not be made.

(b) The signed approval must contain the supporting rationale for the action and an estimate of the cost and/or risk to the government.

432.006 Reduction or suspension of contract payments upon finding of fraud.

432.006–2 Definitions.

(a) The USDA *remedy coordination official* (RCO) is the Assistant Secretary for Administration.

(b) For the purposes of this part, *head of the agency* means, exclusively, the Secretary or the Deputy Secretary.

432.006–3 Responsibilities.

When a contracting officer suspects that a request for advance, partial, or progress payment is based on fraud, the request shall be referred directly to the Office of Inspector General (OIG) in accordance with their instructions. A copy of the referral shall be submitted through the head of the contracting activity (HCA) to the Senior Procurement Executive (SPE).

432.006–4 Procedures.

(a) Immediately upon submittal of the referral described in 432.006–3, the HCA and the contracting officer shall confer with the SPE and representatives of the OIG to discuss the potential for reduction or suspension of further payments based on the considerations listed in FAR 32.006–4(d) (1) through (5).

(b) The SPE will determine whether the contractor has contracts with other Departments or contracting activities and will involve them, as necessary, in the decision making process.

(c) The OIG will determine the need for and the extent of an investigation.

(d) Immediately upon completion of the OIG investigation (or, if deemed necessary by the OIG and the SPE, before completion of the investigation) the SPE, in coordination with the HCA, the contracting officer, and the OIG, shall make a report on the action to the RCO.

(e) Upon receipt of the report, the RCO will submit a recommendation to the Secretary.

(f) Upon receipt of the RCO's report the Secretary will:

(1) Notify the contractor in writing, allowing 30 calendar days after receipt of the notice, that the contractor may submit in writing information and arguments in opposition to the recommendation; and

(2) Consider the RCO's recommendation, the SPE's report, the response of the contractor, and any other relevant information in order to make an appropriate final determination.

(g) This determination will be provided to the contractor and to the SPE for distribution to the agencies involved and for appropriate action under the determination.

(h) The determination and the supporting documentation will be placed in the contract file(s) and a copy will be maintained by the SPE.

(i) The contracting officer will advise the SPE of the actual date of the reduction or suspension action.

(j) Not later than 150 calendar days after the actual date of the reduction or suspension action, the SPE will prepare for the RCO a review of the agency head's determination, and will propose a recommendation from the RCO to the agency head as to whether the reduction or suspension action should continue. The RCO will submit the recommendation (including a recommendation for the time period of a follow up review) to the agency head. This recommendation will be considered by the Secretary and handled as a final action described in paragraph (f) of this section.

(k) The contract may not be closed nor final payment made prior to a final determination by the Secretary.

432.006–5 Reporting.

The annual report required by FAR 32.006–5 is to be prepared by the SPE and to be submitted to the Secretary within 90 calendar days after the end of the fiscal year. When signed by the Secretary, the report is to be maintained by the SPE.

432.007 Contract financing payments.

The HCA may prescribe, on a case-by-case basis, a shorter period for financing payments.

[61 FR 53646, Oct. 15, 1996. Redesignated at 70 FR 48, Jan. 3, 2005]

Subpart 432.1—Non-Commercial Item Purchase Financing

432.102 Description of contract financing methods.

Progress payments based on a percentage or stage of completion are authorized for use as a payment method under USDA contracts or subcontracts for construction, alteration or repair, and shipbuilding and conversion. Such payments also are authorized for service contracts, if the contracting officer determines that progress payments based on costs are not practicable and adequate safeguards are provided to administer progress payments based on a percentage or stage of completion. For all other contracts, progress payment provisions shall be based on costs except that the HCA may authorize progress payments based on a percentage or stage of completion on a case-by-case basis. Each authorization by the HCA shall include a determination and finding that progress payments based on costs cannot be employed practically and that there are adequate safeguards provided for the administration of progress payments based on a percentage or stage of completion.

432.103 Progress payments under construction contracts.

(a) When approving a progress payment under a construction contract, the contracting officer shall indicate the amount to be paid by the payment office and include in the contract file the rationale in support of the payment.

(b) When a retainage is made on a progress payment under a construction contract, the contracting officer shall place in the contract file a written determination stating the reason(s) for the retainage.

(c) When a progress payment under a construction contract has been approved, the amount to be paid, the amount of any retainage withheld, and the reason(s) for the retainage shall be provided to the contractor by the contracting officer in writing before the payment due date.

(d) When the contractor, under a fixed-price construction contract, furnishes evidence to the contracting officer that the surety has been paid in full for bond premiums and requests reimbursement, the first subsequent progress payment shall include the total amount attributable to such bond premiums and the Government shall pay that amount in full. This amount paid for the bond premiums is not an amount in addition to the stated contract price.

432.111 Contract clauses for non-commercial purchases.

The contracting officer shall insert the clause at 452.232–70, Reimbursement for Bond Premiums—Fixed Price Construction Contracts, whenever the clause at FAR 52.232–5, Payments under Fixed-Price Construction Contracts, is used in a contract.

[61 FR 53646, Oct. 15, 1996, as amended at 63 FR 26995, May 15, 1998]

432.113 Customary contract financing.

The contracting officer may determine the necessity for customary contract financing. The determination and finding that customary contract financing is needed shall be placed in the contract file.

432.114 Unusual contract financing.

The HCA is authorized to approve unusual contract financing. The signed determination and finding supporting this approval shall be included in the contract file.

Subpart 432.2—Commercial Item Purchase Financing

432.202 General.

432.202–1 Policy.

In the case of unusual contract financing, the approval by the HCA shall be recorded in a determination and finding and maintained in the contract file.

432.202–4 Security for Government financing.

Prior to determining that an offeror's financial condition is adequate security, the contracting officer must obtain the concurrence of the funding activity in the proposed determination.

432.206 Solicitation provisions and contract clauses.

The responsibility for administration of the liquidation provisions of a contract may not be transferred from the contracting officer.

432.207 Administration and payment of commercial financing payments.

The responsibility for receiving, reviewing, and approval of contract financing requests may not be transferred from the contracting officer.

Subpart 432.3—Loan Guarantees for Defense Production

432.301 Definitions.

Within this subpart, the ''agency'' or ''guaranteeing agency'' is the ''head of the contracting activity'' (HCA) and may not be redelegated.

Subpart 432.4—Advance Payments for Non-Commercial Items

432.402 General.

The HCA is designated as the individual responsible for making the findings and determination, and for approval of the contract terms concerning advance payments.

432.406 Letters of credit.

The HCA is designated as the individual responsible for coordination with the Department of Treasury concerning letters of credit.

432.407 Interest.

(a) The HCA is designated as the individual who may authorize, on a case by case basis, advance payments without interest for the contract types described in FAR 32.407(d)(1), (2), (3), and (4). The signed determination and findings supporting these authorizations shall be included in the contract files.

(b) The SPE is designated as the individual who may authorize advance payments without interest other than those described in paragraph (a) of this section.

432.412 Contract clause.

The decision to use Alternates I or III to clause 52.232–12 must be supported by a determination and finding.

Subpart 432.6—Contract Debts

432.601 Definition.

Responsible official means the contracting officer.

432.616 Compromise actions.

Compromise of a debt within the proceedings under appeal to the Civilian Board of Contract Appeals is the responsibility of the contracting officer.

[72 FR 31438, June 7, 2007]

Subpart 432.7—Contract Funding

432.703 Contract funding requirements.

432.703–3 Contracts crossing fiscal years.

Funds appropriated to USDA may be used for one-year contracts which are to be performed in two fiscal years so long as the total amount for such contracts is obligated in the year for which the funds are appropriated (7 U.S.C. 2209c).

432.770 USDA specific funding limitations.

(a) The USDA is authorized to subscribe for newspapers as may be necessary to carry out its authorized work: *Provided*, that such subscriptions shall not be made unless provision is made therefor in the applicable appropriation and the cost thereof is not in excess of limitations prescribed therein (7 U.S.C. 2258).

(b) The expenditure of any USDA appropriation for any consulting service through any contract, pursuant to section 3109 of Title 5 of the U.S. Code shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive Order issued pursuant to existing law (7 U.S.C. 2225a).

Subpart 432.8—Assignment of Claims

432.802 Conditions.

Written notices of assignment and a true copy of the assigned instrument are to be sent to the contracting officer rather than the agency head. Other copies are distributed as directed in FAR 32.802.

432.803 Policies.

The HCA may make a determination of need to include a no-setoff commitment in a contract.

432.805 Procedure.

The information described in FAR 32.805 shall be filed with the contracting officer.

432.806 Contract clauses.

The contracting officer may make the determination whether to include the clause at FAR 52.232–23 in any purchase order expected to exceed the micro-purchase threshold.

Subpart 432.9—Prompt Payment

432.904 Determining payment due dates.

The payment terms for supplies and services on the Procurement List and provided by a Javits-Wagner-O'Day Act participating nonprofit agency are governed by FAR 8.709.

[61 FR 53646, Oct. 15, 1996. Redesignated at 70 FR 48, Jan. 3, 2005]

Subpart 432.10—Performance-Based Payments

432.1007 Administration and payment of performance-based payments.

The responsibility for receiving, reviewing, and approval of performance-based payment requests may not be transferred from the contracting officer.

PART 433—PROTESTS, DISPUTES AND APPEALS

Subpart 433.1—Protests

Sec.
433.102 General.
433.103 Protests to the agency.
433.104 [Reserved]

Subpart 433.2—Disputes and Appeals

433.203 Applicability.
433.203–70 Civilian Board of Contract Appeals.
433.209 Suspected fraudulent claims.

AUTHORITY: 40 U.S.C. 121, 41 U.S.C. 421.

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 433.1—Protests

433.102 General.

(a) The Senior Procurement Executive (SPE) is responsible for coordinating the handling of bid protests lodged with the Government Accountability Office (GAO).

(b) The head of the contracting activity (HCA), on a non-delegable basis, may resolve protests and authorize reimbursement of costs in accordance with FAR 33.102(b).

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 48, Jan. 3, 2005]

433.103 Protests to the agency.

(a) Actual or prospective bidders or offerors may file protests either with the HCA, as provided by 433.102(b), or with the contracting officer. Protesters who file protests with the HCA shall furnish a complete copy to the contracting officer no later than 1 day after the protest is filed with the HCA.

(b) When a protest is received, the adjudicating official shall take prompt action towards resolution and notify the protester in writing of the action taken. The written final decision shall include a paragraph substantially as follows:

> This decision shall be final and conclusive unless a further written notice of protest is filed with the Government Accountability Office in accordance with 4 CFR part 21. Neither the filing of a protest with USDA nor the filing of a protest with the Government Accountability Office affects your right to file an action in a district court of the United States or the United States Court of Federal Claims.

[61 FR 53646, Oct. 15, 1996, as amended at 70 FR 48, Jan. 3, 2005]

433.104 [Reserved]

Subpart 433.2—Disputes and Appeals

433.203 Applicability.

The Assistant Secretary for Administration is authorized to determine the applicability of the Contract Disputes Act to contracts with foreign governments pursuant to FAR 33.203.

433.203–70 Civilian Board of Contract Appeals.

The organization, jurisdiction, and functions of the Civilian Board of Contract Appeals, together with its Rules of Procedure, are set out in 48 CFR part 6101.

[72 FR 31438, June 7, 2007]

433.209 Suspected fraudulent claims.

The contracting officer shall refer all matters related to suspected fraudulent claims by a contractor under the conditions in FAR 33.209 to the Office of Inspector General for additional action or investigation.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 434—MAJOR SYSTEM ACQUISITION

Subpart 434.0—General

Sec.
434.001 Definitions.
434.002 Policy.
434.003 Responsibilities.
434.004 Acquisition strategy.
434.005 General requirements.
434.005–6 Full production.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 70 FR 49, Jan. 3, 2005, unless otherwise noted.

Subpart 434.0—General

434.001 Definitions.

Pursuant to OMB Circular No. A–109 (A–109) and the definition at FAR 2.101, within USDA, a system shall be considered a major system if:

(a) The total acquisition costs (for information technology, life cycle costs) are estimated to be $50 million or more, or

(b) The system, regardless of estimated acquisition or life cycle costs, has been specifically designated to be a major system by the USDA Acquisition Executive or by the Major Information Technology Systems Executive.

434.002 Policy.

In addition to the policy guidance at FAR 34.002 and other parts of the FAR, the policies outlined in paragraph 6 of A–109 should serve as guidelines for all contracting activities in planning and developing systems, major or otherwise.

434.003 Responsibilities.

(a) The Secretary of Agriculture or other designated USDA key executive is responsible for making four key decisions in each major system acquisition process. These are listed in paragraph 9 of A–109 and elaborated on in paragraphs 10 through 13. The key executives of USDA (Secretary, Deputy Secretary, Under Secretaries and Assistant Secretaries) individually or as a group will participate in this decision making process.

(b) The Chief Information Officer (CIO) is the Major Information Technology Systems Executive. For acquisitions of information technology, the CIO will ensure that A–109 is implemented in USDA and that the management objectives of the Circular are realized. The CIO is responsible for designating the program manager for each major information technology system acquisition, designating an acquisition to be a major information technology system acquisition, and approving the written charter and project control system for each major information technology system acquisition.

(c) The Assistant Secretary for Administration (ASA) is the USDA Acquisition Executive for major system acquisitions other than acquisitions of information technology. The ASA will ensure that A–109 is implemented in USDA and that the management objectives of the Circular are realized. The ASA is responsible for designating the program manager for each major system acquisition, designating an acquisition to be a major system acquisition, and approving the written charter and project control system for each major system acquisition.

(d) Heads of contracting activities must:

(1) Ensure compliance with the requirements of A–109, FAR Part 34 and AGAR Part 434.

(2) Ensure that potential major system acquisitions are brought to the attention of the USDA Acquisition Executive or the Major Information Technology Systems Executive, as appropriate.

(3) Recommend qualified candidates for designation as program managers for each major system acquisition within their jurisdiction.

(4) Ensure that program managers fulfill their responsibilities and discharge their duties.

(5) Cooperate with the ASA and Major Information.

Technology Systems Executive in implementing the requirements of A–109.

(e) The program manager is responsible for planning and executing the major system acquisition, ensuring appropriate coordination with the USDA Acquisition Executive and Major Information Technology Systems Executive and other key USDA executives.

434.004 Acquisition strategy.

(a) The program manager will develop, in coordination with the Acquisition Executive or Major Information Technology Systems Executive, a written charter outlining the authority, responsibility, accountability, and budget for accomplishing the proposed objective.

(b) The program manager will develop, subject to the approval of the Acquisition Executive or Major Information Technology Systems Executive, a project control system to schedule, monitor, and regularly report on all aspects of the project. The control system shall establish reporting periods and milestones consistent with the key decisions listed in paragraph 9 of A–109.

(c) Upon initiation of the project, the program manager will report regularly to the Acquisition Executive or Major Information Technology Systems Executive.

(d) Specific procedures and requirements for information technology systems are included in the USDA Information Technology Capital Planning and Investment Control Guide which can be accessed on the USDA OCIO Web site at *http://www.ocio.usda.gov*.

434.005 General requirements.

434.005–6 Full production.

The Secretary or the USDA key executive designated by the Secretary for the specific program is the agency head for the purposes of FAR 34.005–6.

PART 435—RESEARCH AND DEVELOPMENT CONTRACTING

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

435.010 Scientific and technical reports.

Research and development contracts shall contain a provision requiring that the contractor send copies of all scientific and technical reports to the National Technical Information Service at the address indicated in FAR 35.010(b). The release of research and development contract results to other government activities and to the private sector is subject to the provisions of FAR subpart 4.4.

[61 FR 53646, Oct. 15, 1996]

PART 436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 436.2—Special Aspects of Contracting for Construction

Sec.
436.201 Evaluation of contractor performance.
436.203 Government estimate of construction costs.
436.204 Disclosure of the magnitude of construction projects.
436.205 Statutory cost limitations.
436.209 Construction contracts with architect-engineer firms.
436.213 Special procedures for sealed bidding in construction contracting.
436.213–2 Presolicitation notices.

Subpart 436.3 [Reserved]

Subpart 436.5—Contract Clauses

436.500 Scope of subpart.
436.571 Prohibition against the use of lead-based paint.
436.572 Use of premises.
436.573 Archeological or historic sites.
436.574 Control of erosion, sedimentation, and pollution.
436.575 Maximum workweek-construction schedule.
436.576 Samples and certificates.
436.577 Emergency response.
436.578 [Reserved]
436.579 Opted timber sale road requirements.

Subpart 436.6—Architect-Engineer Services

436.601 Policy.
436.601–3 Applicable contracting procedures.
436.602 Selection of firms for architect-engineer contracts.
436.602–1 Selection criteria.
436.602–2 Evaluation boards.
436.602–3 Evaluation board functions.
436.602–4 Selection authority.
436.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.
436.603 Collecting data on and appraising firms' qualifications.

436.604 Performance evaluation.
436.605 Government cost estimate for architect-engineer work.
436.609 Contract clauses.
436.609–1 Design within funding limitations.
436.670 Firms ineligible for award—construction.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 436.2—Special Aspects of Contracting for Construction

436.201 Evaluation of contractor performance.

Preparation of performance evaluation reports. In addition to the requirements of FAR 36.201, performance evaluation reports shall be prepared for indefinite-delivery type contracts when either the contract maximum or the contracting activity's reasonable estimate of services to be ordered exceeds $500,000.00. For these contracts, performance evaluation reports shall be prepared for each order at the time of final acceptance of the work under the order.

436.203 Government estimate of construction costs.

For acquisitions using sealed bid procedures, the contracting officer may disclose the overall amount of the Government's estimate of construction costs following identification of the responsive bid most advantageous to the Government; verification of that bid's price reasonableness; and verification of the bidder's responsibility. For acquisitions using other than sealed bid procedures (e.g., negotiation), the contracting officer may disclose the overall amount of the estimate after contract award.

436.204 Disclosure of the magnitude of construction projects.

In the case of indefinite-delivery type contracts, the reasonable estimate of work to be done or the maximum in the solicitation, both including all options, is to be used to select the price range. Contracting officers may elect to use both a price range for the base period of services and the total, inclusive of options, to best describe the magnitude of the solicitation.

436.205 Statutory cost limitations.

(a) When it appears that funds available for a project may be insufficient for all the desired features of construction, the contracting officer may provide in the solicitation for a base bid item covering the work generally as specified and for one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order of priority. In this case, the contracting officer shall insert the provision at 452.236–70, Additive or Deductive Items, in solicitations for construction.

(b) In the alternative to the process in paragraph (a) of this section, the contracting officer may use the policies and procedures found in FAR 17.2.

436.209 Construction contracts with architect-engineer firms.

The head of the contracting activity (HCA) is authorized to approve the award of a contract to construct a project, in whole or in part, to the firm (inclusive of its subsidiaries or affiliates) that designed the project.

436.213 Special procedures for sealed bidding in construction contracting.

436.213–2 Presolicitation notices.

The authority to waive a presolicitation notice is restricted to the HCA.

[63 FR 26995, May 15, 1998]

Subpart 436.3 [Reserved]

Subpart 436.5—Contract Clauses

436.500 Scope of subpart.

This subpart prescribes clauses for insertion in USDA solicitations and contracts for construction and for dismantling, demolition, or removal of improvements or structures. The contracting officer shall use the clauses as prescribed, in contracts that exceed the simplified acquisition threshold. The contracting officer may use the clauses if the contract amount is expected to be within the simplified acquisition threshold.

436.571 Prohibition against the use of lead-based paint.

The contracting officer shall insert the clause at 452.236–71, Prohibition Against the Use of Lead-Based Paint, in solicitations and contracts, if the work involves construction or rehabilitation (including dismantling, demolition, or removal) of residential structures. This clause may be used in contracts for other than residential structures.

436.572 Use of premises.

The contracting officer shall insert the clause at 452.236–72, Use of Premises, if the contractor will be permitted to use land or premises administered by USDA.

436.573 Archeological or historic sites.

The contracting officer shall insert the clause at 452.236–73, Archeological or Historic Sites, if the contractor will be working in an area where such sites may be found. Use of the clause is optional in service contracts for on-the-ground work, e.g., reforestation, silvicultural, land stabilization, or other agricultural-related projects.

436.574 Control of erosion, sedimentation, and pollution.

The contracting officer shall insert the clause at 452.236–74, Control of Erosion, Sedimentation and Pollution, if there is a need for applying environmental controls in the performance of work. Use of the clause is optional in service contracts for on-the-ground e.g., reforestation, silvicultural, land stabilization, or other agricultural-related projects.

436.575 Maximum workweek-construction schedule.

The contracting officer shall insert the clause at 452.236–75, Maximum Workweek-Construction Schedule, if the clause at FAR 52.236–15 is used and the contractor's work schedule is restricted by access to the facility or must be coordinated with the schedule of contract administration personnel.

[63 FR 26996, May 15, 1998]

436.576 Samples and certificates.

The contracting officer shall insert the clause at 452.236–76, Samples and Certificates, in all contracts.

436.577 Emergency response.

The contracting officer may insert the clause at 452.236–77, Emergency Response, in construction contracts awarded for the Forest Service.

436.578 [Reserved]

436.579 Opted timber sale road requirements.

The contracting officer shall insert the clause at 452.236–79, Opted Timber Sale Road Requirements, in road construction contracts resulting from a timber sale turnback.

Subpart 436.6—Architect-Engineer Service

436.601 Policy.

436.601–3 Applicable contracting procedures.

The technical official's listing of areas where recovered materials cannot be used shall be referred to the contracting activity's official designated in accordance with FAR 23.404. A copy of the listing and of any approval or disapproval by that official is to be retained in the solicitation file.

436.602 Selection of firms for architect-engineer contracts.

436.602–1 Selection criteria.

The HCA is authorized to approve the use of design competition under the conditions in FAR 36.602–1(b).

436.602–2 Evaluation boards.

HCA's shall establish written procedures for providing permanent or ad hoc architect-engineer evaluation boards as prescribed in FAR 36.602–2. The procedures may provide for the appointment of private practitioners of architecture, engineering, or related professions when such action is determined by the HCA to be essential to meet the Government's minimum needs.

436.602–3 Evaluation board functions.

The selection report required in FAR 36.602–3(d) shall be prepared for the approval of the HCA. The HCA may authorize an acquisition official above the level of the contracting officer to execute the required approval.

436.602–4 Selection authority.

(a) The HCA shall serve as the selection authority in accordance with FAR 36.602–4. The HCA may authorize an acquisition official above the level of the contracting officer to serve as the selection authority.

(b) A copy of the final selection, inclusive of the supporting documents, shall be provided to the contracting officer and maintained in the solicitation file.

436.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

The HCA may include either or both procedures in FAR 36.602–5 in the procedures for evaluation boards.

436.603 Collecting data on and appraising firms' qualifications.

(a) HCA's which require architect-engineer services shall establish procedures to comply with the requirements of FAR 36.603.

(b) The procedures shall include a list of names, addresses, and phone numbers of offices or boards assigned to maintain architect-engineer qualification data files. The list shall be updated annually.

436.604 Performance evaluation.

Preparation of performance evaluation reports. (a) In addition to the requirements of FAR 36.604, performance evaluation reports shall be prepared for indefinite-delivery type contracts when either the contract maximum or the contracting activities reasonable estimate of services to be ordered exceeds $25,000.00. For these contracts, performance evaluation reports shall be prepared for each order at the time of final acceptance of the work under the order.

(b) The contracting officer may require a performance evaluation report on the work done by the architect-engineer after the completion of or during the construction of the designed project.

436.605 Government cost estimate for architect-engineer work.

The contracting officer may release the Government's total cost estimate in accordance with FAR 36.605(b).

436.609 Contract clauses.

436.609–1 Design within funding limitations.

(a) Should the head of the contracting activity appoint a designee to make the determination in FAR 36.609–1(c)(1), the appointment may be to one no lower than the official authorized to commit program funds for the work being acquired.

(b) The contracting officer, with the advice of appropriate technical representatives, may make the determination in FAR 36.609–1(c)(2) or (3).

(c) A copy of the determinations described in paragraph (b) and (c) of this section shall be maintained in the contract file.

436.670 Firms ineligible for award—construction.

The contracting officer shall insert the clause at 452.236–80, Firms Ineligible For Award—Construction, in the contract for architect-engineering services except as provided in FAR 36.209 and AGAR 436.209.

PART 437—SERVICE CONTRACTING

Subpart 437.1—Service Contracts—General

Sec.
437.104 Personal services contracts.
437.110 Solicitation provisions and contract clauses.

Subpart 437.2—Advisory and Assistance Services

437.203 Policy.
437.204 Guidelines for determining availability of personnel.
437.270 Solicitation provisions and contract clauses.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 437.1—Service Contracts—General

437.104 Personal services contracts.

USDA has the following specific statutory authorities to contract for personal services:

(a) Section 706(a) of the Organic Act of 1944 (7 U.S.C. 2225) authorizes contracting with persons or organizations on a temporary basis, without regard to civil service compensation classification standards in 5 U.S.C., Chapter 51 and Subchapter III of Chapter 53, *Provided:*

(1) That no expenditures shall be made unless specifically provided for in the applicable appropriation, and

(2) Expenditures do not exceed any limitations prescribed in the appropriation.

(b) 7 U.S.C. 1627 authorizes the Secretary of Agriculture to contract with technically qualified persons, firms or organizations to perform research, inspection, classification, technical, or other special services, without regard to the civil-service laws, *Provided:* it is for a temporary basis and for a term not to exceed six months in any fiscal year.

437.110 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert a clause substantially the same as the clause at 452.237–70, Loss Damage, Destruction or Repair, in contracts for equipment rental, whether the equipment is furnished with or without operator.

(b) The contracting officer shall insert a provision substantially the same as the clause at 452.237–71, Pre-Bid/Pre-Proposal Conference, in all solicitations if a conference with prospective offerors will be held prior to the submittal of bids or proposals.

(c) The contracting officer shall insert the provision at 452.237–73, Equipment Inspection visit, in solicitations if work is to be done on Government equipment and an offeror's inspection is encouraged for an understanding of the work to be performed prior to submittal of bids or proposals.

(d) The contracting officer shall insert a clause substantially the same as the clause at 452.237–74, Key Personnel, in contracts if contract performance requires identification of the contractor's key personnel.

(e) The contracting officer shall insert a clause substantially the same as the clause at 452.237–75, Restrictions Against Disclosure, in service contracts (including architect-engineer contracts) requiring restrictions on release of information developed or obtained in connection with performance of the contract.

Subpart 437.2—Advisory and Assistance Services

437.203 Policy.

Contracting for advisory and assistance services is subject to the policy and procedures in Departmental Regulations (5000 series).

437.204 Guidelines for determining availability of personnel.

The head of the contracting activity (HCA) is authorized to approve the use of non-Government evaluators in proposal evaluation. Each such decision shall be supported by a written determination in accordance with FAR 37.204.

[64 FR 52675, Sept. 30, 1999]

437.270 Solicitation and contract clauses.

(a) The contracting officer shall insert a clause substantially the same as the clause at 452.237–76, Progress Reporting, in all contracts for advisory and assistance services. It may also be used in other service contracts.

(b) The contracting officer shall insert a clause substantially the same as the clause at 452.237–78, Contracts with Consulting Firms for Services, in solicitations and contracts for consulting services which prohibit follow-on contracts with the contracting firm.

PART 438 [RESERVED]

PART 439—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 439.1—General

Sec.

439.101 Policy.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 439.1—General

439.101 Policy.

(a) In addition to policy and regulatory guidance contained in the FAR and AGAR:

(1) The USDA Information Technology Capital Planning and Investment Control Guide (CPIC) establishes requirements for the acquisition of information technology.

(2) Specific thresholds at which USDA Office of the Chief Information Officer Information Technology Acquisition Approval is required have been established.

(3) The procurement authority delegated to USDA Agencies is established in Departmental Regulations 5000 series.

(4) The CPIC Guide and USDA CIO policy and procedural guidance are available on the USDA OCIO Web site at *http://www.ocio.usda.gov*. Notices of changes in the Information Technology Acquisition Approval Thresholds are also promulgated by AGAR Advisory.

(b) Acquisition of on-line courseware libraries and learning management system services requires specific approval of the ASA and CIO. Information regarding the specific approval requirements and processes is promulgated by AGAR Advisory.

[70 FR 49, Jan. 3, 2005]

PART 440 [RESERVED]

PART 441—ACQUISITION OF UTILITY SERVICES

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

Subpart 441.2—Acquiring Utility Services

441.201 Policy.

As used in FAR 41.201(d)(2)(i) and 41.201(d)(3) the Federal agency head designee is the head of the contracting activity.

[61 FR 53646, Oct. 15, 1996]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 442—CONTRACT ADMINISTRATION

Subpart 442.1—Interagency Contract Administration and Audit Services

Sec.
442.102 Procedures.

Subpart 442.15—Contractor Performance Information

442.1502 Policy.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 442.1—Interagency Contract Administration and Audit Services

442.102 Procedures.

(a) The Office of Inspector General (OIG), Audit Division, has established a cross-servicing arrangement with the Defense Contract Audit Agency (DCAA) to provide contract audit services required by the FAR.

(b) All contract audit services required by contracting officers, except those which can be accomplished in-house, shall be coordinated through the cognizant OIG Regional Inspector General—Auditing (RIG-A). Cognizance is determined on the basis of the contractor's location. There is no charge for DCAA audit services coordinated through OIG.

(c) In order to ensure compliance with this requirement and to evaluate the results of audits, contracting officers shall forward to the RIG-A copies of all price negotiation memoranda prepared for contracts and contract modifications in excess of $500,000.

Subpart 442.15—Contractor Performance Information

442.1502 Policy.

The Contractor Performance System (CPS), developed by the National Institutes of Health, is designated as the single USDA-wide system for maintaining contractor performance/evaluation information. Use of the CPS is mandatory. As a minimum, the CPS shall be accessed for contractor past performance information as part of proposal evaluation in accordance with FAR subpart 15.3, and information resulting from the evaluation of contractor performance in accordance with FAR subpart 42.15 shall be entered into and maintained in this system. The CPS is a part of the USDA Acquisition Toolkit which can be accessed from the USDA Procurement Homepage at *http://www.usda.gov/procurement/*.

[66 FR 49867, Oct. 1, 2001]

PARTS 443–444 [RESERVED]

PART 445—GOVERNMENT PROPERTY

Subpart 445.3—Providing Government Property to Contractors

Sec.
445.302 Providing facilities.
445.302–1 Policy.

Subpart 445.4—Contractor Use and Rental of Government Property

445.403 Rental—Use and Charges clause.
445.407 Non-Government use of plant equipment.

Subpart 445.6 [Reserved]

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 445.3—Providing Government Property to Contractors

445.302 Providing facilities.

445.302–1 Policy.

Heads of contracting activities (HCA's) are authorized to make determinations for providing facilities to a contractor as prescribed in FAR 45.302–1(a)(4).

Subpart 445.4—Contractor Use and Rental of Government Property

445.403 Rental—Use and Charges clause.

HCA's are authorized to make determinations for charging rent on the basis of use under the Use and Charges clause in FAR 52.245–9 as prescribed in FAR 45.403(a).

445.407 Non-Government use of plant equipment.

Requests for non-Government use of plant equipment as prescribed in FAR 45.407 shall be submitted by the HCA to the Senior Procurement Executive (SPE) for approval.

Subpart 445.6 [Reserved]

PART 446—QUALITY ASSURANCE

AUTHORITY: 5 U.S.C. 30 and 40 U.S.C. 486(c).

Subpart 446.3—Contract Clauses

446.370 Inspection and acceptance.

The Contracting Officer shall insert the clause at 452.246–70, Inspection and Acceptance, in contracts where inspection and acceptance will be performed at the same location. The clause with its Alternate I is for use when inspection and acceptance will be performed at different locations.

[61 FR 53646, Oct. 15, 1996]

PART 447—TRANSPORTATION

Subpart 447.3—Transportation in Supply Contracts

Sec.

447.302 Place of delivery—F.O.B. point.
447.305 Solicitation provisions, contract clauses, and transportation factors.
447.305–10 Packing, marking, and consignment instructions.

AUTHORITY: 5 U.S.C. 30 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 447.3—Transportation in Supply Contracts

447.302 Place of delivery—F.O.B. point.

The contracting officer shall insert a clause substantially the same as the clause at 452.247–70, Delivery Location, in supply contracts when it is necessary to specify delivery locations. If appropriate, the clause may reference an attachment which lists various delivery locations and other delivery details (e.g., quantities to be delivered to each location, etc.).

447.305 Solicitation provisions, contract clauses, and transportation factors.

447.305–10 Packing, marking, and consignment instructions.

(a) The contracting officer shall insert a clause substantially the same as the clause at 452.247–71, Marking Deliverables, in solicitations and contracts if special marking on deliverables (other than reports) are required.

(b) The contracting officer shall insert the clause at 452.247–72, Packing for Domestic Shipment, in contracts when item(s) will be delivered for immediate use to a destination in the continental United States; when the material specification or purchase description does not provide preservation, packaging, packing, and/or marking requirements; and/or when the requiring activity has not cited a specific specification for packaging.

(c) The contracting officer shall insert the clause at 452.247–73, Packing for Overseas Shipment, in contracts when item(s) will be delivered to an overseas destination for immediate use, the material specification does not specify packing levels, and the required activity has not specified such requirements.

PART 448 [RESERVED]

PART 449—TERMINATION OF CONTRACTS

Subpart 449.1—General Principles

Sec.
449.106 Fraud or other criminal conduct.
449.111 Review of proposed settlements.

Subpart 449.4—Termination for Default

449.402 Termination of fixed-price contracts for default.
449.402–3 Procedure for default.

Subpart 449.5—Contract Termination Clauses

449.501 General.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 449.1—General Principles

449.106 Fraud or other criminal conduct.

(a) If the contracting officer suspects fraud or other criminal conduct a written report documenting the facts shall be submitted by the head of the contracting activity (HCA) to the Office of Inspector General. Copies of documents or other information connected with the suspected fraud or criminal conduct shall be provided with the report. Concurrently, a copy of the report shall also be submitted to the Senior Procurement Executive.

(b) Depending on the findings of the Office of Inspector General, the HCA may initiate suspension or debarment action as prescribed in FAR part 9.4 and part 409.4.

449.111 Review of proposed settlements.

Proposed settlement agreements shall be reviewed and approved in accordance with contracting activity procedures.

Subpart 449.4—Termination for Default

449.402 Termination of fixed-price contracts for default.

449.402–3 Procedure for default.

In addition to the requirements of FAR 49.402–3(g), the notice of termination shall contain instructions regarding the disposition of any Government property in the possession of the contractor (see FAR 45.508–1) and, in the case of construction contracts, such materials, appliances, and structures as may be on the site of the construction work. The notice shall also contain a statement concerning the liability of the contractor or its surety for any liquidated damages (see FAR 49.402–7).

Subpart 449.5—Contract Termination Clauses

449.501 General.

Use of special purpose termination clauses pursuant to the authority of FAR 49.501 shall be approved in advance by the HCA.

PART 450—EXTRAORDINARY CONTRACTUAL ACTIONS

Sec.
450.001 Definitions.

Subpart 450.1 [Reserved]

Subpart 450.2—Delegation of and Limitations on Exercise of Authority

450.201 Delegation of authority.

Subpart 450.3—Contract Adjustments

450.303 Contract adjustment.
450.303–1 Contractor requests.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

450.001 Definitions.

Approving authority, as used in this part, means the Assistant Secretary for Administration.

Secretarial level, as used in this part means the Assistant Secretary for Administration.

Subpart 450.1 [Reserved]

Subpart 450.2—Delegation of and Limitations on Exercise of Authority

450.201 Delegation of authority.

The Assistant Secretary for Administration is authorized to approve all actions under FAR part 50 except indemnification actions listed in FAR 50.201(d) which must be approved by the Secretary, without power of delegation.

Subpart 450.3—Contract Adjustments

450.303 Contract adjustment.

450.303–1 Contractor requests.

Contractor requests shall be submitted to the contracting officer.

PART 451 [RESERVED]

SUBCHAPTER H—CLAUSES AND FORMS

PART 452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 452.2—Texts of Provisions and Clauses

Sec.
452.204–70 Inquiries.
452.211–70 Brand Name or Equal.
452.211–71 Equal Products Offered.
452.211–72 Statement of Work/Specifications.
452.211–73 Attachments to Statement of Work/Specifications.
452.211–74 Period of Performance.
452.211–75 Effective Period of the Contract.
452.214–70 Award by Lot.
452.215–71 Instructions for the Preparation of Technical and Business Proposals.
452.215–72 Amendments to Proposals.
452.215–73 Post Award Conference.
452.216–70 Award Fee.
452.216–71 Base Fee and Award Fee Proposal.
452.216–72 Evaluation Quantities—Indefinite-Delivery Contract.
452.216–73 Minimum and Maximum Contract Amounts.
452.216–74 Ceiling Price.
452.216–75 Letter Contract.
452.219–70 Size Standard and NAICS Code Information.
452.224–70 Confidentiality of Information.
452.226–70—452.226–72 [Reserved]
452.228–70 Alternative Forms of Security.
452.228–71 Insurance Coverage.
452.232–70 Reimbursement for Bond Premiums—Fixed-Price Construction Contracts.
452.236–70 Additive or Deductive Items.
452.236–71 Prohibition Against the Use of Lead-Based Paint.
452.236–72 Use of Premises.
452.236–73 Archaeological or Historic Sites.
452.236–74 Control of Erosion, Sedimentation, and Pollution.
452.236–75 Maximum Workweek—Construction Schedule.
452.236–76 Samples and Certificates.
452.236–77 Emergency Response.
452.236–78 [Reserved]
452.236–79 Opted Timber Sale Road Requirements.
452.236–80 Firms Ineligible for Award—Construction.
452.237–70 Loss, Damage, Destruction or Repair.
452.237–71 Pre-Bid/Pre-Proposal Conference.
452.237–73 Equipment Inspection Visit.
452.237–74 Key Personnel.
452.237–75 Restrictions Against Disclosure.
452.237–76 Progress Reporting.
452.237–78 Contracts with Consulting Firms for Services.
452.246–70 Inspection and Acceptance.
452.247–70 Delivery Location.
452.247–71 Marking Deliverables.
452.247–72 Packing for Domestic Shipment.
452.247–73 Packing for Overseas Shipment.

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

Subpart 452.2—Texts of Provisions and Clauses

452.204–70 Inquiries.

As prescribed in 404.7001, insert the following provision:

INQUIRIES (FEB 1988)

Inquiries and all correspondence concerning this solicitation should be submitted in writing to the Contracting Officer. Offerors should contact only the Contracting Officer issuing the solicitation about any aspect of this requirement prior to contract award.

(End of provision)

452.211–70 Brand Name or Equal.

As prescribed in 411.171, insert the following provision:

BRAND NAME OR EQUAL (NOV 1996)

(As used in this provision, the term ''brand name'' includes identification of products by make and model.)

(a) If items called for by this solicitation have been identified by a ''brand name or equal'' description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Offers of ''equal'' products (including products of the brand name manufacturer other than the one described by brand name) will be considered for award if such products are clearly identified in the offer (see clause 452.211–71) and are determined by the Contracting Officer to meet fully the salient characteristics requirements listed in the solicitation.

(b) Unless the offeror clearly indicates in its offer that it is offering an ''equal'' product, the offeror shall be considered as offering the brand name product(s) referenced in the solicitation.

(c)(1) If the offeror proposes to furnish an ''equal'' product or products, the brand

name(s), if any, and any other required information about the product(s) to be furnished shall be inserted in the space provided in the solicitation. The evaluation of offers and the determination as to the equality of the product(s) offered shall be the responsibility of the Government and will be based on information furnished by the offeror or identified in its offer as well as other information reasonably available to the contracting activity. Caution to offerors: The contracting activity is not responsible for locating or securing any information which is not identified in the offer and is not reasonably available to the contracting activity. Accordingly, to assure that sufficient information is available, the offeror must furnish as a part of its offer all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the contracting activity to (i) determine whether the product offered meets the salient characteristics requirement of the solicitation, and (ii) establish exactly what the offeror proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific reference to information previously furnished or to information otherwise available to the contracting activity.

(2) If an offeror proposes to modify a product so as to make it conform to the requirements of the solicitation, the offer shall include (i) a clear description of such proposed modifications and (ii) clearly marked descriptive material to show the proposed modifications.

(End of provision)

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998, as amended at 70 FR 50, Jan. 3, 2005]

452.211–71 Equal Products Offered.

As prescribed in 411.171, insert the following or substantially the same clause in solicitations seeking offers on a ''brand name or equal'' basis to allow offerors the opportunity to clearly identify the ''equal'' item being offered, and to illustrate how that item meets the salient characteristics requirements of the Government.

EQUAL PRODUCTS OFFERED (NOV 1996)

(a) Offerors proposing to furnish an ''equal'' product, in accordance with the ''Brand Name or Equal'' provision of this solicitation, shall provide the following information for each offered ''equal'' product:

Contract Line Item Number (if any): _____

Brand Name or Equal Product identified by the Government in this solicitation: _____

Offered Product Name: _____

Catalog Description or part number: _____

_____

Manufacturer's Name: _____

Manufacturer's Address: _____

_____

_____

(b) Offerors are responsible for submitting all additional information on the above product necessary for the Contracting Officer to determine whether the product offered meets the ''brand name or equal'' product's salient characteristics listed in the solicitation.

(End of clause)

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998.]

452.211–72 Statement of Work/Specifications.

As prescribed in 411.171, insert the following clause:

STATEMENT OF WORK/SPECIFICATIONS (FEB 1988)

The Contractor shall furnish the necessary personnel, material, equipment, services and facilities (except as otherwise specified), to perform the Statement of Work/Specifications referenced in Section J.

(End of clause)

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998.]

452.211–73 Attachments to Statement of Work/Specifications.

As prescribed in 411.171, insert the following clause:

ATTACHMENTS TO STATEMENT OF WORK/SPECIFICATIONS (FEB 1988)

The attachments to the Statement of Work/Specifications listed in Section J are hereby made part of this solicitation and any resultant contract.

(End of clause)

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998.]

452.211–74 Period of Performance.

As prescribed in 411.404(a), insert the following clause:

PERIOD OF PERFORMANCE (FEB 1988)

The period of performance of this contract is from _____ through _____.*

(End of clause)

**Contracting Officer shall insert the appropriate dates.*

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998.]

452.211–75 Effective Period of the Contract.

As prescribed in 411.404(b), insert the following clause:

EFFECTIVE PERIOD OF THE CONTRACT (FEB 1988)

The effective period of this contract is from _____ through _____.*

(End of clause)

**Contracting Officer shall insert the appropriate dates.*

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998.]

452.214–70 Award by Lot.

As prescribed in 414.201–6, insert a provision substantially as follows:

AWARD BY LOT (NOV 1996)

Subject to the Section L provision FAR 52.214–10, ''Contract Award—Sealed Bidding,'' award will generally be made to a single bidder on each entire lot. However, the Government reserves the right to award by item within any lot when the contracting officer determines that it is advantageous to the Government.

(End of provision)

452.215–71 Instructions for the Preparation of Technical and Business Proposals.

As prescribed in 415.209(a), insert a provision substantially as follows:

INSTRUCTIONS FOR THE PREPARATION OF TECHNICAL AND BUSINESS PROPOSALS (SEP 1999)

(a) *General Instructions.* Proposals submitted in response to this solicitation shall be furnished in the following format with the numbers of copies as specified below.

(1) The proposal must include a technical proposal and business proposal. Each of the parts shall be separate and complete so that evaluation of one may be accomplished independently from evaluation of the other. The technical proposal must not contain reference to cost; however, resource information (such as data concerning labor hours and categories, materials, subcontracts, etc.) must be contained in the technical proposal so that the contractor's understanding of the statement of work may be evaluated.

(2) Offerors may, at their discretion, submit alternate proposals or proposals which deviate from the requirement; provided, that an offeror also submit a proposal for performance of the work as specified in the statement of work. Any ''alternate'' proposal may be considered if overall performance would be improved or not compromised, and if it is in the best interest of the Government. Alternate proposals, or deviations from any requirement of this RFP, must be clearly identified.

(3) The Government will evaluate proposals in accordance with the evaluation criteria set forth in Section M of this RFP.

(4) Offerors shall submit their proposal(s) in the following format and the quantities specified:

(a) _____* copies of the completed, signed offer (Sections A through K of the solicitation package)

(b) _____* copies of the technical proposal

(c) _____* copies of the business/cost proposal

(b) *Technical Proposal Instructions.* The technical proposal will be used to make an evaluation and arrive at a determination as to whether the proposal will meet the requirements of the Government. Therefore, the technical proposal must present sufficient information to reflect a thorough understanding of the requirements and a detailed, description of the techniques, procedures and program for achieving the objectives of the specifications/statement of work. Proposals which merely paraphrase the requirements of the Government's specifications/ statement of work, or use such phrases as ''will comply'' or ''standard techniques will be employed'' will be considered unacceptable and will not be considered further. As a minimum, the proposal must clearly provide the following:

(*Contracting Officer shall identify in this section the minimum information required to evaluate each technical evaluation factor listed in Section M.*)

(c) *Business Proposal Instructions.*

(1) Cost Proposal.

In addition to any other requirements for cost/pricing information required in clause FAR 52.215–20, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data (OCT 1997), the following is required:

(*Contracting Officer shall identify additional information required if appropriate.*)

(2) Business Proposal.

(a) Furnish financial statements for the last two years, including an interim statement for the current year, unless previously provided to the office issuing the RFP, in which case a statement as to when and where this information was provided may be furnished instead.

(b) Specify the financial capacity, working capital and other resources available to perform the contract without assistance from any outside source.

(c) Provide the name, location, and intercompany pricing policy for other divisions, subsidiaries, parent company, or affiliated companies that will perform work or furnish materials under this contract.

(End of provision)

**Contracting officer shall insert number of copies required.*

[61 FR 53646, Oct. 15, 1996, as amended at 64 FR 52675, Sept. 30, 1999; 70 FR 50, Jan. 3, 2005]

452.215–72 Amendments to Proposals.

As prescribed in 415.209(b), insert the following provision:

AMENDMENTS TO PROPOSALS (FEB 1988)

Any changes to a proposal made by the offeror after its initial submittal shall be accomplished by replacement pages. Changes from the original page shall be indicated on the outside margin by vertical lines adjacent to the change. The offeror shall include the date of the amendment on the lower right corner of the changed pages.

(End of provision)

[61 FR 53646, Oct. 15, 1996, as amended at 64 FR 52675, Sept. 30, 1999]

452.215–73 Post Award Conference.

As prescribed in 415.570, insert a clause substantially as follows:

POST AWARD CONFERENCE (NOV 1996)

A post award conference with the successful offeror is required. It will be scheduled within _____* days after the date of contract award. The conference will be held at: _____*.

(End of clause)

**Contracting officer to insert number of days and location.*

[61 FR 53646, Oct. 15, 1996, as amended at 64 FR 52675, Sept. 30, 1999]

452.216–70 Award Fee.

As prescribed in 416.405, insert a clause substantially as follows:

AWARD FEE (FEB 1988)

The amount of award fee the Contractor earns, if any, is based on a subjective evaluation by the Government of the quality of the Contractor's performance in accordance with the award fee plan. The Government will determine the amount of award fee every _____* months beginning with _____*. The Fee Determination Official (FDO) will unilaterally determine the amount of award fee. The FDO's determination will be in writing to the Contractor and is not subject to the ''Disputes'' clause. The Government may unilaterally change the award fee plan at any time and will provide such changes in writing to the Contractor prior to the beginning of the applicable evaluation period. The Contractor may submit a voucher for the earned award fee. Available award fee not earned during one period does not carry over to subsequent periods.

(End of clause)

**Contracting Officer shall insert appropriate number of months.*

***Contracting Officer shall insert appropriate date.*

452.216–71 Base Fee and Award Fee Proposal.

As prescribed in 416.470, insert the following provision:

BASE FEE AND AWARD PROPOSAL (FEB 1988)

For the purpose of this solicitation, offerors shall propose a base fee of _____* percent of the total estimated cost proposed. The award fee shall not exceed _____* percent of the total estimated cost.

(End of provision)

**Contracting Officer shall insert appropriate percentages.*

452.216–72 Evaluation Quantities—Indefinite-Delivery Contract.

As prescribed in 416.506(a), insert a provision substantially as follows:

EVALUATION QUANTITIES—INDEFINITE-DELIVERY CONTRACT (FEB 1988)

To evaluate offers for award purposes, the Government will apply the offeror's proposed fixed-prices/rates to the estimated quantities included in the solicitation, and will add other direct costs if applicable.

(End of provision)

452.216–73 Minimum and Maximum Contract Amounts.

As prescribed in 416.506(b), insert the following clause:

MINIMUM AND MAXIMUM CONTRACT AMOUNTS (FEB 1988)

During the period specified in FAR clause 52.216–18, ORDERING, the Government shall place orders totaling a minimum of _____*, but not in excess of _____*.

(End of clause)

**Contracting Officer shall insert appropriate quantity or dollar amounts.*

452.216–74 Ceiling Price.

As prescribed in 416.670, insert the following clause:

CEILING PRICE (FEB 1988)

The ceiling price of this contract is $_____*. The Contractor shall not make expenditures or incur obligations in the performance of this contract which exceed the ceiling price specified herein, except at the Contractor's own risk.

(End of clause)

**Contracting Officer shall insert appropriate dollar amount.*

452.216–75 Letter Contract.

As prescribed in 416.603–4, insert the following clause:

LETTER CONTRACT (FEB 1988)

This contract replaces letter contract No. _____* dated _____* and all amendments thereto.

(End of clause)

**Contracting Officer shall insert number and date.*

452.219–70 Size Standard and NAICS Code Information.

As prescribed in 419.508, insert the following provision:

SIZE STANDARD AND NAICS CODE INFORMATION (SEP 2001)

The North American Industrial Classification System Code(s) and business size standard(s) describing the products and/or services to be acquired under this solicitation are listed below:

Contract line item(s): _____* NAICS Code _____* Size Standard _____*

(End of provision)

**Contracting Officer shall insert the appropriate data for each contract line item in the solicitation. The data entry line may be duplicated as required to describe all of the contract line items or sub-items.*

[61 FR 53646, Oct. 15, 1996, as amended at 66 FR 49317, Sept. 27, 2001]

452.224–70 Confidentiality of Information.

As prescribed in 424.104, insert a clause substantially as follows:

CONFIDENTIALITY OF INFORMATION (FEB 1988)

(a) Confidential information, as used in this clause, means—

(1) information or data of a personal nature, proprietary about an individual, or (2) information or data submitted by or pertaining to an organization.

(b) In addition to the types of confidential information described in (a)(1) and (2) above, information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of primarily invalidated findings could create an erroneous conclusion which might threaten public health or safety if acted upon.

(c) The Contracting Officer and the Contractor may, by mutual consent, identify elsewhere in this contract specific information and/or categories of information which the Government will furnish to the Contractor or that the Contractor is expected to generate which is confidential. Similarly, the Contracting Officer and the Contractor may, by mutual consent, identify such confidential information from time to time during the performance of the contract. Failure to agree will be settled pursuant to the ''Disputes'' clause.

(d) If it is established that information to be utilized under this contract is subject to the Privacy Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 U.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in (a)(1) and (2) above, shall not be disclosed without the prior written consent of the individual, institution or organization.

(f) Written advance notice of at least 45 days will be provided to the Contracting Officer of the Contractor's intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in (b) above. If the Contracting Officer does not pose any objections in writing within the 45 day period, the Contractor may proceed with disclosure. Disagreements not resolved by the Contractor and Contracting Officer will be settled pursuant to the ''Disputes'' clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor shall obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping provisions in other Federal, State or local laws.

(End of clause)

452.226–70—452.226–72 [Reserved]

452.228–70 Alternative Forms of Security.

As prescribed in 428.204–2, insert the following provision:

ALTERNATIVE FORMS OF SECURITY (NOV 1996)

If furnished as security, money orders, drafts, cashiers checks, or certified checks shall be drawn payable to: _____*.

(End of provision)

**Contracting Officer shall insert the name of the USDA contracting activity.*

452.228–71 Insurance Coverage.

As prescribed in 428.310, insert the following clause:

INSURANCE COVERAGE (NOV 1996)

Pursuant to FAR clause 52.228–5, Insurance-Work on a Government Installation, the Contractor will be required to present evidence to show, as a minimum, the amounts of insurance coverage indicated below:

(a) Workers Compensation and Employer's Liability. The Contractor is required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a Contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in States with exclusive or monopolistic funds that do not permit worker's compensation to be written by private carriers.

(b) General Liability. The Contractor shall have bodily injury liability insurance coverage written on a comprehensive form of policy of at least $500,000 per occurrence.

(c) Automobile Liability. The Contractor shall have automobile liability insurance written on a comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage or loss.

(d) Aircraft Public and Passenger Liability. When aircraft are used in connection with performing the contract, the Contractor shall have aircraft public and passenger liability insurance. Coverage shall be at least $200,000 per person and $500,000 per occurrence for bodily injury, other than passenger injury. Coverage for passenger injury shall be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.

(End of clause)

Alternate I (NOV 1996). As prescribed in 428.310, substitute the following paragraph (b), when additionally the contractor must have property damage liability coverage:

(b) General Liability. (1) The Contractor shall have bodily injury liability coverage written on a comprehensive form of policy of at least $500,000 per occurrence.

(2) The Contractor shall have property damage liability insurance shall be required in the amount of _____* per occurrence.

**Contracting Officer shall insert amount required.*

452.232–70 Reimbursement for Bond Premiums—Fixed-Price Construction Contracts.

As prescribed in 432.111, insert the following clause:

REIMBURSEMENT FOR BOND PREMIUMS—FIXED-PRICE CONSTRUCTION CONTRACTS (NOV 1996)

The Contract Price includes the total amount for premiums that the Contractor attributes to the furnishing of performance and payment bonds required by the contract. Reimbursement for bond premiums under the clause at FAR 52.232–5, Payments Under Fixed-Price Construction, shall not cover any amount therefor not included in the contract price.

(End of clause)

[61 FR 53646, Oct. 15, 1996. Redesignated at 63 FR 26996, May 15, 1998, as amended at 70 FR 50, Jan. 3, 2005]

452.236–70 Additive or Deductive Items.

As prescribed in 436.205, insert the following provision:

ADDITIVE OR DEDUCTIVE ITEMS (FEB 1988)

The low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the government to be available before bids are opened. If addition of another bid item in the listed order of priority would make the award exceed such funds for all bidders, it shall be skipped and the next subsequent additive bid item in a lower amount shall be added if award therein can be made within such funds. For example, when the amount available is $100,000 and a bidder's base bid and four successive additives are $85,000, $10,000, $8,000, $6,000, and $4,000, the aggregate amount of the bid for purposes of award would be $99,000 for the base bid plus the first and fourth additives, the second and third additives being skipped because of each of them would cause the aggregate bid to exceed $100,000. In any case all bids shall be evaluated on the basis of the same additive or deductive bid items, determined as above provided. The listed order of priority need be followed only for determining the low bidder. After determination of the low bidder as stated, award in the best interests of the Government may be made on the selected first or base bid item and any combination of additive or deductive items for which funds are determined to be available at the time of the award, provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of bid items.

(End of clause)

452.236–71 Prohibition Against the Use of Lead-Based Paint.

As prescribed in 436.571, insert the following clause:

PROHIBITION AGAINST THE USE OF LEAD-BASED PAINT (NOV 1996)

Neither the Contractor nor any subcontractor performing under this contract shall use paints containing more then 0.06 of 1 percent lead by weight (calculated as lead metal) in the total nonvolatile content of the paint, or the equivalent measure of lead in the dried film of paint already applied, or both.

(End of clause)

452.236–72 Use of Premises.

As prescribed in 436.572, insert the following clause:

USE OF PREMISES (NOV 1996)

(a) Before any camp, quarry, borrow pit, storage, detour, or bypass site, other than shown on the drawings, is opened or operated on USDA land or lands administered by the USDA, the Contractor shall obtain written permission from the Contracting Officer. A camp is interpreted to include a campsite or trailer parking area of any employee working on the project for the Contractor.

(b) Unless excepted elsewhere in the contract, the Contractor shall (i) provide and maintain sanitation facilities for the work force at the site and (ii) dispose of solid waste in accordance with applicable Federal, State and local regulations.

(End of clause)

452.236–73 Archaeological or Historic Sites.

As prescribed in 436.573, insert the following clause:

ARCHAEOLOGICAL OR HISTORIC SITES (FEB 1988)

If a previously unidentified archaeological or historic site(s) is encountered, the Contractor shall discontinue work in the general area of the site(s) and notify the Contracting Officer immediately.

(End of clause)

452.236–74 Control of Erosion, Sedimentation, and Pollution.

As prescribed in 436.574, insert the following clause:

CONTROL OF EROSION, SEDIMENTATION, AND POLLUTION (NOV 1996)

(a) Operations shall be scheduled and conducted to minimize erosion of soils and to prevent silting and muddying of streams, rivers, irrigation systems, and impoundments (lakes, reservoirs, etc.).

(b) Pollutants such as fuels, lubricants, bitumens, raw sewage, and other harmful materials shall not be discharged on the ground; into or nearby rivers, streams, or impoundments; or into natural or man-made channels. Wash water or waste from concrete or aggregate operations shall not be allowed to enter live streams prior to treatment by filtration, settling, or other means sufficient to reduce the sediment content to not more than that of the stream into which it is discharged.

(c) Mechanized equipment shall not be operated in flowing streams without written approval by the Contracting Officer.

(End of clause)

452.236–75 Maximum Workweek—Construction Schedule.

As prescribed in 436.575, insert the following clause:

MAXIMUM WORKWEEK—CONSTRUCTION SCHEDULE (NOV 1996)

Within ____ calendar days after receipt of a written request from the Contracting Officer, the Contractor must submit the following in writing for approval:

(a) A schedule as required by FAR clause 52.236–15, Schedules for Construction Contracts, and

(b) The hours (including the daily starting and stopping times) and days of the week the Contractor proposes to carry out the work.

The maximum workweek that will be approved is ____*.

(End of clause)

**Contracting Officer shall insert appropriate number of days and hours and/or days.*

452.236–76 Samples and Certificates.

As prescribed in 436.576, insert the following clause:

SAMPLES AND CERTIFICATES (FEB 1988)

When required by the specifications or the Contracting Officer, samples, certificates, and test data shall be submitted after award of the contract, prepaid, in time for proper action by the Contracting Officer or his/her designated representative. Certificates and test data shall be submitted in triplicate to show compliance with materials and construction specified in the contract performance requirements.

Samples shall be submitted in duplicate by the Contractor, except as otherwise specified, to show compliance with the contract requirements. Materials or equipment for which samples, certifications or test data are required shall not be used in the work until approved in writing by the Contracting Officer.

(End of clause)

452.236–77 Emergency Response.

As prescribed in 436.577, the following clause may be used in Forest Service construction contracts:

EMERGENCY RESPONSE (NOV 1996)

(a) *Contractor's Responsibility for Fire Fighting.* (1) The Contractor, under the provisions of FAR clause 52.236–9, Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements, shall immediately extinguish all fires on the work site other than those fires in use as a part of the work.

(2) The Contractor may be held liable for all damages and for all costs incurred by the Government for labor, subsistence, equipment, supplies, and transportation deemed necessary to control or suppress a fire set or caused by the Contractor or the Contractor's agents or employees.

(b) *Contractor's Responsibility for Notification in Case of Fire.* The Contractor shall immediately notify the Government of any fires sighted on or in the vicinity of the work site.

(c) *Contractor's Responsibility for Responding to Emergencies.* When directed by the Contracting Officer, the Contractor shall allow the Government to temporarily use employees and equipment from the work site for emergency work (anticipated to be restricted to fire fighting). An equitable adjustment for the temporary use of employees and equipment will be made under the Changes clause, FAR 52.243–4.

(End of clause)

452.236–78 [Reserved]

452.236–79 Opted Timber Sale Road Requirements.

As prescribed in 436.579, insert the following clause:

OPTED TIMBER SALE ROAD REQUIREMENTS (NOV 1996)

This contract is for the construction of timber sale road(s) which a timber purchaser has opted to have the Government construct. The Government is obligated to make these roads available to the timber purchaser by _____*. Failure to make these roads available by this date could result in Government liability for delay to the timber purchaser for which the Contractor might become liable should the Contractor fail to complete this contract within the specified and allowed contract time.

(End of clause)

**Contracting Officer shall insert appropriate date.*

452.236–80 Firms Ineligible for Award—Construction.

As prescribed in 436.670, insert the following clause:

FIRMS INELIGIBLE FOR AWARD—CONSTRUCTION (NOV 1996)

The firm(s) and its subsidiaries or affiliates signatory to this contract shall be ineligible for award of any construction contract resulting from the design work performed under this contract.

(End of clause)

452.237–70 Loss, Damage, Destruction or Repair.

(a) As prescribed in 437.110(a), insert a clause substantially as follows:

LOSS, DAMAGE, DESTRUCTION OR REPAIR (FEB 1988)

(a) For equipment furnished under this contract without operator, the Government will assume liability for any loss, damage or destruction of such equipment, not to exceed a total of $_____* except that no reimbursement will be made for loss, damage or destruction due to (1) ordinary wear or tear, (2) mechanical failure, or (3) the fault or negligence of the Contractor or the Contractor's agents or employees.

(b) For equipment furnished under this contract with operator, the Government shall not be liable for any loss, damage or destruction of such equipment, except for loss, damage or destruction resulting from the negligent or wrongful act(s) of Government employee(s) while acting within the scope of their employment.

(c) All repairs to equipment furnished under this contract shall be made by the Contractor and reimbursement, if any, shall be determined in accordance with (a) or (b) above. Repairs shall be made promptly and equipment returned to use within _____** hours. In lieu of repairing equipment, the Contractor may furnish similar replacement equipment within the time specified. The Contractor may authorize the Government to make repairs upon the request of the Contracting Officer. In such case, the Contractor will be billed for labor and parts costs.

(End of clause)

**Contracting Officer shall insert amount available in current funds to cover potential liability.*

***Contracting Officer shall insert appropriate number of hours.*

452.237–71 Pre-Bid/Pre-Proposal Conference.

As prescribed in 437.110(b), insert a provision substantially as follows:

PRE-BID/PRE-PROPOSAL CONFERENCE (FEB 1988)

(a) The Government is planning a pre-bid/pre-proposal conference, during which potential offerors may obtain a better understanding of the work required.

(b) Offerors are encouraged to submit all questions in writing at least five (5) days prior to the conference. Questions will be considered at any time prior to or during the conference; however, offerors will be asked to confirm verbal questions in writing. Subsequent to the conference, an amendment to the solicitation containing an abstract of the questions and answers, and a list of attendees, will be disseminated.

(c) In order to facilitate conference preparations, it is requested that the person named on the Standard Form 33 of this solicitation be contacted and advised of the number of persons who will attend.

(d) The Government assumes no responsibility for any expense incurred by an offeror prior to contract award.

(e) Offerors are cautioned that, notwithstanding any remarks or clarifications given at the conference, all terms and conditions of the solicitation remain unchanged unless they are changed by amendment to the solicitation. If the answers to conference questions, or any solicitation amendment, create ambiguities, it is the responsibility of the offeror to seek clarification prior to submitting an offer.

(f) The conference will be held:

Date: _____

Time: _____

Location: _____

(End of clause)

452.237–73 Equipment Inspection Visit.

As prescribed in 437.110(c), insert the following provision:

EQUIPMENT INSPECTION VISIT (FEB 1988)

Offerors are urged and expected to inspect the equipment on which maintenance or repairs are to be performed and to satisfy themselves regarding all conditions that may affect the cost of contract performance, to the extent that the information is reasonably obtainable. In no event shall failure to inspect the equipment constitute grounds for a claim after contract award.

Offerors are invited to inspect the _____* at _____* by telephoning _____* on _____* for an appointment.

(End of clause)

**Contracting Officer shall insert appropriate data.*

452.237–74 Key Personnel.

As prescribed in 437.110(d), insert a clause substantially as follows:

KEY PERSONNEL (FEB 1988)

(a) The Contractor shall assign to this contract the following key personnel: _____

(b) During the first ninety (90) days of performance, the Contractor shall make no substitutions of key personnel unless the substitution is necessitated by illness, death, or termination of employment. The Contractor shall notify the Contracting Officer within 15 calendar days after the occurrence of any of these events and provide the information required by paragraph (c) below. After the initial 90-day period, the Contractor shall submit the information required by paragraph (c) to the Contracting Officer at least 15 days prior to making any permanent substitutions.

(c) The Contractor shall provide a detailed explanation of the circumstances necessitating the proposed substitutions, complete resumes for the proposed substitutes, and any additional information requested by the Contracting Officer. Proposed substitutes should have comparable qualifications to those of the persons being replaced. The Contracting Officer will notify the Contractor within 15 calendar days after receipt of all required information of the decision on substitutions. The contract will be modified to reflect any approved changes of key personnel.

(End of clause)

452.237–75 Restrictions Against Disclosure.

As prescribed in 437.110(e), insert a clause substantially as follows:

RESTRICTIONS AGAINST DISCLOSURE (FEB 1988)

(a) The Contractor agrees, in the performance of this contract, to keep all information contained in source documents or other media furnished by the Government in the strictest confidence. The Contractor also agrees not to publish or otherwise divulge such information in whole or in part in any manner or form, or to authorize or permit others to do so, taking such reasonable measures as are necessary to restrict access to such information while in the Contractor's possession, to those employees needing such information to perform the work provided herein, *i.e.*, on a ''need to know'' basis. The Contractor agrees to immediately notify in writing, the Contracting Officer, named herein, in the event that the Contractor determines or has reason to suspect a breach of this requirement.

(b) The Contractor agrees not to disclose any information concerning the work under this contract to any persons or individual unless prior written approval is obtained from the Contracting Officer. The Contractor agrees to insert the substance of this clause in any consultant agreement or subcontract hereunder.

(End of clause)

452.237–76 Progress Reporting.

As prescribed in 437.270(a), insert a clause substantially as follows:

PROGRESS REPORTING (FEB 1988)

The Contractor shall submit a progress report _____*, covering work accomplished during that period of the contract performance. The progress report shall be brief and factual and shall be prepared in accordance with the following format:

(a) A cover page containing:

(1) Contract number and title;

(2) Type of report, sequence number of report, and period of performance being reported;

(3) Contractor's name and address;

(4) Author(s); and

(5) Date of report.

(b) Section I—An introduction covering the purpose and scope of the contract effort. This shall be limited to one paragraph in all but the first and final month's narrative.

(c) Section II—A description of overall progress plus a separate description of each task or other logical segment of work on which effort was expended during the report period. The description shall include pertinent data and/or graphs in sufficient detail to explain any significant results achieved.

(d) Section III—A description of current technical or substantive performance, and any problem(s) which may impede performance along with proposed corrective action.

(e) Section IV—A planning schedule shall be included with the first progress report for all assigned tasks required under the contract, along with the estimated starting and completion dates for each task. The planning schedule shall be updated and submitted with each subsequent technical progress report, including an explanation of any difference between actual progress and planned progress, why the differences have occurred, and—if behind planned progress—what corrective steps are planned.

(f) Section V—If applicable, financial information shall be submitted for each major task or line item cost.

Data shall include:

(1) The total estimated cost budgeted (fee excluded).

(2) The estimated cost expended during the current reporting period.

(3) Identification of direct labor hours of prime contractor and subcontractor(s) and/or consultant(s), if applicable.
(4) Total project to-date expenditures.
(5) Total remaining funds.

(End of clause)

**Contracting Officer shall insert frequency of reporting requirement.*

452.237–78 Contracts with Consulting Firms for Services.

As prescribed in 437.270(b), insert a clause substantially as follows:

CONTRACTS WITH CONSULTING FIRMS FOR SERVICES (FEB 1988)

Offerors are specifically cautioned that any firm(s) receiving a contract award to provide the services described herein will be prohibited from competing for or receiving a follow-on contract to perform _____.*

(End of clause)

**Contracting Officer shall insert the appropriate information.*

452.246–70 Inspection and Acceptance.

As prescribed in 446.370, insert the following clause:

INSPECTION AND ACCEPTANCE (FEB 1988)

(a) The Contracting Officer or the Contracting Officer's duly authorized representative will inspect and accept the supplies and/or services to be provided under this contract.
(b) Inspection and acceptance will be performed at: _____.*

(End of clause)

**Contracting Officer shall insert appropriate identifying data.*

Alternate I (FEB 1988). As prescribed in 446.370, substitute a paragraph (b) and add a paragraph (c):

(b) Inspection will be performed at: _____.*
(c) Acceptance will be performed at: _____.*

(End of clause)

452.247–70 Delivery Location.

As prescribed in 447.302, insert a clause substantially as follows:

DELIVERY LOCATION (FEB 1988)

Shipment of deliverable items, other than reports, shall be to: _____.*

(End of clause)

**Contracting Officer shall insert appropriate identifying data.*

452.247–71 Marking Deliverables.

As prescribed in 447.305–10(a), insert a clause substantially as follows:

MARKING DELIVERABLES (FEB 1988)

(a) The contract number shall be placed on or adjacent to all exterior mailing or shipping labels of deliverable items called for by the contract.
(b) Mark deliverables, except reports, for: _____.*

(End of clause)

**Contracting Officer shall insert the appropriate information.*

452.247–72 Packing for Domestic Shipment.

As prescribed in 447.305–10(b), insert the following clause:

PACKING FOR DOMESTIC SHIPMENT (FEB 1988)

Material shall be packed for shipment in such a manner that will insure acceptance by common carriers and safe delivery at destination. Containers and closures shall comply with the Interstate Commerce Commission regulations, Uniform Freight Classification Rules, or regulations of other carriers as applicable to the mode of transportation.

(End of clause)

452.247–73 Packing for Overseas Shipment.

As prescribed in 447.305–10(c), insert the following clause:

PACKING FOR OVERSEAS SHIPMENT (FEB 1988)

Supplies shall be packed for overseas shipment in accordance with the best commercial export practice suitable for water movement to arrive undamaged at ultimate destination.

(End of clause)

PART 453—FORMS

Sec.
453.000 Scope of part.

Subpart 453.1—General

453.103 Exceptions.
453.108 Recommendations concerning forms.

Subpart 453.2—Prescription of Forms

453.200 Scope of subpart.
453.213 Simplified Acquisition and other simplified purchase procedures (AD–838).
453.270 Request for contract action (AD–700).

Subpart 453.3—Illustrations of Forms

453.300 Scope of subpart.
453.303 Agency forms.
453.303–700 Procurement Request (AD–700).
453.303–838 Purchase Order (AD–838).

AUTHORITY: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SOURCE: 61 FR 53646, Oct. 15, 1996, unless otherwise noted.

453.000 Scope of part.

This part:

(a) Prescribes USDA (AD) forms for use in acquisition,

(b) Contains requirements and information generally applicable to AD forms and forms prescribed by FAR part 53, and

(c) Illustrates AD forms.

Subpart 453.1—General

453.103 Exceptions.

(a) The contracting officer shall submit a request for exceptions to forms prescribed in FAR part 53 through the head of the contracting activity (HCA) to the Senior Procurement Executive (SPE) for referral to the GSA.

(b) Requests for exceptions to AD forms prescribed in part 453 shall be handled as individual or class deviations, as appropriate (see subpart 401.4).

453.108 Recommendations concerning forms.

Contracting officers shall submit recommendations for new forms or to revise, eliminate, or consolidate forms prescribed by FAR part 53 and part 453 through the HCA to the SPE.

Subpart 453.2—Prescription of Forms

453.200 Scope of subpart.

This subpart prescribes USDA (AD) forms for use in acquisition. Consistent with the approach used in FAR subpart 53.2, this subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the AGAR in which the form usage requirements are addressed.

453.213 Simplified Acquisition and other simplified purchase procedures (AD–838).

Form AD–838, *Purchase Order*, is prescribed for use as a Simplified Acquisition Procedure/delivery order/task order document in lieu of OF 347 and OF 348, except that use of the OF 347 and OF 348 is authorized when utilizing the USDA Integrated Acquisition System (See 413.307).

[70 FR 50, Jan. 3, 2005]

453.270 Request for contract action (AD–700).

Form AD–700, *Procurement Request*, may be used as a contract requisition document by contracting activities in USDA.

Subpart 453.3—Illustrations of Forms

453.300 Scope of subpart.

This subpart contains illustrations of USDA (AD) forms for use in acquisitions. Forms are not illustrated in the FEDERAL REGISTER or Code of Federal Regulations. Individual copies may be obtained from any USDA contracting activity or the office of the SPE.

453.303 Agency forms.

453.303–700 Procurement Request (AD–700).

453.303–838 Purchase Order (AD–838).

SUBCHAPTER I—FOOD ASSISTANCE PROGRAMS

PART 470—COMMODITY ACQUISITIONS

Sec.
470.000 Scope of part.
470.101 Definitions.
470.102 Policy.
470.103 United States origin of agricultural products.
470.200 [Reserved]
470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.
470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.
470.203 Cargo preference.

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 1691 through 1726b; 1731 through 1736g–3; 1736o; 1736o–1; 40 U.S.C. 121(c); 46 U.S.C. 53305, 55314 and 55316.

SOURCE: 74 FR 13079, Mar. 26, 2009, unless otherwise noted.

470.000 Scope of part.

This part sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by the Department of Agriculture for use:

(a) Under any domestic feeding and assistance program administered by the Food and Nutrition Service; and

(b) Under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*); the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

470.101 Definitions.

The following definitions are applicable to this part:

Commingled product means grains, oilseeds, rice, pulses, other similar commodities and the products of such commodities, when such commodity or product is normally stored on a commingled basis in such a manner that the commodity or product produced in the United States cannot be readily distinguished from a commodity or product not produced in the United States.

Department means the Department of Agriculture.

Food and Nutrition Service means such agency located within the Department of Agriculture.

Foreign Agriculture Service means such agency located within the Department of Agriculture.

Free alongside ship (f.a.s.) (* * named port of shipment)* means a term of sale which means the seller fulfills its obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. The buyer bears all costs and risks of loss of or damage to the goods from that moment.

Free carrier (FCA) (* * named place)* means a term of sale which means the seller fulfills its obligation when the seller has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose, within the place or range stipulated, where the carrier should take the goods into their charge.

Grantee organization means an organization which will receive commodities from the United States Agency for International Development under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*) or from the Foreign Agricultural Service under the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

Ingredient means spices, vitamins, micronutrients, desiccants, and preservatives when added to an agricultural commodity product.

Last contract lay day means the last day specified in an ocean freight contract by which the carriage of goods must start for contract performance.

Lowest landed cost means, as authorized by 46 U.S.C. 55314(c), with respect to an agricultural product acquired under this part the lowest aggregate cost for the acquisition of such product and the shipment of such product to a foreign destination.

Multi-port voyage charter means the charter of an ocean carrier in which

the carrier will stop at two or more ports to discharge cargo.

470.102 Policy.

(a) *Policy*. It is the policy of the Department to follow the policies and procedures set forth in the Federal Acquisition Regulation (FAR) as supplemented by the Agriculture Acquisition Regulation, including this part, in the procurement of agricultural commodities and products of agricultural commodities that are used in domestic feeding and international feeding and development programs.

(b) *Electronic submission*. To the maximum extent possible, the use of electronic submission of solicitation-related documents shall be used with respect to the acquisition of agricultural commodities and related freight; however, to the extent that a solicitation allows for the submission of written information in addition to information in an electronic format and there is a discrepancy in such submissions, the information submitted in a written format shall prevail unless the electronic submission states that a specific existing written term is superseded by the electronic submission.

(c) *Freight*. With respect to the acquisition of freight for the shipment of agricultural commodities and products of agricultural commodities, the provisions of the FAR, including part 47, shall be utilized and various types of services to be obtained may include multi-trip voyage charters.

470.103 United States origin of agricultural products.

(a) *Products of United States origin*. As provided by 7 U.S.C. 1732(2) and 1736o–1(a) commodities and the products of agricultural commodities acquired for use in international feeding and development programs shall be products of United States origin. A product shall not be considered to be a product of the United States if it contains any ingredient that is not produced in the United States if that ingredient is:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(b) *Use by the Food and Nutrition Service*. Commodities and the products of agricultural commodities acquired for use by the Food and Nutrition Service shall be a product of the United States, except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to ingredients. Ingredients from non-domestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(c) *Commingled product*. (1) Except as provided in paragraph (c)(2) of this section, a commingled product shall be considered to be a product of the United States if the offeror can establish that the offeror has in inventory at the time the contract for the commodity or product is awarded to the offeror, or obtains during the contract performance period specified in the solicitation, or a combination thereof, a sufficient quantity of the commodity or product that was produced in the United States to fulfill the contract being awarded, and all unfulfilled contracts that the offeror entered into to provide such commingled product to the United States.

(2) To the extent the Department has determined a commodity is one that is generally commingled, but is also one which can be readily stored on an identity preserved basis with respect to its country of origin, the Department may require that the commodity procured by the Department shall be of 100 percent United States origin.

(d) *Product derived from animals*. With respect to the procurement of products derived from animals, the solicitation will set forth any specific requirement that is applicable to the country in which the animal was bred, raised, slaughtered or further processed.

470.200 [Reserved]

470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service programs.

(a) *Lowest landed cost and delivery considerations.* (1) Except as provided in paragraphs (a)(3) and (4) of this section, in contracts for the Foreign Agricultural Service for commodities and related freight shipment for delivery to foreign destinations, the contracting officer shall consider the lowest landed cost of delivering the commodity to the intended destination. This lowest landed cost determination will be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement or a related freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or related freight, when combined with other offers for commodities or related freight, results in a lower landed cost to the Department.

(2) The Department may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors considered in this determination may include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of the Department to have the commodity delivered in a safe and timely manner. Such situations include:

(i) A port is congested;

(ii) Port facilities are overloaded;

(iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) *Use of other than lowest landed cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the contracting officer may award an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors may adversely affect the delivery of such commodities through damage or untimely delivery. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels not being able to dock and load cargo without delay due to conditions at the port; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the timely delivery of the commodity;

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured; or

(E) The contracting officer determines that extenuating circumstances preclude awards on the basis of lowest-landed cost, or that efficiency and cost-savings justify use of types of ocean

service that would not involve an analysis of freight. However, in all such cases, commodities would be transported in compliance with cargo preference requirements. Examples of extenuating circumstances are events such as internal strife at the foreign destination or urgent humanitarian conditions threatening the lives of persons at the foreign destination. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery cost and freight (C & F), delivery cost insurance and freight (CIF), and indexed ocean freight costs.

(4) If a contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer will provide to the Head of Contracting Activity Designee a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis consistent with Title 48 Code of Federal Regulations. This request shall include a statement of the reasons for not using lowest landed cost basis. The Head of the Contracting Activity Designee, or the designee one level above the contracting officer, may either accept or reject this request and shall document this determination.

(b) *Multiple offers or delivery points*. If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(c) *Freight shipping and rates*. (1) In determining the lowest-landed cost, the Department shall use the freight rates offered in response to solicitations issued by the Department or, if applicable, the grantee organization.

(2) Freight rates offered must be submitted as specified in the solicitation issued by the Department or, if applicable, the grantee organization. Any such solicitation issued by a grantee organization must contain the following elements:

(i) If directed by the Department, include a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that freight offers are required to have a canceling date no later than the last contract lay day specified in the solicitation;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Be received and opened prior to any related offer for acquisition of commodities to be shipped.

(3) The Department may require organizations that will receive commodities from the Department to submit information relating to the capacity of a U.S. port, or, if applicable, a terminal, prior to the acquisition of such commodities or freight.

(d) *Freight rate notification*. If the Department is not the party procuring freight with respect to a shipment of an agricultural commodity for delivery to a foreign destination, the organization that will receive commodities from the Department, or its shipping agent, shall be notified by the Department of the vessel freight rate used in determining the commodity contract award and the organization will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate.

470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.

(a) *Lowest landed cost and delivery considerations*. (1) Except as provided in paragraphs (a)(3) and (e)(2) of this section, with respect to the acquisition of agricultural commodities for delivery to foreign destinations and related freight to transport such commodities under Title II of Public Law 480, contracts will be entered into in a manner that will result in the lowest landed cost of such commodity delivery to the

intended destination. This lowest landed cost determination shall be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet 46 U.S.C. 55314(c)(3) and cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement or a freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or freight, when combined with other offers for commodities or freight, results in a lower landed cost to USAID.

(2) The Department may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. The Department may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of the Department to have the commodity delivered in a safe and/or timely manner. Such situations include:

(i) A port is congested;

(ii) Port facilities are overloaded;

(iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) *Use of other than lowest landed cost.* In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the Department may complete an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors will adversely affect the delivery of such commodities without damage or in a timely manner. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels would not be able to dock and load cargo without delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of the Department to achieve timely delivery of the commodity; or

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer shall provide to the head of contracting activity designee and to USAID, a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis. This request shall include a statement of the reasons for not using lowest landed cost basis. The head of contracting authority designee, or one level above the contracting officer, with the concurrence of USAID, shall, on an expedited basis, either accept or reject this request and shall document this determination in writing and provide a copy to USAID.

(b) *Freight shipping and rates.* (1) In determining lowest-landed cost as specified in paragraph (a) of this section, the Department shall use vessel rates offered in response to solicitations issued by USAID or grantee organizations receiving commodities under 7 U.S.C. 1731 *et seq.*

(2) USAID may require, or direct a grantee organization to require, an ocean carrier to submit offers electronically through a Web-based system maintained by the Department. If electronic submissions are required, the Department may, at its discretion, accept corrections to such submissions that are submitted in a written form other than by use of such Web-based system.

(c) *Delivery date.* The contracting officer shall consider total transit time, as it relates to a final delivery date, in order to satisfy Public Law 480 Title II program requirements.

(d) *Delivery points.* (1) Commodities offered for delivery free alongside ship Great Lakes port range or intermodal bridge-point Great Lakes port range that represent the overall (foreign and U.S. flag) lowest landed cost will be awarded on a lowest landed cost basis. Tonnage allocated on this basis will not be reevaluated on a lowest landed cost U.S.-flag basis unless the contracting officer determines that 25 percent of the total annual tonnage of bagged, processed, or fortified commodities furnished under 7 U.S.C. 1731 *et seq.* has been, or will be, transported from the Great Lakes port range during that fiscal year.

(2) The contracting officer shall consider commodity offers as offers for delivery ''intermodal bridge-point Great Lakes port range'' only if:

(i) The offer specifies delivery at a marine cargo-handling facility that is capable of loading ocean going vessels at a Great Lakes port, as well as loading ocean going conveyances such as barges and container vans, and

(ii) The commodities will be moved from one transportation conveyance to another at such a facility.

(e) *Multiple awards or delivery points.* (1) If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(2) The contracting officer may determine that extenuating circumstances preclude awards on the basis of lowest landed cost. However, in all such cases, commodities may be transported in compliance with cargo preference requirements as determined by USAID.

(3) The contracting officer shall notify USAID or, if applicable, the grantee organization, that its shipping agent will be notified of the vessel freight rate used in determining the commodity contract award. The grantee organization or USAID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

470.203 Cargo preference.

An agency having responsibility under this subpart shall administer its programs, with respect to this subpart, in accordance with regulations prescribed by the Secretary of Transportation.

CHAPTER 5—GENERAL SERVICES ADMINISTRATION

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SUBCHAPTER A—GENERAL

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

Subpart 501.1—Purpose, Authority, Issuance

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501.404–71 Deviations to the nonregulatory GSAM.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37203, July 9, 1999, unless otherwise noted.

Subpart 501.1—Purpose, Authority, Issuance

501.101 Purpose.

(a) The General Services Acquisition Regulation (GSAR) contains agency acquisition policies and practices, contract clauses, solicitation provisions, and forms that control the relationship between GSA and contractors and prospective contractors.

(b) GSAR address rules directly to you, the contracting officer, unless otherwise indicated.

501.103 Authority.

GSA's Senior Procurement Executive issues the GSAR under the authority of the Federal Property and Administrative Services Act of 1949, as amended.

501.104 Applicability.

(a) *General.* The GSAR applies to contracts for suppliers or services, including construction.

(b) *Acquisition of leasehold interests in real property.* Part 570 establishes rules for the acquisition of leasehold interests in real property. Other provisions of 48 CFR chapter 5 (GSAR) do not apply to leases of real property unless specifically cross-reference in part 570.

(c) *Relationship to state.* Some GSAR rules implement and interpret laws and other authorities affecting procurement. A GSAR rule specifically directed by statute has the force and effect of law.

(d) *GSAR/FAR Relationship.* The GSAR may deviate from the Federal Acquisition Regulation (FAR) if authorized. If the GSAR does not implement the FAR, the FAR alone governs.

501.105 Issuance.

501.105–1 Publication and code arrangement.

The GSAR is published in the following sources:

(a) Daily issue of the FEDERAL REGISTER.

(b) Annual Code of Federal Regulations (CFR), as Chapter 5 of Title 48.

(c) GSA Acquisition Manual distributed within GSA.

(d) GSA Home Page at *http://www/gas.gov*. Click on either ''Government Agencies'' or on ''Business and Industry,'' the click on ''Acquisition.''

501.105–2 Arrangement of regulations.

(a) The GSAR numbers and captions policies and procedures to correspond to how they appear in the FAR, e.g., 1.104 in the FAR is 501.104 in the GSAR.

(b) GSAR rules not implementing the FAR have numbers beginning with 70, e.g., part 570, subsection 515.209–70.

(c) The GSAR may have gaps in its numbering scheme because a FAR rule may not require GSAR implementation.

501.105–3 Copies.

The GSAR in CFR form may be purchased from: Superintendent of Documents, Government Printing Office, Washington, DC 20402.

501.106 OMB approval under the Paperwork Reduction Act.

GSAR Reference	OMB Control No.
509.105–1(a)	3090–0007
511.140–70	3090–0203
511.204(c)	3090–0246
514.201–1(a)	3090–0163
514.201–7(a)	3090–0200
516.203–4(a)(1)	3090–0243
516.506	3090–0248
519.70	3090–0286
519.708(b)	3090–0252
522.406–6	1215–0149
523.370	3090–0205
532.111(c)	3090–0080
532.905–70	9000–0102
532.905–71	3090–0080
537.110(a)	3090–0197
537.110(b)	3090–0006
538.273(a)(1)	3090–0250
538.273(a)(3)	3090–0262
538.273(b)(1)	3090–0121
542.1107	3090–0027
546.307–70	3090–0027
546.302–71	3090–0027
552.211–77	3090–0246
552.214–71	3090–0200
552.216–70	3090–0243
552.216–72	3090–0248
552.216–73	3090–0248
552.219–72	3090–0252
552.219–75	3090–0286
552.219–76	3090–0286
552.223–72	3090–0205
552.232–72	3090–0080
552.237–70	3090–0197
552.237–71	3090–0006
552.238–70	3090–0250
552.238–72	3090–0262
552.238–74	3090–0121, 3090–0250
552.242–70	3090–0027
552.246–70	3090–0027
552.246–71	3090–0027
GSA–72–A	3090–0121
GSA–527	3090–0007
GSA–618–D	1215–0149
GSA–1142	3090–0080
GSA–1364	3090–0086
GSA–1678	3090–0027
GSA–2419	9000–0102
570.702(c)	3090–0086

[64 FR 37203, July 9, 1999, as amended at 65 FR 41378, July 5, 2000; 68 FR 41288, July 11, 2003; 74 FR 21273, May 7, 2009; 74 FR 41063, Aug. 14, 2009; 74 FR 47738, Sept. 17, 2009; 74 FR 66253, Dec. 15, 2009]

EDITORIAL NOTE: At 74 FR 66253, Dec. 15, 2009, the table in § 501.106 was amended by removing the GSAR reference number ''511.104–70'' and its corresponding OMB Control Number ''3090–0203''; however, the amendment could not be done because this reference number is not found in the table.

Subpart 501.4—Deviations From the FAR and GSAR

501.402 Policy.

Uniformity is a goal of GSA's Acquisition Regulation System. Despite this desire for uniformity, a contracting activity may take any of the following actions:

(a) Develop and test new procedures and techniques.

(b) Adopt alternate procedures in the public interest for unique programmatic or managerial requirements

(c) Deviate from a regulatory provision implementing a statutory requirement provided the deviation does not violate the underlying statute. Deviations must not be used to defeat the FAR and GSAR approval requirements.

501.403 Individual deviations.

(a) An individual deviation affects only one contract action.

(1) The Head of the Contracting Activity (HCA) must approve an individual deviation to the FAR. The authority to grant an individual deviation may not be re-delegated. A copy of the deviation must be provided to GSA's Senior Procurement Executive (SPE).

(2) An individual deviation to the GSAR must be approved by the HCA. The authority to grant an individual deviation may be re-delegated to the Contracting Director.

(b) If GSA delegates authority to another agency and requires compliance with the GSAR as a condition of the delegation, the Contracting Director in the agency receiving the delegation may approve individual deviations from the GSAR unless the agency head receiving the delegation designates another official.

(c) Send a copy of each deviation to GSA's SPE (V).

[64 FR 37203, July 9, 1999, as amended at 70 FR 15779, Mar. 29, 2005]

501.404 Class deviations.

(a) A class deviation affects more than one contract action. A deviation for any solicitation that will result in multiple awards or any solicitation under the multiple award Federal Supply Schedule program is considered to

be a class deviation. Each award under such a solicitation is considered an individual contract action.

(1) A class deviation to the FAR must be forwarded by the cognizant HCA to GSA's SPE for approval. Prior to approving a class deviation to the FAR, the SPE will consult with the Chairman of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a)(1).

(2) A class deviation to the GSAR must be forwarded by the cognizant HCA to GSA's SPE for approval.

(3) When an HCA knows that a proposed class deviation will be required on a permanent basis, the HCA should propose or recommend an appropriate FAR and/or GSAR revision.

(b) If GSA delegates authority to another agency and requires compliance with the GSAR as a condition of the delegation, the HCA in the agency receiving the delegation may approve class deviations from the GSAR unless the agency head receiving the delegation designates another official.

(c) Send a copy of each deviation to GSA's SPE (V).

(d) A request for class deviations must be supported by statements that fully describe the need for and the nature of the deviation.

(e) Class deviations from the GSAR:

(1) Expire in 12 months if not extended.

(2) May be rescinded earlier by GSA's SPE or by officials designated under paragraph (a) of this section without prejudice to any action taken previously.

[64 FR 37203, July 9, 1999, as amended at 70 FR 15780, Mar. 29, 2005]

501.404–70 Contract action.

Contract action. A contract action, for the purpose of determining whether an individual or class deviation is appropriate, has the same meaning as that used for reporting contract actions to Federal Procurement Data System—Next Generation (FPDS-NG). A contract action includes, but is not limited to, any of the following:

(a) Initial letter contract.

(b) Definitive contract superseding letter contract.

(c) New definitive contract.

(d) Purchase order/BPA calls using simplified acquisition procedures.

(e) Orders under single award indefinite delivery contracts.

(f) Orders under BOA.

(g) Order/modification under Federal schedule contract.

(h) Modification.

(i) Termination for Default.

(j) Termination for Convenience.

(k) Order under multiple award contract.

(l) Initial load of Federal schedule contract.

[70 FR 15780, Mar. 29, 2005]

501.404–71 Deviations to the nonregulatory GSAM.

Handle individual and class deviations to the nonregulatory (unshaded) part of the GSAM as stated in 501.403 and 501.404.

[70 FR 15780, Mar. 29, 2005]

PART 502—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37204, July 9, 1999, unless otherwise noted.

Subpart 502.1—Definitions

502.101 Definitions.

Agency competition advocate means the GSA Competition Advocate in the Office of the Chief Acquisition Officer.

Assigned counsel means the attorney employed by the Office of General Counsel (including offices of Regional Counsel) assigned to provide legal review or assistance.

Contracting activity competition advocate means the individual designated in writing by the Head of the Contracting Activity (HCA). This authority may not be redelegated. The HCA must ensure that the designated competition advocate is not assigned any duty or responsibility that is inconsistent with the advocacy function. The identity of the designated official shall be communicated to procuring staff and the Senior Procurement Executive.

Contracting director means:

(a) Except in the Federal Acquisition Service (FAS), a director of a Central

Office or Regional office Division responsible for performing contracting or contract administration functions.

(b) In FAS Central Office—

(1) The Assistant Commissioner for Assisted Acquisition Services or designee;

(2) The Assistant Commissioner for General Supplies and Services or designee;

(3) The Assistant Commissioner for Integrated Technology Services or designee;

(4) The Assistant Commissioner for Travel, Motor Vehicle and Card Services or designee; and

(5) The Assistant Commissioner for Acquisition Management or designee for support offices with contracting functions.

(c) In FAS Regions, the Assistant Regional Commissioner or designee.

Contracting officer's representative (COR), contracting officer's technical representative (COTR), or contract administrator means a Government employee designated in writing by the contracting officer to perform specific limited activities for the contracting officer, such as contract administration.

Debarring official or ''suspending official'' means the Senior Procurement Executive or a designee.

Head of the contracting activity means the Deputy Chief Acquisition Officer; Commissioners of the Federal Acquisition Service (FAS) or Public Buildings Service (PBS); or Regional Commissioners. The Deputy Chief Acquisition Officer serves as the HCA for Central Office contracting activities outside of FAS and PBS.

Senior procurement executive means the Deputy Chief Acquisition Officer.

Senior program official means a person reporting to, and designated by, the HCA to have overall program responsibility for determining how the agency will meet its needs. The official should have a position of authority over the participating offices. Examples include Assistant Regional Commissioners or Deputy Commissioners.

[74 FR 39564, Aug. 7, 2009]

PART 503—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 503.1—Safeguards

Sec.
503.104 Procurement integrity.

Subpart 503.2—Contractor Gratuities to Government Personnel

503.204 Treatment of violations.

Subpart 503.4—Contingent Fees

Subpart 503.5—Other Improper Business Practices

503.570 Advertising.
503.570–1 Policy.
503.570–2 Contract clause.

Subpart 503.7—Voiding and Rescinding Contracts

503.703 Authority.

Subpart 503.10—Contractor Code of Business Ethics and Conduct

503.1004 Contract clauses.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: At 64 FR 37204, July 9, 1999, unless otherwise noted.

Subpart 503.1—Safeguards

503.104 Procurement integrity.

Subpart 503.2—Contractor Gratuities to Government Personnel

503.204 Treatment of violations.

(a) The Senior Procurement Executive, or designee, makes determinations under FAR 3.204.

The Senior Procurement Executive, or designee, takes all the following actions:

(1) Coordinates with legal counsel;

(2) Initiates proceedings under FAR 3.204(a) by notifying the contractor that GSA is considering action against the contractor for a violation of the Gratuities clause. Notice is sent by a certified letter to the last known address of the party, its counsel, or agent for service of process. In the case of a business, notice is sent to any partner,

principal officer, director, owner or co-owner; and

(3) Presumes receipt if no return receipt is received within 10 calendar days after mailing the notice.

(b) The contractor has 30 calendar days to exercise its rights under FAR 3.204(b), unless the Senior Procurement Executive, or designee, grants an extension.

(c) If there is a dispute of fact material to making a determination, the Senior Procurement Executive, or designee, may refer the matter to an agency fact-finding official, designated by the Suspension and Debarment Official, in accordance with GSAR 509.403. Referrals for fact-finding are not made in cases arising from a conviction or indictment as defined in FAR 9.403. If a referral is made, the fact-finding official takes all the following actions:

(1) Gives the contractor an opportunity to dispute material facts relating to the determinations under FAR 3.204(a)(1) and (2);

(2) Conducts proceedings under rules consistent with FAR 3.204(b);

(3) Schedules a hearing within 20 calendar days of receipt of the referral. The contractor or GSA may request an extension for good cause; and

(4) Delivers to the Senior Procurement Executive, or designee, written findings of fact (together with a transcription of the proceedings, if made) within 20 calendar days after the hearing record closes. The findings must resolve any material disputes of fact by a preponderance of the evidence.

(d) The Senior Procurement Executive, or designee, may reject the findings of the fact-finding official only if the findings are clearly erroneous or arbitrary and capricious.

(e) In cases arising from conviction or indictment, or in which there are no disputes of material fact, the Senior Procurement Executive, or designee, conducts the hearing required by FAR 3.204(b).

(f) If the Gratuities clause was violated, the contractor may present evidence of mitigating factors to the Senior Procurement Executive, or designee, in accordance with FAR 3.204(b) either orally or in writing, consistent with a schedule the Senior Procurement Executive, or designee, establishes. The Senior Procurement Executive, or designee, exercises the Government's rights under FAR 3.204(c) only after considering mitigating factors.

[64 FR 37204, July 9, 1999, as amended at 74 FR 51511, Oct. 7, 2009]

Subpart 503.4—Contingent Fees

Subpart 503.5—Other Improper Business Practices

503.570 Advertising.

503.570–1 Policy.

GSA policy precludes contractors from making references to GSA contracts in commercial advertising in a manner that states or implies the Government approves or endorses the product or service or considers it superior to other products or services. The intent of this policy is to prevent the appearance of Government bias toward any product or service.

[64 FR 37204, July 9, 1999, as amended at 74 FR 51511, Oct. 7, 2009]

503.570–2 Contract clause.

Insert the clause at 552.203–71, Restriction on Advertising, in solicitations and contracts, including acquisitions of leasehold interests in real property, if the contract amount is expected to exceed the simplified acquisition threshold.

Subpart 503.7—Voiding and Rescinding Contracts

503.703 Authority.

Pursuant to FAR 3.703 and 3.705(b), the authority to void or rescind contracts resides with the Senior Procurement Executive.

[74 FR 51512, Oct. 7, 2009]

Subpart 503.10—Contractor Code of Business Ethics and Conduct

503.1004 Contract clauses.

(a) The FAR threshold for the clause at 52.203–14, Display of Hotline Poster(s), is $5,000,000. However, GSA has exercised the authority provided at FAR 3.1004(b)(1)(i) to establish a lower threshold, $1,000,000, for inclusion of

the clause when the contract or order is funded with disaster assistance funds.

(b) The information required to be inserted in the clause at FAR 52.203–14, Display of Hotline Poster(s), is as follows:

(1) Poster: GSA Office of Inspector General ''FRAUDNET HOTLINE''; and

(2) Obtain from: Contracting Officer.

[74 FR 51512, Oct. 7, 2009]

PART 504—ADMINISTRATIVE MATTERS

Subpart 504.4—Safeguarding Classified Information Within Industry

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504.402 General.
504.475 Return of classified information.

Subpart 504.5—Electronic Commerce in Contracting

504.500 Scope of subpart.
504.502 Policy.
504.570 Procedures for using the EPS.

Subpart 504.6—Contract Reporting

504.602–71 Federal Procurement Data System—Public access to data.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37205, July 9, 1999, unless otherwise noted.

Subpart 504.4—Safeguarding Classified Information Within Industry

504.402 General.

(a) This subpart:

(1) Prescribes procedures for safeguarding classified information required to be disclosed to contractors in connection with the solicitation of offers, and the award, performance, and termination of contracts.

(2) Implements the requirements of the Department of Defense's Industrial Security Regulation (ISR) and Industrial Security Manual for Safeguarding Classified Information (ISM). By agreement, the Department of Defense (DOD) will act for, and on behalf of, GSA in rendering security services required for safeguarding classified information released by GSA to U.S. industry.

(b) As used in this subpart, the term:

(1) ''Contractor(s)'' means prospective contractors, subcontractors, vendors, and suppliers.

(2) ''U.S. industry'' means those industries (including educational and research institutions) located within the United States, its possessions, and the Commonwealth of Puerto Rico.

504.475 Return of classified information.

(a) You must recover classified information unless it has been destroyed as provided in paragraph 19 of the ISM. The Government agency that provided classified information to a GSA contractor is responsible for the return of the information.

(b) You must ensure that classified information furnished to prospective offerors, offerors, or contractors is returned immediately after any of the following:

(1) After bid opening or closing date for receipt of proposals by non-responding offerors.

(2) After contract award by unsuccessful offerors.

(3) Upon termination or completion of the contract.

(4) Upon notification that authorization to release classified information has been withdrawn.

(5) After notification that a facility:

(i) Does not have adequate means to safeguard classified information.

(ii) Has had its security clearance revoked or inactivated.

(6) Whenever otherwise instructed by the authority responsible for the security classification.

Subpart 504.5—Electronic Commerce in Contracting

504.500 Scope of subpart.

This subpart provides policy and procedure for use of GSA's Electronic Posting System (EPS).

504.502 Policy.

(a) The EPS is GSA's primary vehicle for disseminating synopses and written solicitations. GSA intends that the EPS will substitute for, not supplement, paper copies of solicitations.

(Note that FAR 2.101 defines ''in writing'' or ''written'' to include ''electronically transmitted and stored information.'')

(b) This policy does not apply to orders placed against existing contracts, including Federal Supply Service schedule contracts.

(c) Nothing in this policy limits your authority to obtain oral quotations or proposals as authorized by regulation (e.g., FAR 13.106–1 or FAR 15.203(f)).

504.570 Procedures for using the EPS.

(a) You must use the EPS to issue any synopsis required by FAR part 5 or GSAR part 505.

(b) You must issue each written solicitation on the EPS, except as provided in paragraphs (c)(2) and (d) of this section.

(c) Although GSA intends that the EPS will substitute for paper copies of solicitations, web-based transactions are not practical in some industries or in some geographic areas at this time.

(1) If you expect that electronic access to a solicitation will result in adequate competition, distribute the solicitation only through the EPS. Include the following notice in the related synopsis:

GSA is issuing this solicitation only electronically. Interested parties may access the solicitation at *http://www.eps.gov*. This site provides instructions for downloading the solicitation file.

(2) If you believe that distribution of paper copies is necessary to ensure adequate competition, document the file to justify distribution of paper copies. Include the notice in paragraph (c)(1) of this section in the related synopsis, leaving out the first sentence.

(d) In some cases, release of construction drawings must be controlled to ensure adequate security. In other cases, an exhibit or attachment incorporated in a solicitation may not be available electronically. In either of these cases, you must explain in both the synopsis and the solicitation how interested parties may obtain a copy. In addition to the notice required by paragraph (c), include a notice substantially the same as follows in both the synopsis and solicitation. Tailor the notice as necessary for the particular acquisition.

This solicitation incorporates documents which are not available electronically. See [Identify the solicitation section that lists the subject documents]. Interested parties may request copies of these documents by writing the Contracting Officer at the address in [Identify address block in the solicitation].

(e) The Electronic Posting System Manual provides detailed instructions for using the EPS. The Manual is available at *http://www.eps.gov/buyer.html*.

Subpart 504.6—Contract Reporting

504.602–71 Federal Procurement Data System—Public access to data.

(a) *The FPDS database*. The General Services Administration awarded a contract for creation and operation of the Federal Procurement Data System (FPDS) database. That database includes information reported by departments and agencies as required by Federal Acquisition Regulation (FAR) Subpart 4.6. One of the primary purposes of the FPDS database is to provide information on Government procurement to the public.

(b) *Fee for direct hook-up*. To the extent that a member of the public requests establishment of real-time integration of reporting services to run reports from another application, a one-time charge of $2,500 for the original integration must be paid by the requestor. This one-time charge covers the setup and certification required for an integrator to access the FPDS database and for technical assistance to help integrators use the web services. The fee will be paid to the FPDS contractor and credited to invoices submitted to GSA by the FPDS contractor.

[69 FR 77662, Dec. 28, 2004]

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 505 [RESERVED]

PART 509—CONTRACTOR QUALIFICATIONS

Subpart 509.1—Responsible Prospective Contractors

Sec.
509.105 Procedures.
509.105–1 Obtaining information.
509.105–2 Determinations and documentation.
509.106–2 Requests for preaward surveys.

Subpart 509.2 [Reserved]

Subpart 509.3—First Article Testing and Approval

509.306 Solicitation requirements.
509.308–1 Testing performed by the contractor.
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Subpart 509.4—Debarment, Suspension, and Ineligibility

509.401 Applicability.
509.403 Definitions.
509.405 Effect of listing.
509.405–1 Continuation of current contracts.
509.405–2 Restrictions on subcontracting.
509.406 Debarment.
509.406–1 General.
509.406–3 Procedures.
509.407 Suspension.
509.407–1 General.
509.407–3 Procedures.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37207, July 9, 1999, unless otherwise noted.

Subpart 509.1—Responsible Prospective Contractors

509.105 Procedures.

509.105–1 Obtaining information.

(a) *From a prospective contractor*. FAR 9.105–1 lists a number of sources of information that a contracting officer may utilize before making a determination of responsibility. The contracting officer may request information directly from a prospective contractor using GSA Form 527, Contractor's Qualifications and Financial Information, but only after exhausting other available sources of information.

(b) *From Government personnel*. The contracting officer may solicit and consider information from any appropriate activities, e.g., legal counsel, quality control, contract management, credit and finance, and auditors before determining that an offeror is responsible.

[74 FR 12732, Mar. 25, 2009]

509.105–2 Determinations and documentation.

(a) The contracting officer shall provide written notification to a prospective contractor determined not responsible. Include the basis for the determination. Notification provides the prospective contractor with the opportunity to correct any problem for future solicitations.

(b) Due to the potential for de facto debarment, the contracting officer shall avoid making repeated determinations of nonresponsibility based on the same past performance information.

(c) To provide for timely consideration of the need to institute action to debar a contractor, the contracting officer shall submit a copy of each nonresponsibility determination, other than those based on capacity or financial capability, to the Suspension and Debarment Official in the Office of the Chief Acquisition Officer.

[74 FR 12732, Mar. 25, 2009]

509.106–2 Requests for preaward surveys.

Federal Supply Service (FSS). Contracting activities in FSS may use GSA Form 353, Performance Evaluation & Facilities Report, in lieu of SF 1403 through 1406. Complete Section I in accordance with instructions in 553.370–353–I.

Subpart 509.2 [Reserved]

Subpart 509.3—First Article Testing and Approval

509.306 Solicitation requirements.

The clauses at FAR 52.209–3 and 52.209–4 do not cover all the solicitation requirements described in FAR 9.306. If a solicitation contains a testing and approval requirement, the contracting officer must address the requirements in FAR 9.306(d) and (f) through (j) in the solicitation's Section H, special contract requirements.

[74 FR 12732, Mar. 25, 2009]

509.308–1 Testing performed by the contractor.

In FSS solicitations and contracts that will require the contractor to perform testing, insert 552.209–72, Supplemental Requirements for First Article Approval—Contractor Testing, and FAR 52.209–3, Alternate I.

509.308–2 Testing performed by the Government.

In FSS solicitations and contracts that will have the Government responsible for first article testing, insert 552.209.73, Supplemental Requirements for First Article Approval—Government Testing, and FAR 52.209–4, Alternate I.

Subpart 509.4—Debarment, Suspension, and Ineligibility

509.401 Applicability.

This subpart applies to all the following:

(a) Acquisitions of personal property, nonpersonal services, construction, and space in buildings.

(b) Acquisition of transportation services (Federal Management Regulation (FMR) Parts 102–117 and 102–118 (41 CFR parts 102–117 and 102–118)).

(c) Contracts for disposal of personal property (FMR Parts 102–36 through 102–38 (41 CFR parts 102–36 through 102–38)).

(d) Covered transactions as defined by 41 CFR part 105–68.

[74 FR 12732, Mar. 25, 2009]

509.403 Definitions.

Debarring official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

Fact-finding official, means the Suspension and Debarment Official or a designee.

Notice means a letter sent by certified mail, return receipt requested, to the last known address of a party, its counsel, or agent for service of process. In the case of a business, such notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venturer. If no return receipt is received within 10 calendar days of mailing, receipt will then be presumed.

Suspending official means the Suspension and Debarment Official within the Office of the Chief Acquisition Officer.

[64 FR 37207, July 9, 1999, as amended at 74 FR 12732, Mar. 25, 2009]

509.405 Effect of listing.

509.405–1 Continuation of current contracts.

(a) When a contractor appears on the current EPLS, consider terminating a contract under any of the following circumstances:

(1) Any circumstances giving rise to the debarment or suspension also constitute a default in the contractor's performance of the contract.

(2) The contractor presents a significant risk to the Government in completing the contract.

(3) The conduct that provides the cause of the suspension, proposed debarment, or debarment involved a GSA contract.

(b) Before terminating a contract when a contractor appears on the current EPLS, consider the following factors:

(1) Seriousness of the cause for debarment or suspension.

(2) Extent of contract performance.

(3) Potential costs of termination and reprocurement.

(4) Need for or urgency of the requirement, contract coverage, and the impact of delay for reprocurement.

(5) Availability of other safeguards to protect the Government's interest until completion of the contract.

(6) Availability of alternate competitive sources to meet the requirement

(e.g., other multiple award contracts, readily available commercial items.)

(c) The responsibilities of the agency head under FAR 9.405–1 are delegated to the GSA Suspension and Debarment Official.

[74 FR 12732, Mar. 25, 2009]

509.405–2 Restrictions on subcontracting.

The responsibilities of the agency head under FAR 9.405–2(a) are delegated to the GSA Suspension and Debarment Official.

[74 FR 12732, Mar. 25, 2009]

509.406 Debarment.

509.406–1 General.

The Suspension and Debarment Official is the designee under FAR 9.406–1(c).

[74 FR 12733, Mar. 25, 2009]

509.406–3 Procedures.

(a) *Investigation and referral.* (1) Refer to the Suspension and Debarment Official matters involving serious contract improprieties or performance deficiencies. Performance deficiencies that continue over a period of time or apply to more than one contract may warrant debarment consideration.

(2) Refer possible criminal or fraudulent activities to the Office of the Inspector General (OIG). See 5 CFR 6701.107, Reporting Waste, Fraud, Abuse, and Corruption. If, after investigation, the OIG believes a cause for debarment exists, it will refer the matter to the Suspension and Debarment Official for consideration of debarment action.

(b) *Reports.* Include in referrals to the Suspension and Debarment Official a report that contains at least the following:

(1) The recommendation and supporting rationale.

(2) A list of parties to be considered for possible debarment, including the contractor, principals, and affiliates. Include last known home and business addresses, zip codes, and DUNS Numbers.

(3) A statement of facts.

(4) Copies of documentary evidence and a list of witnesses. Include addresses and telephone numbers. Determine their availability to appear at a fact-finding proceeding and identify the subject matter of their testimony.

(5) GSA's acquisition history with the contractor. Include recent experience, copies of the pertinent contracts, and an explanation of impact debarment would have on GSA programs. OIG referrals do not require this explanation; the Suspension and Debarment Official will obtain the information directly from the contracting activity(s).

(6) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Board of Contract Appeals.

(c) *Review.* The Suspension and Debarment Official will review the report, and after coordinating with assigned legal counsel—

(1) Initiate debarment action;

(2) Decline debarment action;

(3) Request additional information; or

(4) Refer the matter to the OIG for further investigation and development of a case file.

(d) *Decisionmaking process.* (1) The Suspension and Debarment Official will provide:

(i) Notice of declinations, proposed debarments, and decisions to the referring activity.

(ii) Notice of proposed debarment to each party being considered for debarment.

(iii) Decision notices to each party after considering information in the administrative record and information and argument submitted by the affected party or parties.

(2) A party proposed for debarment:

(i) Has 30 calendar days after receipt of the notice to respond to the Suspension and Debarment Official or the debarment becomes final.

(ii) May request and receive a copy of the administrative record that was the basis for the proposed debarment. If information is withheld, the party will be notified and provided the reason.

(iii) May request the opportunity to present information and argument in person to the Suspension and Debarment Official. The Suspension and Debarment Official will schedule an oral presentation within 20 calendar days of

receipt of the request, unless a longer period of time is requested by the party. An oral presentation is informal and a transcript usually is not made. The party may supplement the oral presentation with written information and arguments.

(iv) May identify to the Suspension and Debarment Official material facts in dispute and the bases. For an action other than one based on a conviction of civil judgment, a party may request review and a written finding by a fact-finding official.

(3) Following a review of the record and, if needed, a presentation by the contractor in opposition to the proposed action, the Suspension and Debarment Official will determine whether there is a genuine dispute of material fact. If so, the Suspension and Debarment Official will initiate the fact-finding process. The fact-finding official will:

(i) Establish a date for a fact-finding proceeding, normally to be held within 45 days of the determination of who will function as the fact-finding official.

(ii) Grant extensions for good cause.

(iii) Provide notice of the scheduled hearing.

(iv) Provide the parties with a schedule for exchange of documents and witness lists.

(v) Develop an official transcript of the fact-finding proceeding.

(vi) Provide the Government's representative and the contractor with an opportunity to present evidence relevant to the facts at issue. The contractor may appear in person or through a representative.

(vii) Conduct hearings under rules consistent with FAR 9.406–3 pertaining to fact finding. Neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure govern fact finding. Hearsay evidence may be presented and will be given appropriate weight by the fact-finding official.

(viii) Provide for witness testimony. Witnesses may testify in person. Witnesses are subject to cross examination.

(ix) Prepare written findings of fact based on a preponderance of the evidence and submit them to both the Suspension and Debarment Official and the contractor within 20 calendar days following the conclusion of the fact-finding proceeding.

[64 FR 37207, July 9, 1999, as amended at 74 FR 12733, Mar. 25, 2009]

509.407 Suspension.

509.407–1 General.

The Suspension and Debarment Official is the designee under FAR 9.407–1(d).

[64 FR 37207, July 9, 1999, as amended at 74 FR 12733, Mar. 25, 2009]

509.407–3 Procedures.

(a) *General*. The procedures in 509.406–3 apply to suspension actions except as noted in paragraph (b) of this section.

(b) *Fact-finding*. (1) Fact-finding will not be conducted in an action:

(i) Based on an indictment.

(ii) When the Suspension and Debarment Official finds no genuine dispute of material facts.

(2) If the action is not based on an indictment, the Suspension and Debarment Official must coordinate with the Department of Justice or state prosecutorial authority through OIG. Based on the advice received, the Suspension and Debarment Official will determine if fact-finding would impair substantial interests of the Federal or state Government. In an action not based on an indictment, a suspended party may:

(i) Identify to the Suspension and Debarment Official material facts in dispute and the bases.

(ii) Request review and a written finding by a fact-finding official to resolve genuine disputes of material fact. For procedures involving a genuine dispute of material fact, see 509.406–3(d)(3).

[64 FR 37207, July 9, 1999, as amended at 74 FR 12733, Mar. 25, 2009]

PART 511—DESCRIBING AGENCY NEEDS

Subpart 511.2—Using and Maintaining Requirements Documents

Sec.

511.204 Solicitation provisions and contract clauses.

Subpart 511.4—Delivery or Performance Schedules

511.404 Contract clauses.

Subpart 511.6—Priorities and Allocations

511.600 Scope of subpart.
511.601 [Reserved]
511.602 General.
511.603 Procedures.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37209, July 9, 1999, unless otherwise noted.

Subpart 511.2—Using and Maintaining Requirements Documents

511.204 Solicitation provisions and contract clauses.

(a) *Federal specifications.* The contracting officer shall insert the clause at 552.211–72, Reference to Specifications in Drawings, in solicitations and contracts citing Federal or agency specifications that contain drawings.

(b) *Supply contracts that exceed the simplified acquisition threshold.* (1) The contracting officer shall include the clause at 552.211–73, Marking, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(2) The contracting officer shall include the clause at 552.211–75, Preservation, Packaging, and Packing, in solicitations and contracts for supplies expected to exceed the simplified acquisition threshold. The contracting officer may also include the clause in contracts estimated to be at or below the simplified acquisition threshold when appropriate. The contracting officer shall use Alternate I in solicitations and contracts for—

(i) Federal Supply Schedule 70 and the Consolidated Products and Services Schedule containing information technology Special Item Numbers; or

(ii) Federal Supply Schedules for recovery purchasing (see 538.7102).

(3) The contracting officer shall insert a clause substantially the same as the clause at 552.211–76, Charges for Packaging, Packing, and Marking, in solicitations and contracts for supplies to be delivered to GSA distribution centers.

(4) The contracting officer shall include the clause 552.211–85, Consistent Pack and Package Requirements, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(5) The contracting officer shall include the clause 552.211–86, Maximum Weight Per Shipping Container, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(6) The contracting officer shall include the clause 552.211–87, Export Packing, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(7) The contracting officer shall include the clause 552.211–88, Vehicle Export Preparation, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(8) The contracting officer shall include the clause at 552.211–89, Non-Manufactured Wood Packaging Material for Export, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities overseas and the contract amount is expected to exceed the simplified acquisition threshold.

(9) The contracting officer shall include the clause 552.211–90, Small Parts, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(10) The contracting officer shall include the clause 552.211–91, Vehicle Decals, Stickers, and Data Plates, in solicitations and contracts for supplies when deliveries may be made to both civilian and military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(11) The contracting officer shall include the clause 552.211–92, Radio Frequency Identification (RFID) using Passive Tags, in solicitations and contracts for supplies when deliveries may be made to military activities and the contract amount is expected to exceed the simplified acquisition threshold.

(12) The contracting officer shall include the clause 552.211–93, Unique Item Identification (UID), in solicitations and contracts for supplies when deliveries may be made to military activities and a single item exceeds $5,000.00 in cost.

(c) *Supply contracts.* The contracting officer shall include the clause at 552.211–77, Packing List, in solicitations and contracts for supplies, including purchases over the micropurchase threshold. Use Alternate I in solicitations and contracts for—

(1) FSS Schedule 70 and the Consolidated Products and Services Schedule containing information technology Special Item Numbers; or

(2) Federal Supply Schedules for recovery purchasing (see 538.7102).

[74 FR 66253, Dec. 15, 2009]

Subpart 511.4—Delivery or Performance Schedules

511.404 Contract clauses.

In supply contracts, the contracting officer shall use the clauses as specified in this section.

(a) *Shelf-life items.* The contracting officer shall use the following clauses in solicitations and contracts that require delivery of shelf-life items within a specified number of months from the date of manufacture or production:

(1) The contracting officer shall insert 552.211–79, Acceptable Age of Supplies, if the required shelf-life period is 12 months or less, and lengthy acceptance testing may be involved. For items having a limited shelf-life, substitute Alternate I when required by the director of the portfolio concerned.

(2) The contracting officer shall insert 552.211–80, Age on Delivery, if the required shelf-life period is more than 12 months, or when source inspection can be performed within a short time period.

(b) *Stock replenishment contracts.* The contracting officer shall insert 552.211–81, Time of Shipment, in solicitations and stock replenishment contracts that do not include the Availability for Inspection, Testing, and Shipment/Delivery clause at 552.211–83 and require shipment within 45 calendar days after receipt of the order. If shipment is required in more than 45 days, the contracting officer shall use Alternate I.

(c) *Indeterminate testing time.* The contracting officer shall insert 552.211–83, Availability for Inspection, Testing, and Shipment/Delivery, in solicitations and contracts that provide for source inspection by Government personnel and that require lengthy testing for which time frames cannot be determined in advance. If the contract is for stock items, the contracting officer shall use Alternate I.

(d) The contracting officer shall insert the clause at 552.211–94, Time of Delivery, in solicitations and contracts for supplies for the Stock Program when neither of the FAR delivery clauses (FAR 52.211–8 or 52.211–9) is suitable.

[74 FR 66253, Dec. 15, 2009]

Subpart 511.6—Priorities and Allocations

SOURCE: 69 FR 55934, Sept. 16, 2004, unless otherwise noted.

511.600 Scope of subpart.

Pursuant to the Defense Priorities and Allocations System (DPAS) Delegation 3, the Department of Commerce (DOC) has delegated to GSA the authority to use the DPAS under certain conditions. DPAS Delegation 3 restricts use of DPAS authority to GSA supply system procurement in support of the Department of Defense (DoD), Department of Energy (DoE), and Federal Emergency Management Agency (FEMA) approved programs.

[74 FR 66254, Dec. 15, 2009]

511.601 [Reserved]

511.602 General.

(a) The purpose of the DPAS is to assure the timely availability of industrial resources to meet current national defense, energy, and civil emergency preparedness program requirements and to provide an operating system to support rapid industrial response in a national emergency. The primary statutory authority for the DPAS is Title I of the Defense Production Act of 1950, as amended, with additional authority from the Selective Service Act of 1948 and the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Executive Orders 12919 and 12742 delegate to the DOC authority to administer the DPAS. Within the DOC, the Office of Strategic Industries and Economic Security (SIES) is assigned responsibility for DPAS implementation, administration, and compliance.

(b) The DPAS is published in the Code of Federal Regulations at 15 CFR part 700. This regulation provides an overview, a detailed explanation of operations and procedures, and other implementing guidance, including information on special priorities assistance and compliance.

(c) Orders placed under DPAS are ''rated orders.'' Rated orders must receive preferential treatment only as necessary to meet delivery requirements. Rated orders are identified by a rating symbol of either ''DX'' or ''DO'' followed by a program identification symbol. All ''DO'' rated orders have equal priority with each other and take preference over unrated orders. All ''DX'' rated orders have equal priority with each other and take preference over ''DO'' rated orders and unrated orders. A program identification symbol indicates which approved program is supported by the rated order.

(d) The authority delegated to GSA shall not be used to support the procurement of any items that—

(1) Are commonly available in commercial markets for general consumption;

(2) Do not require major modification when purchased for approved program use;

(3) Are readily available in sufficient quantity so as to cause no delay in meeting approved program requirements; or

(4) Are to be used primarily for administrative purposes (including Federal Supply Classification (FSC) classes, groups, or items), such as for personnel or financial management. The Commissioner, FAS, shall issue additional guidance, as may be necessary, to ensure effective implementation of its delegated DPAS authority.

[74 FR 66254, Dec. 15, 2009]

511.603 Procedures.

(a) A DPAS rating may be placed against an entire contract at time of award or an individual order issued under an existing, otherwise unrated, contract. FAR 11.604 requires contracting officers to insert the provision at 52.211–14, Notice of Priority Rating for National Defense, Emergency Preparedness, and Energy Program Use, in solicitations when the contract or order to be awarded will be a rated order and to insert the clause at 52.211–15, Defense Priority and Allocation Requirements, in contracts that are rated orders.

(b) In addition to the FAR provision and clause referenced in paragraph (a) of this section, the contract or order must include the following (*see* 15 CFR 700.12):

(1) The appropriate priority rating symbol (*i.e.*, either ''DO'' or ''DX'') along with the program identification symbol. When GSA contracting officers place DO rated orders, they must use program identification symbol ''K1''. When placing a DX-rated order for other agencies, GSA contracting officers must use the requesting agency program identification symbol from the DoD Master Urgency List and may only do so when GSA is acting as the procuring agent for DoD or DoE and has received a ''DX'' rated contract or order from either department.

(2) A required delivery date. The words ''as soon as possible'' or ''immediately'' do not constitute a required delivery date. Use of either a specific date or a specified number of days ARO (after receipt of order) is acceptable.

(3) The written signature on a manually placed order, or the digital signature or name on an electronically placed order of an individual authorized to place rated orders.

(4) A statement that reads substantially as follows: ''This is a rated order certified for national defense use, and you are required to follow all the provisions of the Defense Priorities and Allocations System regulation (15 CFR part 700)''.

(c) Multiple and Single Award Schedule contracts are not rated at time of award.

[74 FR 66254, Dec. 15, 2009]

PART 512—ACQUISITION OF COMMERCIAL ITEMS

AUTHORITY: 40 U.S.C. 486(c).

Subpart 512.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

512.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) *Solicitation provisions and clauses.* Insert these provisions or clauses in solicitations or solicitations and contracts, respectively, in accordance with the instructions provided:

(1) 552.212–71, Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Items, when listed clauses apply. The clause provides for incorporation by reference of terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practice. If necessary, tailor this clause.

(2) 552.212–72, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to GSA Acquisitions of Commercial Items, when listed clauses apply. The clause provides for the incorporation by reference of terms and conditions required to implement provisions of law or executive orders that apply to commercial item acquisitions.

(b) *Discretionary use of GSAR provisions and clauses.* Consistent with the limitations contained in FAR 12.302(c), include in solicitations and contracts by addendum other GSAR provisions and clauses.

(c) *Use of additional provisions and clauses.* The Senior Procurement Executive must approve the use of a provision or clause that is either not:

(1) Prescribed in the FAR or GSAR for use in contracts for commercial items.

(2) Consistent with customary commercial practice.

(d) In solicitations issued in conjunction with the policy and procedures in FAR part 14, Sealed Bidding; or FAR part 15, Contracting by Negotiation, include the two notices in paragraphs (d)(1) and (d)(2) of this section, except that acquisitions of leasehold interests in real property, must include only the notice in paragraph (d)(1) of this section.

(1) The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0163.

(2) The General Services Administration's hours of operation are 8 a.m. to 4:30 p.m. Requests for preaward debriefings postmarked or otherwise submitted after 4:30 p.m. will be considered submitted the following business day. Requests for postaward debriefings delivered after 4:30 p.m. will be considered received and filed the following business day.

[75 FR 5242, Feb. 2, 2010]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 513 [RESERVED]

PART 514—SEALED BIDDING

Subpart 514.2—Solicitation of Bids

Sec.
514.201 Preparation of invitations for bids.
514.201–1 Uniform contract format.
514.201–2 Part I—The Schedule.
514.201–6 Solicitation provisions.
514.201–7 Contract clauses.
514.202 General rules for solicitation of bids.
514.202–4 Bid samples.
514.202–5 Descriptive literature.
514.203–1 Transmittal to prospective bidders.
514.270 Aggregate awards.
514.270–1 Definition.
514.270–2 Guidelines for use.
514.270–3 Evaluation factors for award.
514.270–4 Grouping line items for aggregate award.
514.270–5 Evaluation methodologies for aggregate awards.
514.270–6 Guidelines for using the weight factors method.
514.270–7 Guidelines for using the price list method.

Subpart 514.4—Opening of Bids and Award of Contract

514.407 Mistakes in bids.
514.407–3 Other mistakes disclosed before award.
514.407–4 Mistakes after award.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37211, July 9, 1999, unless otherwise noted.

Subpart 514.2—Solicitation of Bids

514.201 Preparation of invitations for bids.

514.201–1 Uniform contract format.

Include the following notice in each solicitation:

The information collection requirements contained in this solicitation/contract, are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0162.

514.201–2 Part I—The Schedule.

(a) When using Standard Form 33, Solicitation, Offer and Award, include the following cautionary notice:

''Notice to Bidders—Use Item 13 of the Standard Form 33, Solicitation, Offer and Award, to offer prompt payment discounts. The Prompt Payment clause of this solicitation sets forth payment terms. Do not insert any statement in Item 13 that requires payment sooner than the time stipulated in the Prompt Payment clause (See FAR 52.232–25, 52.232–26, or 52.232–27, as applicable). EXAMPLE: If you insert ''NET 20'' in Item 13, GSA will reject your bid as nonresponsive because the entry contradicts the 30 day payment terms specified in the Prompt Payment clause.''

(b) When using other authorized forms (e.g., Standard Form 1447, Solicitation/Contract; Standard Form 1449, Solicitation/Contract/Order for Commercial Items), include the notice in paragraph (a) of this section. Change the reference to the form number, form title, and item number accordingly.

[74 FR 47738, Sept. 17, 2009]

514.201–6 Solicitation provisions.

When considering all or none bids, insert the provision at 552.214–70, ''All or None'' Bids, in the solicitation.

[74 FR 47739, Sept. 17, 2009]

514.201–7 Contract clauses.

Stock replenishment contracts. For some stock replenishment contracts, individual contractors may be unable to furnish the Government's monthly requirements. The contracting officer may determine that progressive awards will be more expedient. In such cases, insert a clause substantially the same as the clause at 552.214–71, Progressive Awards and Monthly Quantity Allocations, in the solicitation and contract.

[74 FR 47739, Sept. 17, 2009]

514.202 General rules for solicitation of bids.

514.202–4 Bid samples.

(a) *Requirements for samples in invitations for bids.* (1) When bid samples are required, the contracting officer shall require bidders to submit samples produced by the manufacturer whose products will be supplied under the contract.

(2) The FAR limits use of bid samples to cases where the contracting officer cannot describe some characteristics of a product adequately in the specification or purchase description. This usually applies to subjective characteristics. The contracting officer may determine that there is a need to examine objective characteristics of bid samples to determine the responsiveness of a bid. The contracting officer should base the determination on past experience or other valid considerations. In the solicitation, separately list ''Subjective Characteristics'' and ''Objective Characteristics''.

(3) A provision appears at 552.214–72, Bid Sample Requirements. This provision may be modified to fit the circumstances of a procurement.

(b) *Handling bid samples.* (1) Samples from accepted bids must be retained for the period of contract performance. If there are no outstanding claims regarding the contract, the contracting officer may authorize disposal of the samples at the end of the contract term following the bidder's instructions.

(2) If the contracting officer anticipates a claim regarding the contract, the contracting officer shall require that the bid samples be retained until the claim is resolved.

(3) The contracting officer shall require that samples from unsuccessful bids be retained until award. After award, these samples may be disposed of following the bidder's instructions.

[74 FR 47739, Sept. 17, 2009]

514.202–5 Descriptive literature.

Requirements for Invitations for bids. When using brand name or equal purchase descriptions, the provision at FAR 52.211–6 satisfies the requirement for descriptive literature.

[74 FR 47739, Sept. 17, 2009]

514.203–1 Transmittal to prospective bidders.

Prospective bidders, as used in FAR 14.203–1, include both the following:

(a) The incumbent contractor, except when its written response to the notice of contract action under FAR subpart 5.2 states a negative interest.

(b) Bidders that responded to recent solicitations for the same or similar items.

514.270 Aggregate awards.

514.270–1 Definition.

Aggregate award means an arrangement whereby two or more separately-priced line items are combined for award to that bidder whose bid will result in the lowest overall cost to the Government for the line items as a group. The individual price for each item does not have to be the lowest bid received. (See also the definition of a ''line item'' in FAR 3.302.)

514.270–2 Guidelines for use.

(a) GSA usually solicits prices and reserves the right to make award for individual line items. In some cases it serves GSA's best interest to combine two or more line items for an aggregate award. Such cases include when:

(1) Users desire uniformity of design, style, and finish (e.g., suites of household furniture).

(2) The articles will be assembled and used as a unit, and different manufacturers' components may not be interchangeable.

(3) Users have high demand for certain articles, but demand for related articles is insufficient to attract competitive bids (e.g., various sized of socket wrenches). Awarding the low-demand articles in conjunction with the high-demand articles may encourage competition.

(4) Awarding the low-demand articles in conjunction with the high-demand articles may encourage competition.

(5) One location (delivery point) has a large requirement, and another location has a requirement too small to individually attract competitive bids.

(6) Awarding and administering numerous small contracts for similar articles or services is impractical.

(b) Before deciding to combine items for aggregate award, the contracting officer should consider the following factors:

(1) The capability of bidders to furnish the types and quantities of supplies or services in the aggregate.

(2) How grouping delivery points will affect bidders.

(3) Which combinations will accurately project the lowest overall cost to the Government.

(c) The contracting officer should not use an aggregate award if it will significantly restrict the number of eligible bidders.

[64 FR 37211, July 9, 1999, as amended at 74 FR 47739, Sept. 17, 2009]

514.270–3 Evaluation factors for award.

The solicitation should clearly state the basis for evaluating bids for aggregate award, require bidders to submit a price on each item within the group or a percentage to be added or subtracted from a list price, and advise bidders that failure to submit prices as required within a group makes a bid ineligible for award for that group.

[74 FR 47739, Sept. 17, 2009]

514.270–4 Grouping line items for aggregate award.

(a) *Supplies and services*. This subsection applies to acquisitions of supplies and services.

(b) *Effect on compeition*. Provide for full and open competition when grouping items for award. Grouping items for award may preclude a significant of firms from bidding. This occurs if firms are unable to provide all the types or quanities of supplies or services, or make deliveries to the various delivery points included in the prospective aggregate group.

(c) *Grouping different articles*. Include only related articles in an aggregate group. Related articles are those normally manufactured or produced by a majority of prospective bidders. Grouping unrelated articles often restricts competition unnecessarily.

(d) *Grouping geographic locations or delivery points*. Consider the following guidelines before deciding to group different geographic locations or delivery points:

(1) A delivery point may have sufficient requirements so that individual shipments involve economic production runs and carload or truckload quanities. In this case, list it as a separate line item.

(2) The types of bidders (*i.e.*, small or large firms, manufacturers or distributors, etc.) who responded to previous solicitations can provide important information. For example, if previous bidders are distributors with franchises in certain territories, grouping different territories could tend to restrict competition.

(3) Transportation costs can affect competition and pricing. They may constitute a significant portion of the total delivered cost. Obtain the advice and assistance of transportation specialists before grouping geographic locations or delivery points. Depending upon the supplies being acquired:

(i) Grouping widespread geographic locations or delivery points may reduce competition or result in higher prices. It can cause the loss of ''area pricing'' advantages provided by a supplier with a single production point.

(ii) Conversely, for many small commercial items (hand tools, locks, etc.), manufacturers may quote the same price for delivery anywhere in the U.S.

(iii) Tariff boundaries can also affect how manufacturers price deliveries to different areas.

[64 FR 37211, July 9, 1999, as amended at 74 FR 47739, Sept. 17, 2009]

514.270–5 Evaluation methodologies for aggregate awards.

(a) *Definite quantity contracts without options*. For definite quantity contracts without options, the evaluated bid price is the total bid price, as adjusted for any price-related factors identified in the solicitation. This reflects the actual cost to the Government and will identify the most advantageous bid.

(b) *Indefinite quantity contracts, requirements contracts, and options*. Indefinite quantity and requirements contracts use estimated quantities. Options involve the probability of whether and when the options will be exercised. These situations may result in

unbalanced bids (see FAR 15.404–1(g)), leading to inaccurate evaluation of the projected cost and award to other than the most advantageous bid. To avoid unbalanced bids, GSA has two preferred methods for evaluating bids for aggregate awards: weight factors and price list.

(1) *Weight factors method*. Assign a weight to each item in a group. The weight is based on the portion of quantities that item represents. To evaluate bids, multiply each unit price by its weight factor, then total the results.

(2) *Price list method*. Establish prices for bidders to use as a base for preparing their bids. Prepare a list that identifies a base price for each item in a group. Bidders bid a percentage factor to add to or subtract from the base price.

514.270–6 Guidelines for using the weight factors method.

(a) Use the weight factors method when there are reliable estimates for the quantities needed in an acquisition. Reliable estimates of quantities form the foundation for:

(1) Accurate evaluation of the projected cost of each bid.

(2) An appropriate determination of which bid is most advantageous to the Government for the aggregate group.

(b) Assign a weight factor to each item in a group. Develop the weight factor by calculating the portion of the total quantity in a defined group that each item represents.

(c) To evaluate bid prices, first multiply the price bid for each item (unit price X quantity) by its weight factor. Then, add the subtotals together to project the cost for the aggregate group.

(d) Estimated quantities may be reduced to smaller numbers by a common denominator. This may help facilitate the computations involved in evaluating bids.

(e) Consider all price-related factors identified in the solicitation. Award to the responsive and responsible bidder with the lowest evaluated overall cost to the Government for the aggregate group. This represents the most advantageous bid.

[64 FR 37211, July 9, 1999, as amended at 74 FR 47739, Sept. 17, 2009]

514.270–7 Guidelines for using the price list method.

(a) *General*. The price list method helps avoid unbalanced bidding when making aggregate awards, but lack accurate estimates of anticipated quantities. This method establishes base prices for bidders to use in preparing their bids.

(b) *Solicitation requirements*. When using the price list method, in the solicitation:

(1) Include the price list.

(2) Include an estimate of requirements.

(3) Require the bidder to express its price as ''net'' or as a percentage added to or subtracted from the list prices for each group. Require the bidder to quote only one percentage factor for each group. This means that the bidder provides one percentage factor that applies to every item in a group; not a separate percentage for each item. ''Net'' indicates the bidder chooses to submit the list prices as its bid.

(4) Identify the percentage factor in paragraph (b)(3) of this section as a price related evaluation factor.

(c) *Developing list prices*. Price lists may be developed using one or more of the following sources:

(1) Industry published prices.

(2) Industry surveys.

(3) Government cost estimates based on knowledge of the supplies or services and previous contract prices.

(d) *First time use for an item or service*. The first time the contracting officer uses list prices for an item or service, give prospective bidders an opportunity to review the proposed list. Also provide information on how GSA will use the list prices. This information may be provided in a draft solicitation.

(e) *Balanced prices*. Ensure that the list prices for the grouped items bear a reasonable and balanced relationship to one another. Prices may be used from previous awards made using the weight factors method to develop price lists. Review those prices first to ensure they did not result from unbalanced bidding.

(f) *Evaluation and award*. Consider all price-related factors identified in the solicitation. Award to the responsive and responsible bidder whose percentage factor produces the most favorable

price to the Government. This represents the most advantageous bid.

(g) *Example*. The following illustrates a bidding schedule arrangement for a group of items for aggregate award under the price list method:

DRILLS, TWIST, HIGH SPEED, UNDER FEDERAL SPECIFICATION (NO. AND DATE), AND AMENDMENT (NO. AND DATE), AMENDMENT (NO. AND DATE) WIRE GAUGE SIZES, STRAIGHT SHANK, SHORT LENGTH, TYPE C

Item No.	National Stock No.	Drill size	Est. quantity	Unit	List price
Group 1 (Items 1 through 5)					
1	5133–00–189–9246	1	2,800	Pkg	$11.16
2	5133–00–189–9247	2	2,400	Pkg	11.16
3	5133–00–189–9248	3	2,800	Pkg	10.44
4	5133–00–189–9249	4	1,600	Pkg	10.80
5	5133–00–189–9250	5	2,000	Pkg	10.80

The bid on each item above is the list price shown minus/plus ____ percent. (Bidder, insert ''net'' or a single percentage amount in the blank space and cross out minus or plus, as appropriate.)

(h) *Special considerations for contracts for store stock items*. Show estimated quantities only if estimates of demand for each item within a group can be derived from Government records or verified contractor sales reports. Use only current estimates. If the Government's needs cannot be estimated, the solicitation may include past orders. (See CG Decision, B–209037, 82–2 CPD para 323 (1982).)

(i) *Special considerations for repair and alteration contracts*. In the solicitation:

(1) List the estimated quantities for work to be performed during both normal working hours and outside of normal working hours.

(2) State the percent of work anticipated to be performed during normal working hours.

(3) List the unit prices for work to be performed during both normal working hours and outside of normal working hours.

(4) Define ''normal'' in terms of hours and days of the week.

(5) Advise bidders of the previous year's total expenditures or portions of that total attributable to the listed items.

(6) If providing quantity estimates, state that the estimates are for information only and do not constitute guarantees or commitments to order items under the contract.

(7) Solicit two percentage factors for the line item unit prices listed: one for the unit prices for work performed during normal working hours and the second for the unit prices for work performed outside of normal working hours.

(8) When the solicitation further groups unit prices by trade or business category, multiple percentages may be required.

(9) For the evaluated bid price, add together the following percentages:

(i) The percentage of work performed during normal work hours multiplied by the total estimate adjusted by the bidder's percentage factor for that portion of the work, plus

(ii) The percentage of work performed during other than normal working hours multiplied by the total estimate adjusted by the bidder's percentage factor for that portion of the work.

(10) Consider other price-related factors identified in the solicitation. Make award to the responsible and responsive bidder submitting the lowest overall evaluated bid price for the aggregate group. This represents the most advantageous bid.

[64 FR 37211, July 9, 1999, as amended at 74 FR 47739, Sept. 17, 2009]

Subpart 514.4—Opening of Bids and Award of Contract

514.407 Mistakes in bids.

514.407–3 Other mistakes disclosed before award.

Delegation of authority by head of the agency. Under FAR 14.407–3(e), contracting directors (see 502.101) are authorized, without power of redelegation, to make:

(a) The determinations regarding corrections and withdrawals under FAR 14.407–3(a), (b), and (c); and

(b) The corollary determinations not to permit withdrawal or correction under FAR 14.407–3(d).

[74 FR 47740, Sept. 17, 2009]

514.407–4 Mistakes after award.

The contracting director and assigned counsel are required to review and approve the contracting officer's determinations under FAR 14.407–4(b) and (c).

[74 FR 47740, Sept. 17, 2009]

PART 515—CONTRACTING BY NEGOTIATION

Subpart 515.2—Solicitation and Receipt of Proposals and Information

Sec.
515.204 Contract format.
515.204–1 Uniform contract format.
515.205 Issuing solicitations.
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Subpart 515.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

515.506 Postaward debriefing of offerors.

Subpart 515.70—Use of Samples

515.7002 Procedures.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37214, July 9, 1999, unless otherwise noted.

Subpart 515.2—Solicitation and Receipt of Proposals and Information

515.204 Contract format.

515.204–1 Uniform contract format.

(a) The uniform contract format is not required for leases of real property.

(b) Each solicitation and contract must include the two notices in paragraphs (b)(1) and (b)(2) of this section, except that acquisitions of interests in real property, must include only the notice in (b)(1):

(1) ''The information collection requirements contained in this solicitation/contract are either required by regulation or approved by the Office of Management and Budget pursuant to the Paperwork Reduction Act and assigned OMB Control No. 3090–0163.''

(2) ''GSA's hours of operation are 8:00 a.m. to 4:30 p.m. Requests for preaward debriefings postmarked or otherwise submitted after 4:30 p.m. will be considered submitted the following business day. Requests for postaward debriefings delivered after 4:30 p.m. will be considered received and filed the following business day.''

515.205 Issuing solicitations.

Potential sources, as used in FAR 15.205, include both of the following:

(a) The incumbent contractor, except when its written response to the notice of contract action under FAR subpart 5.2 states a negative interest.

(b) Offerors that responded to recent solicitations for the same or similar items.

515.209 Solicitation provisions and contract clauses.

515.209–70 Examination of records by GSA clause.

Clause for Other Than Multiple Award Schedules

(a) For other than multiple award schedule (MAS) contracts, insert the clause at 552.215–70, Examination of Records by GSA, in solicitations and

contracts over $100,000, including acquisitions of leasehold interests in real property, that meet any of the following conditions:

(1) Involve the use or disposition of Government-furnished property.

(2) Provide for advance payments, progress payments based on cost, or guaranteed loan.

(3) Contain a price warranty or price reduction clause.

(4) Involve income to the Government where income is based on operations under the control of the contractor.

(5) Include an economic price adjustment clause where the adjustment is not based solely on an established, third party index.

(6) Are requirements, indefinite-quantity, or letter type contracts as defined in FAR part 6.

(7) Are subject to adjustment based on a negotiated cost escalation base.

(8) Contain the provision of FAR 52.223–4, Recovered Material Certification.

(b) You may modify the clause at 552.215–70 to define the specific area of audit (e.g., the use or disposition of Government-furnished property, compliance with the price reduction clause). Counsel and the Assistant Inspector General—Auditing or Regional Inspector General—Auditing, as appropriate, must concur in any modifications to the clause.

Clause for Multiple Award Schedules

(c) Insert the clause at 552.215–71, Examination of Records by GSA (Multiple Award Schedule), in solicitations and contracts for MAS contracts.

(d) With the Senior Procurement's Executive approval, you may modify the clause at 552.215–71 to provide for post-award access to and the right to examine records to verify that the pre-award/modification pricing, sales or other data related to the supplies or services offered under the contract which formed the basis for the award/modification was accurate, current, and complete. The following procedures apply:

(1) Such a modification of the clause must provide for the right of access to expire 2 years after award or modification.

(2) Before modifying the clause, you must make a determination that absent such access there is a likelihood of significant harm to the Government and submit it to the Senior Procurement Executive for approval.

(3) The determinations under paragraph (d)(2) of this section must be made on a schedule-by-schedule basis.

Subpart 515.3—Source Selection

515.305 Proposal evaluation.

(a) *Restrictions placed on a proposal by the submitter*. If you receive a proposal with more restrictive conditions than those in the provision at FAR 52.215–1(e), ask whether the submitter is willing to accept the conditions of the paragraph at FAR 52.215–1(e). If the submitter refuses, consult with legal counsel on whether to accept the proposal as marked or return it.

(b) *Actions before releasing proposal*. Before releasing any proposal to an evaluator you must take all the following actions:

(1) Obtain the signed original ''Conflict of Interest Acknowledgment and Nondisclosure Agreement'' from each Government and nongovernment individual serving as an evaluator. Use the Acknowledgment/Agreement in Figure 515.3–1.

(i) For employees of other Executive agencies, replace the reference in paragraph (c) of the Acknowledgement/Agreement to GSA's supplemental standards with a reference to the applicable agency.

(ii) for nongovernment evaluators, substitute paragraph (c) of the Acknowledgement/Agreement with the following language and delete paragraph (h):

(c) I have read and understand the requirements of subsection 27(a) and 27(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 423).

(2) Attach to each proposal a cover page bearing the following notice:

GOVERNMENT NOTICE FOR HANDLING PROPOSALS

To anyone receiving this proposal or proposal abstract:

(1) This proposal must be used and disclosed for evaluation purposes only.

(2) You must apply a copy of this Government notice to any reproduction or abstract of this proposal.

(3) You must comply strictly with any authorized restrictive notices which the submitter places on this proposal.

(4) You must *not* disclose this proposal outside the Government for evaluation purposes except to the extent authorized by, and in accordance with, the procedures in 48 CFR 515.305–71.

515.305–70 Use of outside evaluators.

(a) *Conditions*. To use outside evaluators, you must meet the restrictions in FAR 37.203 and 537.2.

(b) *Limitations on disclosing proposal information*. You may disclose proposal information outside the Government before the Government's decision as to contract award only to the extent authorized in this section. Disclosure and handling must comply with FAR 3.1 and 503.1.

(c) *Solicitation notice*. Include in the solicitation a notice substantially as follows:

NOTICE ABOUT RELEASING PROPOSALS

(1) The Government intends to disclose proposals received in response to this solicitation to nongovernment evaluators.

(2) Each evaluator will sign and provide to GSA a ''Conflict of Interest Acknowledgment and Nondisclosure Agreement.''

FIGURE 515.3–1—CONFLICT OF INTEREST ACKNOWLEDGMENT AND NONDISCLOSURE AGREEMENT

CONFLICT OF INTEREST ACKNOWLEDGMENT AND NONDISCLOSURE AGREEMENT

For proposals submitted in response to GAS solicitation no. _____, I agree to the following:

(a) To the best of my knowledge and belief, no conflict of interest exists that may either:

(1) Diminish my capacity to impartially review the proposals submitted.

(2) Or result in a biased opinion or unfair advantage.

(b) In making the above statement, I have considered all the following factors that might place me in a position of conflict, real or apparent, with the evaluation proceedings:

(1) All my stocks, bonds, other outstanding financial interests or commitments.

(2) All my employment arrangements (past, present, and under consideration).

(3) As far as I know, all financial interests and employment arrangements of my spouse, minor children, and other members of my immediate household.

(c) I have read and understand the requirements of the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635) and Supplemental Standards of Ethical Conduct for Employees of the General Service Administration (5 CFR Part 6701).

(d) I have a continuing obligation to disclose any circumstances that may create an actual or apparent conflict of interest. If I learn of any such conflict, I will report it immediately to the Contracting Officer. I will perform no more duties related to evaluating proposals until I receive instructions on the matter.

(e) I will use proposal information for evaluation purposes only. I understand that any authorized restriction on disclosure placed on the proposal by the prospective contractor, prospective subcontractor, or the Government applies to any reproduction or abstracted information of the proposal.

(f) I will use my best efforts to safeguard proposal information physically. I will not disclose the contents of, nor release any information about, the proposals to anyone other than:

(1) The Source Selection Evaluation Board or other panel assembled to evaluate proposals submitted in response to the solicitation identified above.

(2) Other individuals designed by the contracting Officer.

(g) After completing evaluation, I will return to the Government all copies of the proposals and any abstracts.

(h) GSA Appropriations Act restriction: These restrictions are consistent with and do not supersede, conflict with or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosure of Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Codes, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 *et seq.*) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling.

_____
(Enter name of evaluator and organization)

_____
Date

Subpart 515.4—Contract Pricing

515.408 Solicitation provisions and contract clauses.

MAS REQUESTS FOR INFORMATION OTHER THAN COST OR PRICING DATA

(a) You should use Alternative IV of the FAR provision at 52.215–20, Requirements for Cost or Pricing Data or Information Other than Cost or Pricing Data, for MAS contracts to provide the format for submission of information other than cost or pricing data for MAS contracts. To provide uniformity in request under the MAS program, you should insert the following in paragraph (b) of the provision:

(1) An offer prepared and submitted in accordance with the clause at 552.212–70, Preparation of Offer (Multuiple Award Schedule).

(2) Commercial sales practices. The Offeror shall submit information in the format provided in this solicitation in accordance with the instructions at Figure 515.4 of the GSA Acquisition Regulation (48 CFR 515–2), or submit information in the Offeror's own format.

(3) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.

(4) By submission of an offer in response to this solicitation, the Offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before initial award, books, records, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extend to Offeror's cost or profit information of other data relevant solely to the Offeror's determination of the prices to be offered in the catalog or marketplace.

(b) Insert the following format for commercial sales practices in the exhibits or attachments section of the solicitation and resulting contract (see FAR 12.303).

COMMERCIAL SALES PRACTICES FORMAT

Name of Offeror _____ SIN(s) _____

NOTE: Please refer to Clause 552.212–70, Preparation of Offer (Multiple Award Schedule), for additional information concerning your offer. Provide the following information for each SIN (or group of SINs or SubSIN for which information is the same).

(1) Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12-month period or the offerors last fiscal year: $_____. State beginning and ending of the 12 month period. Beginning _____ ending _____. In the event that a dollar value is not an appropriate measure of the sales, provide and describe your own measure of the sales of the item(s).

(2) Show your total projected annual sales to the Government under this contract for the contract term, excluding options, for each SIN offered. If you currently hold a Federal Supply Schedule contract for the SIN the total projected annual sales should be based on your mostrecent 12 months of sales under that contract.

SIN _____ $_____
SIN _____ $_____
SIN _____ $_____

(3) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), are the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions? YES____ NO____ (See definition of ''concession'' and ''discount'' in 552.212–70.)

(4)(a) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), provide information as requested for each SIN (or group of SINs for which the information is the same) in accordance with the instructions at Figure 515.4, which is provided in this solicitation for your convenience. The information should be provided in the chart below or in an equivalent format developed by the offeror. Rows should be added to accommodate as many customers as required.

Column 1 Customer	Column 2 Discount	Column 3 Quantity/Volume	Column 4 FOB Term	Column 5 Concessions

(b) Do any deviations from your written policies or standard commercial sales practices disclosed in the above chart ever result in better discounts (lower prices) or concessions than indicated? YES__ NO__. If YES, explain deviations in accordance with the instructions at Figure 515.4, which is provided in this solicitation for your convenience.

(5) If you are a dealer/reseller without significant sales to the general public, you should provide manufacturers' information required by paragraphs (1) through (4) above for each item/SINoffered, if the manufacturer's sales under any resulting contract are expected to exceed $500,000. You must also obtain written authorization from the manufacturer(s) for Government access, at any time before award or before agreeing to a modification, to the manufacturer's sales records for the purpose of verifying the information submitted by the manufacturer. The information is required in order to enable the Government to make a determination that the offered price is fair and reasonable. To expedite the review and processing of offers, you should advise the manufacturer(s) of this requirement. The contracting officer may require the information be submitted on electronic media with commercially available spreadsheet(s). The information may be provided by the manufacturer directly to the Government. If the manufacturer's item(s) is being offered by multiple dealers/resellers, only one copy of the requested information should be submitted to the Government. In addition, you must submit the following information along with a listing of contact information regarding each of the manufacturers whose products and/or services are included in the offer (include the manufacturer's name, address, the manufacturer's contact point, telephone number, and FAX number) for each model offered by SIN:

(a) Manufacturer's Name.

(b) Manufacturer's Part Number.

(c) Dealer's/Reseller's Part Number.

(d) Product Description.

(e) Manufacturer's List Price.

(f) Dealer's/Reseller's percentage discount from list price or net prices.

(End of format)

(c) Include the instructions for completing the commercial sales practices format in Figure 515.4 in solicitations issued under the MAS program.

FIGURE 515.4—INSTRUCTIONS FOR COMMERCIAL SALES PRACTICES FORMAT

If you responded ''yes'' to question (3), on the Commercial Sales Practices Format in paragraph (b) of this section, complete the chart in question (4)(a) for the customer(s) who receive your best discount. If you responded ''no'', complete the chart in question (4)(a) showing your written policies or standard sales practices for all customers or customer categories to whom you sell at a price (discounts and concessions in combination) that is equal to or better than the price(s) offered to the Government under this solicitation or with which the Offeror has a current agreement to sell at a discount which equals or exceeds the discount(s) offered under this solicitation. Such agreement shall be in effect on the date the offer is submitted or contain an effective date during the proposed multiple award schedule contract period. If your offer is lower than your price to other customers or customers categories, you will be aligned with the customer or category of customer that receives your best price for purposes of the Price Reductions clause at 552.238–75. The Government expects you to provide information required by the format in accordance with these instructions that is, to the best of your knowledge and belief, current, accurate, and complete as of 14 calender days prior to its submission. You must also disclose any changes in your price list(s), discounts and/or discounting policies which occur after the offer is submitted, but before the close of negotiations. If your discount practices vary by model or product line, the discount information should be by model or product line as appropriate. You may limit the number of models or product lines reported to those which exceed 75% of actual historical Government sales (commercial sales may be substituted if Government sales are unavailable) value of the special item number (SIN).

COLUMN 1—IDENTIFY THE APPLICABLE CUSTOMER OR CATEGORY OF CUSTOMER

A ''customer'' is any entity, except the Federal Government, which acquires supplies or services from the Offeror. The term customer includes, but is not limited to original equipment manufacturers, value added resellers, state and local Governments, distributors, educational institutions (an elementary, junior high, or degree granting school which maintains a regular faculty and established curriculum and an organized body of students), dealers, national accounts, and end users. In any instance where the Offeror is asked to disclose information for a customer, the Offeror may disclose information by category of customer if the Offeror's discount policies or practices are the same for all customers in the category. (Use a separate line for each customer or category of customer.)

COLUMN 2—IDENTIFY THE DISCOUNT

The term ''discount'' is as defined in solicitation clause 552.212–70, Preparation of Offer (Multiple Award Schedule). Indicate the best discount (based on your written discounting policies or standard commercial discounting

practices if you do not have written discounting policies) at which you sell to the customer or category of customer identified in column 1, without regard to quantity; terms and conditions of the agreements under which the discounts are given; and whether the agreements are written or oral. Net prices or discounts off of other price lists should be expressed as percentage discounts from the price list which is the basis of your offer. If the discount disclosed is a combination of various discounts (prompt payment, quantity, etc.), the percentage should be broken out for each type of discount. If the price lists which are the basis of the discounts given to the customers identified in the chart are different than the price list submitted upon which your offer is based, identify the type or title and date of each price list. The contracting officer may require submission of these price lists. To expedite evaluation, offerors may provide these price lists at the time of submission.

COLUMN 3—IDENTIFY THE QUANTITY OR VOLUME OF SALES

Insert the minimum quantity or sales volume which the identified customer or category of customer must either purchase/order, per order or within a specified period, to earn a discount indicate the time period.

COLUMN 4—INDICATE THE FOB DELIVERY TERM FOR EACH IDENTIFIED CUSTOMER

See FAR 47.3 for an explanation of FOB delivery terms.

COLUMN 5—INDICATE CONCESSIONS REGARDLESS OF QUANTITY GRANTED TO THE IDENTIFIED CUSTOMER OR CATEGORY OF CUSTOMER

Concessions are defined in solicitation clause 552.12–70, Preparation of Offers (Multiple Award Schedule). If the space provided is inadequate, the disclosure should be made on a separate sheet by reference.

If you respond ''yes'' to question 4(b) in the Commercial Sales Practices Format, provide an explanation of the circumstances under which you deviate from your written policies or standard commercial sales practices disclosed in the chart on the Commercial Sales Practices Format and explain how often they occur. Your explanation should include a discussion of situations that lead to deviations from standard practice, an explanation of how often they occur, and the controls you employ to assure the integrity of your pricing. Examples of typical deviations may include, but are not limited to, one time goodwill discounts to charity organizations or to compensate an otherwise disgruntled customer; a limited sale of obsolete or damaged goods; the sale of sample goods to a new customer, or the sales of prototype goods for testing purposes.

If deviations from your written policies or standard commercial sales practices disclosed in the chart on the Commercial Sales Practices Format are so significant and/or frequent that the Contracting Officer cannot establish whether the price(s) offered is fair and reasonable, then you may be asked to provide additional information. The Contracting Officer may ask for information to demonstrate that you have made substantial sales of the item(s) in the commercial market consistent with the information reflected on the chart on the Commercial Sales Practices Format, a description of the conditions surrounding those sales deviations, or other information that may be necessary in order for the Contracting Officer to determine whether your offered price(s) is fair and reasonable. In cases where additional information is requested the Contracting Officer will target the request in order to limit the submission of data to that needed to establish the reasonableness of the offered price.

(End of figure)

(d) Insert the clause at 552.215–72, Price Adjustment—Failure to Provide Accurate Information, in solicitations and contracts under the MAS program.

(e) You should use Alternate IV of FAR 52.215–21, Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data—Modifications, to provide for submission of information other than cost or pricing data for MAS contracts. To provide for uniformity in requests under the MAS program, you should insert the following in paragraph (b) of the clause:

(1) Information required by the clause at 552.243–72, Modifications (Multiple Award Schedule).

(2) Any additional supporting information requested by the Contracting Officer. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether the price(s) offered is fair and reasonable.

(3) By submitting a request for modification, the Contractor grants the Contracting Officer or an authorized representative the right to examine, at any time before agreeing to a modification, books, record, documents, papers, and other directly pertinent records to verify the pricing, sales and other data related to the supplies or services proposed in order to determine the reasonableness of price(s). Access does not extent to Contractor's cost or profit information or other data related solely to the Contractor's determination of the prices to be offered in the catalog or marketplace.

[64 FR 37214, July 9, 1999, as amended at 65 FR 11247, Mar. 2, 2000]

Subpart 515.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

515.506 Postaward debriefing of offerors.

For purposes of determining the date of receipt of a request for a post award debriefing, GSA's hours of operation are 8:00 a.m. to 4:30 p.m. Request received after 4:30 p.m. will be considered received the following business day.

Subpart 515.70—Use of Samples

515.7002 Procedures.

(a) *Unsolicited samples*. The reference to FAR 14.404–2(d) in FAR 14.202–4(g) does not apply.

However, qualifications in the proposal that are at variance with the Government's requirements, constitute deficiencies. Resolve these as provided in FAR 15.306.

(b) *Solicitation requirements*. (1) Use the clause at FR 52.214–20. The second sentence in paragraph (c) of the clause does not apply. Substitute a sentence substantially as follows:

Failure of the bid samples to conform to all the required characteristics listed in the solicitation constitutes a deficiency in the proposal (see FAR 15.306).

(2) In addition to listing subjective characteristics that you cannot adequately describe in the specification, you may list and evaluate objective characteristics. To include objective characteristics, you must determine that examination of such characteristics is essential to the acquisition of any acceptable product. Base your determination on past experience or other valid considerations.

(c) FAR 52.215–1(c)(3) applies to samples received after the time set for receipt of offers.

PART 516—TYPES OF CONTRACTS

Subpart 516.2—Fixed Price Contracts

Sec.
516.203–4 Contract clauses.

Subpart 516.5—Indefinite-Delivery Contracts

516.506 Solicitation provisions and contract clauses.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37218, July 9, 1999, unless otherwise noted.

Subpart 516.2—Fixed Price Contracts

516.203–4 Contract clauses.

(a) *Special Order Program Contracts*. In multiyear solicitations and contracts, after making the determination required by FAR 16.203–3, use 552.216–71, Economic Price Adjustment Special Order Program Contracts, or a clause prepared as authorized in paragraph (a)(3) of this subsection.

(1) If the contract includes one or more options to extend the term of the contract, use the clause with its Alternate I or a clause substantially the same as 552.216–71 with its Alternate I suitably modified.

(2) In a contract requiring a minimum adjustment before the price adjustment mechanism is effectuated, use the basic clause with Alternate II or with Alternate I and Alternate II.

(3) If the Producer Price Index is not an appropriate indicator for price adjustment, modify the clause to use an alternate indicator for adjusting prices. Similarly, if other aspects of 552.216–71 are not appropriate, use an alternate clause following established procedures.

(b) *Adjustments based on cost indexes of labor or material*. (1) If the contracting officer decides to provide for adjustments based on cost indexes of labor or material, prepare a clause that defines each of the following elements:

(i) The type of labor and/or material subject to adjustment;

(ii) The labor rates, including any fringe benefits and/or unit prices of materials that may be increased or decreased;

(iii) The index(es) that will be used to measure changes in price levels and the base period or reference point from which changes will be measured; and

(iv) The period during which the price(s) will be subject to adjustment.

(2) The contracting director must approve use of this clause.

[75 FR 41095, July 15, 2010]

Subpart 516.5—Indefinite-Delivery Contracts

516.506 Solicitation provisions and contract clauses.

(a) In solicitations and contracts for Special Order Program items, when the contract authorizes FAS and other activities to issue delivery or task orders, insert the clause at 552.216–72, Placement of Orders. If only FAS will issue delivery or task orders, insert the clause with its Alternate I.

(b) In solicitations and contracts for GSA awarded ID/IQ contracts, insert clause 552.216–74, Task–Order and Delivery–Order Ombudsman.

(c) If the clause at 552.216–72 is prescribed, insert the provision at 552.216–73, Ordering Information, in solicitations for Special Order Program items and in other FAS Program solicitations.

[75 FR 41096, July 15, 2010]

PART 517—SPECIAL CONTRACTING METHODS

Subpart 517.1—Multiyear Contracting

Sec.
517.109 Contract clauses.

Subpart 517.2—Options

17.200 Scope of subpart.
17.202 Use of options.
17.203 Solicitations.
17.207 Exercise of options.
17.208 Solicitation provisions and contract clauses.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37218, July 9, 1999, unless otherwise noted.

Subpart 517.1—Multiyear Contracting

517.109 Contract clauses.

Use of FAR 52.217–2, Cancellation Under Multi-year Contracts, is optional in multiyear contracts authorized by 40 U.S.C. 490(a)(14) for maintenance and repair of fixed equipment in federally-owned buildings and services and 40 U.S.C. 481(a)(3) for public utility services.

Subpart 517.2—Options

517.200 Scope of subpart.

(a) This subpart applies to all GSA contracts for supplies and services, including:

(1) Services involving construction, alteration, or repair (including dredging, excavating, and painting) of buildings, bridges, roads, or other kinds of real property.

(2) Architect-engineer services.

(b) If a requirement in this subpart is inconsistent with FAR 17.2, this subpart takes precedence.

517.202 Use of options.

(a) *Supplies or services.* (1) You should use options when they meet one or more of the following objectives:

(i) Reduce procurement lead time and associated costs.

(ii) Ensure continuity of contract support.

(iii) Improve overall contractor performance.

(iv) Facilitate longer term contractual relationships with those contractors that continually meet or exceed quality performance expectations.

(2) An option is normally in the Government's interest in the following circumstances:

(i) You anticipate a need for additional supplies or services during the contract term.

(ii) Multiyear contracting authority is not available or its use is inappropriate and you anticipate a need for additional supplies or services beyond the initial contract term.

(iii) There is a need for continuity of supply or service support.

(iv) Funds are not available for the entirety of the Government's needs, but are likely to become available during the contract term.

(v) The initial contract will be used to evaluate the performance of an emerging small business.

(3) Do not use an option if the market price is likely to change substantially and an economic price adjustment clause inadequately protects the Government's interest.

(b) *Construction.* For limitations on the use of options, see 536.213 and 536.270.

517.203 Solicitations.

A solicitation that includes an option to extend should inform offerors that the contract could result in a long term contractual relationship subject to both of the following conditions:

(a) Continuing need by GSA.

(b) Level of contract performance that at least meets GSA's quality performance expectations.

517.207 Exercise of options.

Before exercising an option, you must:

(a) Synopsize it unless you meet of the following conditions:

(1) The option was evaluated as part of the original competition.

(2) The contract action meets an exception in FAR 5.202.

(b) Conclude that the contractor's performance under the contract met or exceeded the Government's expectation for quality performance, unless another circumstance justifies an extended contractual relationship.

(c) Determine that the option price is fair and reasonable.

517.208 Solicitation provisions and contract clauses.

(a) For solicitations under FSS's Stock or Special Order Program, insert a provision substantially the same as the provision at 552.217–70, Evaluation of Options, if both of the following conditions apply:

(1) The solicitation contains an option to extend the term of the contract.

(2) The contract will be fixed price and contain an economic price adjustment clause.

(b) Insert the provision at 552.217–71, Notice Regarding Option(s), or a similar provision, in solicitations that include an option for increased quantities of supplies or services or an option to extend.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 519—SMALL BUSINESS PROGRAMS

Subpart 519.5—Set-Asides for Small Business

Sec.
519.508 Soliciation provisions for contract clauses.

Subpart 519.7—The Small Business Subcontracting Program

519.708 Contract clauses.
519.708–70 Solicitation provisions.

Subpart 519.8—Contracting With the Small Business Administration (The 8(a) Program)

519.870 Direct 8(a) contracting.
519.870–8 Contract clauses.

Subpart 519.12—Small Disadvantaged Business Participation Program

519.1202 Evaluation factor or subfactor.
519.1202–2 Applicability.

Subpart 519.70—GSA Mentor-Protégé Program

519.7001 Scope of subpart.
519.7002 Definitions.
519.7003 General policy.
519.7004 Incentives for prime contractors.
519.7005 Measurement of program success.
519.7006 Mentor firms.
519.7007 Protégé firms.
519.7008 Selection of protégé firms.
519.7009 Application process.
519.7010 Agreement contents.
519.7011 Application review.
519.7012 Developmental assistance.
519.7013 Obligation.
519.7014 Internal controls.
519.7015 Reports.
519.7016 Program review.
519.7017 Contract clauses.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37219, July 9, 1999, unless otherwise noted.

Subpart 519.5—Set-Asides for Small Business

519.508 Solicitation provisions for contract clauses.

Insert 552.219–70, Allocation of Orders—Partially Set-Asides Items, in solicitations and requirements type supply contracts that are partially set aside for small business.

Subpart 519.7—The Small Business Subcontracting Program

519.708 Contract clauses.

519.708–70 Solicitation provisions.

Insert the following provisions as directed:

(a) 552.219–71, Notice to Offerors of Subcontracting Plan Requirements, on the cover page of solicitations containing the clause at FAR 52.219–9, Small Business Subcontracting Plan.

(b) 552.219–72, Preparation, Submission, and Negotiations of Subcontracting Plans, in solicitations requiring submission of the subcontracting plan with initial offers.

(c) 552.219–73, Goals for Subcontracting Plan as follows:

(1) Use the basic provision in sealed bid solicitations containing FAR 52.219–9 if you are able to establish realistic target goals.

(2) Use Alternate I in:

(i) sealed bid solicitations if you cannot establish target goals.

(ii) Negotiated solicitations that include FAR 52.219–9, but do not include 552.219–72.

Subpart 519.8—Contracting With the Small Business Administration (The 8(a) Program)

519.870 Direct 8(a) contracting.

519.870–8 Contract clauses.

(a) Insert the following clauses in solicitations, contracts, and orders issued under the MOU:

(1) Insert the clause at 552.219–74, Section 8(a) Direct Award.

(2) Insert the clause at FAR 52.219–14, Limitation on Subcontracting.

(3) Insert the clause at FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, Substitute the following paragraph for paragraph (c) of the clause. Add the word ''Deviation'' at the end of the clause title.

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

(b) Do not use the clauses at FAR 52.219–11, Special 8(a) Contract Conditions, FAR 52.219–12, Special 8(a) Subcontract Conditions, or FAR 52.219–17, Section 8(a) Award.

Subpart 519.12—Small Disadvantaged Business Participation Program

519.1202 Evaluation factor or subfactor.

519.1202–2 Applicability.

In addition to the exception in FAR 19.1202–2, do not evaluate the extent of participation of SDB concerns in performance of multiple award schedule contracts when all fair and reasonable offers from responsible sources are accepted.

Subpart 519.70—GSA Mentor-Protégé Program

SOURCE: 74 FR 41063, Aug. 14, 2009, unless otherwise noted.

519.7001 Scope of subpart.

The GSA Mentor-Protégé Program is designed to encourage and motivate GSA prime contractors to assist small businesses concerns, small disadvantaged businesses concerns, women-owned small businesses concerns, veteran-owned small business concerns, service-disabled veteran-owned small businesses concerns, and HUBZone small businesses concerns, and enhance their capability of performing successfully on GSA contracts and subcontracts, foster the establishment of long-term business relationships between these small business entities and GSA prime contractors, and increase the overall number of small business entities that receive GSA contract and subcontract awards.

519.7002 Definitions.

The definitions of small business concern, small disadvantaged business concern, HUBZone small business concern, women-owned small business concern, veteran-owned small business concern, and service-disabled veteran-owned small business concern are the same as found in FAR 2.101. Also see 13 CFR 121, 124, 125 and 126.

(a) *Mentor* as used in the GSA Mentor-Protégé Program, is a prime contractor that elects, on a specific GSA contract, to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the protégé.

(b) *Mentor-Protégé Program Manager* means an employee in the Office of Small Business Utilization (OSBU) (E) designated by the Associate Administrator of OSBU to manage the Mentor-Protégé Program.

(c) *Protégé* as used in the GSA Mentor-Protégé Program is a small business concern that is the recipient of developmental assistance pursuant to a mentor-protégé arrangement on a specific GSA contract.

519.7003 General policy.

(a) A large business prime contractor that meets the requirements at section 519.7006, and is approved as a mentor firm by the Mentor-Protégé Program Manager, may enter into an Agreement with a small business concern, small disadvantaged business concern, women-owned small business concern, veteran-owned small business concern, service-disabled veteran-owned small business concern or HUBZone small business concern that meets the requirements for being a protégé (see 519.7007) in order to provide appropriate developmental assistance to enhance the capabilities of the protégé to perform successfully as a subcontractor and supplier.

(b) A small business prime contractor that is capable of providing developmental assistance to protégés, may also be approved as a mentor.

(c) An active mentor-protégé arrangement requires the protégé to either be a current or newly selected subcontractor under the mentor's prime contract with GSA.

(d) A small business concern's status as a protégé under a GSA contract shall not have an effect on its ability

to seek other prime contracts or subcontracts.

(e) Potential Mentors may submit an application for admittance to the Mentor-Protégé Program at any time as long as the requirements at section 519.7006 are met.

(f) The determination of affiliation is a function of the SBA.

519.7004 Incentives for prime contractors.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), the GSA is authorized to provide appropriate incentives to prime contractors in order to encourage subcontracting opportunities for small business concerns consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements, including the GSA Multiple Award Schedule contracts and the GSA Governmentwide Acquisition Contracts. It does not include orders under any GSA contracts.

(b) Costs incurred by a mentor to provide developmental assistance, as described in section 519.7012 to fulfill the terms of their agreement(s) with a protégé firm(s), are not reimbursable as a direct cost under a GSA contract. If GSA is the mentor's responsible audit agency under FAR 42.703–1, GSA will consider these costs in determining indirect cost rates. If GSA is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to paragraph (b) of this section, contracting officers may give mentors evaluation credit during the source selection process for subcontracts awarded under their subcontracting plans pursuant to their Mentor-Protégé Agreements. (See FAR 15.101–1). Therefore:

(1) Contracting officers may evaluate proposals with subcontracting plans containing Mentor-Protégé Agreements more favorably than proposals with subcontracting plans that do not include Mentor-Protégé Agreements; and

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under certain circumstances (see FAR 15.304(c)(3) and 15.305(a)(2)(v)) and determining contractor responsibility FAR section 19.705–5(a)(1).

(d) *OSBU Mentoring Award.* A nonmonetary award may be presented annually to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Administrator of GSA.

(e) *OSBU Mentor-Protégé Annual Conference.* At the conclusion of each year in the Mentor-Protégé Program, mentor firms will be invited to brief contracting officers, program leaders, office directors, and other guests on their experience and progress under the Program. Participation is voluntary.

519.7005 Measurement of program success.

The overall success of the GSA Mentor-Protégé Program encompassing all participating mentors and protégés will be measured by the extent to which it results in:

(a) An increase in the number, dollar value, and percentage of subcontracts awarded to protégés by mentor firms under GSA contracts since the date of entry into the Program. The baseline that demonstrates an increase is determined by comparing the number and total dollar amount of subcontract awards made to the identified protégé firm(s) during the two preceding fiscal years (if any) that are listed in application;

(b) An increase in the number and dollar value of contract and subcontract awards (including percentage of subcontract awards) to protégé firms since the date of the protégé's entry into the Program (under GSA contracts and contracts awarded by other Federal agencies);

(c) An increase in the number and dollar value of subcontracts awarded to a protégé firm by its mentor firm; and

(d) An increase in subcontracting with protégé firms in industry categories where they have not traditionally participated within the mentor

firm's activity (*i.e.*, the protégé is expanding its field of expertise or is increasing its opportunities in areas where it has not traditionally performed).

(e) Assessments of the semi-annual reports submitted by the mentors and ''Lessons Learned'' evaluation submitted by the mentors and protégés to the GSA Mentor-Protégé Program Manager.

519.7006 Mentor firms.

(a) Mentors must be:

(1) A large business prime contractor that is currently performing under an approved subcontracting plan as required by FAR 19.7 - Small business mentors are exempted; or

(2) A small business prime contractor that can provide developmental assistance to enhance the capabilities of protégés to perform as contractors, subcontractors, and suppliers;

(b) Must be eligible (not listed in the ''Excluded Parties List System'') for U.S. Government contracts and not excluded from the Mentor-Protégé Program under section 519.7014(b);

(c) Must be able to provide developmental assistance that will enhance the ability of protégés to perform as contractors and subcontractors; and

(d) Must provide semi-annual reports detailing the assistance provided and the cost incurred in supporting protégés.

519.7007 Protégé firms.

(a) For selection as a protégé, a firm must be:

(1) A small business concern, small disadvantaged business concern, veteran-owned small business concern, service-disabled veteran-owned small business concern, HUBZone small business concern, or women-owned small business concern;

(2) Small for the NAICS code the prime contractor/mentor assigns to the subcontract; and

(3) Eligible (not listed in the ''Excluded Parties List System'') for U.S. Government contracts and not excluded from the Mentor-Protégé Program under section 519.7014(b).

(b) A protégé firm may self-represent to a mentor firm that it meets the requirements set forth in paragraph (a) of this section. Mentors may check the Central Contractor Registration (CCR) at *www.ccr.gov* to verify that the self-representation of the potential protégé meets the specified small business and socioeconomic category eligibility requirements (see FAR 19.703(b) and (d)). HUBZone and small disadvantaged business status eligibility and documentation requirements are determined according to 13 CFR parts 124 and 126.

(c) A protégé firm must not have another formal, active mentor-protégé relationship under GSA's Mentor-Protégé Program but may have an active mentor-protégé relationship under another agency's program.

519.7008 Selection of protégé firms.

(a) Mentor firms will be solely responsible for selecting protégé firms. Mentors are encouraged to select from a broad base of small business concerns including small disadvantaged business concerns, women-owned small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, and HUBZone small business concerns. A protégé must be either a current subcontractor or a newly selected subcontractor for the prime contractor's GSA contract.

(b) Mentor firms may have more than one protégé. GSA reserves the right to limit the number of protégés participating under each mentor firm.

(c) The selection of protégé firms by mentor firms is not protestable, except for a protest regarding the size or eligibility status of an entity selected by a mentor to be a protégé. Such protests shall be handled in accordance with FAR 19.703(b). The contracting officer shall notify the Office of Small Business Utilization (OSBU) of the protest.

519.7009 Application process.

(a) Prime contractors interested in becoming a mentor firm must apply in writing by submitting the GSA Form 3695 to the GSA Mentor-Protégé Program Manager, at GSA Office of Small Business Utilization (E), Washington, DC 20405. The Application shall include the Mentor-Protégé Agreement and will be evaluated for approval based on

the extent to which the company plans to provide developmental assistance.

(b) The application must contain:

(1) A statement that the mentor firm is currently performing under at least one active approved subcontracting plan (small business exempted) and the firm is eligible, as of the date of Application, for the award of Federal contracts;

(2) The number of proposed protégé arrangements;

(3) Data on all current GSA contracts, and subcontracts including the contract/subcontract number(s), type of contract(s), period of performance (including options), contract/subcontract value(s) including options, technical program effort(s) (program title), name of GSA Project Manager or Contracting Officer's Representative (including contact information), name of contracting officer(s) and contact information, and awarding GSA installation;

(4) Data on total number and dollar value of subcontracts awarded under GSA prime contracts within the past 2 years and the number and dollar value of such subcontracts awarded to entities who are proposed protégés;

(5) Information on the proposed types of developmental assistance. For each proposed mentor-protégé relationship include information on the company's ability to provide developmental assistance to the identified protégé firm and how that assistance will potentially increase subcontracting opportunities for the protégé firm, including subcontracting opportunities in industry categories where these entities are not dominant in the company's current subcontractor base; and

(6) Agreement information as listed in 519.7010.

519.7010 Agreement contents.

The contents of the Agreement must contain:

(a) Names, addresses (including facsimile, e-mail, and homepage) and telephone numbers of mentor and protégé firms and the name, telephone number, and position title within both firms of the person who will oversee the Agreement.

(b) An eligibility statement from the protégé stating that it is a small business, its primary NAICS code, and when applicable the type of small business (small disadvantaged business concern, HUBZone small business concern, women-owned small business concern, veteran-owned small business concern, or service-disabled veteran-owned small business concern).

(c) A description of the type of developmental assistance that will be provided by the mentor firm to the protégé firm (see 519.7012).

(d) Milestones for providing the identified developmental assistance.

(e) Factors to assess the protégé firm's developmental progress under the Program.

(f) The anticipated dollar value and type of subcontracts that may be awarded to the protégé firm consistent with the extent and nature of mentor firm's business, and the period of time over which they may be awarded.

(g) *Program participation term*: State the period of time over which the developmental assistance will be performed.

(h) *Mentor termination procedures*: Describe the procedures applicable to the mentor firm when notifying the Protégé firm, in writing and at least 30 days in advance, of the mentor firm's intent to voluntarily withdraw its participation in the Program, or to terminate the Agreement.

(i) *Protégé termination procedures*: Describe the procedures applicable to the protégé firm when notifying the mentor firm, in writing at least 30 days in advance, of the protégé firm's intent to terminate the Mentor-Protégé Agreement.

(j) Plan for accomplishing contract work should the Mentor-Protégé Agreement be terminated or a party excluded under 519.7014(b). The mentor's prime contract with GSA continues even if the Mentor-Protégé Agreement or the Mentor-Protégé Program is discontinued.

(k) The protégé must agree to provide input into the mentor firm's semi-annual reports (see 519.7015). The protégé must submit a ''Lessons Learned'' evaluation along with the mentor firm at the conclusion of the Mentor-Protégé agreement.

(l) Other terms and conditions as specified by the Mentor-Protégé Manager on a case-by-case basis.

519.7011 Application review.

(a) The Mentor-Protégé Program Manager will review the information specified in section 519.7009(b) and 519.7010 to establish the Mentor's and Protégé's eligibility and to ensure all necessary information is included. If the application relates to a specific contract, then the Mentor-Protégé Program Manager will consult with the applicable contracting officer regarding the adequacy of the proposed Agreement, as appropriate. The Mentor-Protégé Program Manager will complete its review no later than 30 days after receipt of the application. The contracting officer must provide feedback to the Program Manager no later than 10 days after receipt of the application.

(b) After the Mentor-Protégé Program Manager completes its review and provides written approval, the Mentor may execute the Agreement and implement the developmental assistance as provided under the Agreement. The Mentor-Protégé Program Manager will provide a copy of the Mentor-Protégé Agreement to the GSA contracting officer for any GSA contracts affected by the Agreement.

(c) The Agreement defines the relationship between the Mentor and the Protégé firms only. The Agreement itself does not create any privity of contract or contractual relationship between the Mentor and GSA nor the Protégé and GSA.

(d) If the Agreement is disapproved, the Mentor may provide additional information for reconsideration. The Mentor-Protégé Program Manager will complete the review of any supplemental information no later than 30 days after its receipt. Upon finding deficiencies that GSA considers correctable, the Mentor-Protégé Program Manager will notify the Mentor and Protégé and request correction of the deficiencies to be provided within 15 days.

519.7012 Developmental assistance.

The forms of developmental assistance a mentor can provide to a protégé include:

(a) Management guidance relating to—

(1) Financial management;

(2) Organizational management;

(3) Overall business management/planning; and

(4) Business development.

(b) Engineering and other technical assistance.

(c) Loans.

(d) Rent-free use of facilities and/or equipment.

(e) Temporary assignment of personnel to the protégé for purpose of training.

(f) Any other types of developmental assistance approved by the GSA Mentor-Protégé Program Manager.

519.7013 Obligation.

(a) The mentor or protégé may terminate the Agreement in accordance with 519.7010. The mentor will notify the Mentor-Protégé Program Manager and the contracting officer, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw from the Program or to terminate the Agreement, or upon receipt of a protégé's notice to withdraw from the Program.

(b) Mentor and protégé firms will submit a ''Lessons Learned'' evaluation to the GSA Mentor-Protégé Program Manager at the conclusion or termination of each Mentor-Protégé Agreement or withdrawal from the Mentor-Protégé program.

519.7014 Internal controls.

(a) The GSA Mentor-Protégé Program Manager will manage the Program. Internal controls will be established by the Mentor-Protégé Program Manager to achieve the stated Program objectives (by serving as checks and balances against undesired actions or consequences) such as:

(1) Reviewing and evaluating mentor Applications for realism, validity and accuracy of provided information;

(2) Monitoring each Mentor-Protégé Agreement by reviewing semi-annual progress reports submitted by mentors and protégés on protégé development

to measure protégé progress against the master plan contained in the approved Agreement;

(3) Monitoring milestones in the Agreement (see 519.7010); and

(4) Evaluating ''Lessons Learned'' submitted by the Mentor and the Protégé as required by section 519.7013 to improve the GSA Mentor-Protégé Program.

(b)(1) GSA has the authority to exclude mentor or protégé firms from participating in the GSA Program.

(2) GSA may rescind approval of an existing Mentor-Protégé Agreement if it determines that such action is in GSA's best interest. The rescission shall be in writing and sent to the Mentor and protégé after approval by the Director of OSBU. Rescission of an Agreement does not change the terms of any subcontract between the Mentor and the Protégé.

(3) Exclusion from the Program does not constitute a termination of the subcontract between the mentor and the protégé.

519.7015 Reports.

(a) Semi-annual reports shall be submitted by the mentor to the GSA Mentor-Protégé Program manager to include information as outlined in section 552.219–76(c).

(b) Protégés must agree to provide input into the mentor firm's semi-annual reports detailing the assistance provided and goals achieved since agreement inception. However, for cost reimbursable contracts, costs associated with the preparation of these reports are unallowable costs under these Government contracts and will not be reimbursed by the Government.

(c) The GSA contracting officer, or if applicable the technical program manager, shall include an assessment of the prime contractor's (mentor's) performance in the Mentor-Protégé Program in a quarterly ''Strengths and Weaknesses'' evaluation report. A copy of this assessment will be provided to the Mentor-Protégé Program Manager and to the mentor and protégé.

519.7016 Program review.

At the conclusion of each year in the Mentor-Protégé Program (anniversary date of the Mentor-Protégé Program), the prime contractor and protégé, as appropriate, will formally brief the GSA Mentor-Protégé Program Manager, the technical program manager, and the contracting officer regarding Mentor-Protégé Program accomplishments pertaining to the approved Agreement.

519.7017 Contract clauses.

(a) The contracting officer shall insert the clause at 552.219–75, GSA Mentor-Protégé Program, in all unrestricted solicitations (not set aside) and contracts that exceed the simplified acquisition threshold that offer subcontracting opportunities or in the case of a small business, that can offer developmental assistance to a small business protégé.

(b) The contracting officer shall insert the clause at 552.219–76, Mentor Requirements and Evaluation, in contracts anticipated to exceed the simplified acquisition threshold where the prime contractor has signed a Mentor-Protégé Agreement with GSA.

PART 522—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Sec.
522.001 Defintion.

Subpart 522.1—Basic Labor Policies

522.101 Labor relations.
522.101–1 General.
522.103–5 Contract clauses.

Subpart 522.4—Labor Standards for Contracts Involving Construction

522.406 Administration and enforcement.
522.406–6 Payrolls and statements.

Subpart 522.8—Equal Employment Opportunity

522.803 Responsibilities.
522.804 Affirmative action programs.
522.804–1 Nonconstruction.
522.804–2 Construction.
522.805 Procedures.
522.807 Exemptions.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37220, July 9, 1999, unless otherwise noted.

522.001 Definition.

Agency labor advisor, as used in this part, means the Director of the Contract Policy Division (VPC) within the Office of the Chief Acquisition Officer (OCAO).

[73 FR 46203, Aug. 8, 2008]

Subpart 522.1—Basic Labor Policies

522.101 Labor relations.

522.101–1 General.

The Office of General Counsel (OGC) and the agency labor advisor shall—

(a) Serve as the GSA points of contact on all contractor labor relations matters;

(b) Initiate contact on contractor labor relations matters with national offices of labor organizations, Government departments, agencies or other governmental organizations. Contracting offices shall notify OGC and the agency labor advisor when they are contacted by such external organizations;

(c) Serve as a clearinghouse for information on labor laws applicable to Government acquisitions; and

(d) Respond to questions involving FAR Part 22, Application of Labor Laws to Government Acquisitions, or other contractor labor relations matters concerning GSA acquisition programs. OGC determines the agency's legal position.

[73 FR 46203, Aug. 8, 2008]

522.103–5 Contract clauses.

Insert FAR 52.222–1, Notice to the Government of Labor Disputes, in solicitations and contracts for DX rated orders under the Defense Priorities and Allocations System (DPAS). Information on the DPAS can be found at FAR Subpart 11.6, Priorities and Allocations.

[73 FR 46203, Aug. 8, 2008]

Subpart 522.4—Labor Standards for Contracts Involving Construction

522.406 Administration and enforcement.

522.406–6 Payrolls and statements.

Weekly payrolls and statements of compliance with respect to payment of wages are not required from a prime contractor or a subcontractor that personally performs work.

[73 FR 46203, Aug. 8, 2008]

Subpart 522.8—Equal Employment Opportunity

522.803 Responsibilities.

Contracting officers should submit questions on the applicability of E.O. 11246 and implementing regulations to assigned legal counsel.

[64 FR 37220, July 9, 1999, as amended at 73 FR 46203, Aug. 8, 2008]

522.804 Affirmative action programs.

522.804–1 Nonconstruction.

(a) The requirements of FAR 22.804 also apply to each contractor and subcontractor with 50 or more employees that either:

(1) Serves as a depository of Government funds; or

(2) Is a financial institution serving as an issuing and paying agent for U.S. savings bonds and savings notes.

(b) The contractors, subcontractors, and financial institutions described in 522.804–1(a) must develop a written affirmative action compliance program for each of its establishments regardless of the contract or holding value, in accordance with 41 CFR 60–1.40.

[64 FR 37220, July 9, 1999, as amended at 73 FR 46203, Aug. 8, 2008]

522.804–2 Construction.

Goals for the employment of minorities and women in the construction industry are established by the Director, Office of Federal Contract Compliance Programs (OFCCP), Department of Labor. The current goal for the utilization of women is 6.9%, regardless of the location of the Federal contract. This

goal was extended indefinitely by the Department of Labor in 1980. The current goals for minority participation vary by location and are listed in Appendix E of DOL's ''Technical Assistance Guide for Federal Construction Contractors.'' This guide can be accessed at *http://www.dol.gov/esa/ofccp/TAguides/ctaguide.htm*.

[73 FR 46203, Aug. 8, 2008]

522.805 Procedures.

(a) To determine whether the contract meets the threshold in FAR 22.805(a), contracting officers shall include the value of the basic contract plus priced options. A contract modification exercising a priced option is not a contract award under FAR 22.805(a)(1)(ii) and does not a require a preaward clearance.

(b) Contracting officers shall submit preaward clearance requests directly to the appropriate OFCCP regional office. A list of these offices can be found at *http://www.dol.gov/esa/contacts/ofccp/ofcpkeyp.htm*.

(c) The EEO poster required by FAR 22.805(b) can be found at: *http://www.dol.gov/esa/regs/compliance/posters/pdf/eeopost.pdf*. In addition to providing this poster to each non-exempt contractor, the contracting officer shall advise contractors to complete the Employer Information Report (EEO–1) at *http://www.eeoc.gov/eeo1survey/index.html*.

[64 FR 37220, July 9, 1999, as amended at 73 FR 46203, Aug. 8, 2008]

522.807 Exemptions.

The agency labor advisor submits a request for exemption.

PART 523—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY AND DRUG-FREE WORKPLACE

Subpart 523.3—Hazardous Materials Identification and Material Safety Data

Sec.
523.303 Contract clause.
523.370 Solicitation provision.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37220, July 9, 1999, unless otherwise noted.

Subpart 523.3—Hazardous Materials Identification and Material Safety Data

523.303 Contract clause.

(a) Insert 552.223–70, Hazardous Substances, in solicitations and contracts for packaged items subject to the Federal Hazardous Substances Act and the Hazardous Materials Transportation Act.

(b) Insert 552.223–71, Nonconforming Hazardous Materials, in solicitations and contracts for supplies that contain hazardous materials.

523.370 Solicitation provision.

Insert 552.223–72, Hazardous Material Information, in any solicitation that provides for delivery of hazardous materials on an f.o.b. origin basis.

PART 525—FOREIGN ACQUISITION

Subpart 525.1—Buy American Act-Supplies [Reserved]

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37221, July 9, 1999, unless otherwise noted.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 527—PATENTS, DATA, AND COPYRIGHTS

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37221, July 9, 1999, unless otherwise noted.

Subpart 527.4—Rights in Data and Copyrights

527.409 Solicitation provisions and contract clauses.

Architect-Engineer Services and Construction Contracts Involving Architect-Engineer Services

Insert the following in solicitations and contracts for architect-engineer services and construction contracts involving architect-engineer services:

(a) Insert 552.227–70, Government Rights (Unlimited), instead of FAR 52.227–17, Rights in Data-Special Works, in contracts, except if 552.227–71 is prescribed.

(b) If the Government requires sole property rights and exclusive control over the design and data, insert 552.227–71, Drawings and Other Data to Become Property of Government, instead of FAR 52.227–17.

PART 528—BONDS AND INSURANCE

Subpart 528.2—Sureties and Other Security for Bonds

Sec.
528.202 Acceptability of corporate sureties.

Subpart 528.3—Insurance

528.310 Contract clause for work on a Government installation.
528.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
528.311–1 Contract clause.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37221, July 9, 1999, unless otherwise noted.

Subpart 528.2—Sureties and Other Security for Bonds

528.202 Acceptability of corporate sureties.

Corporate surety bonds must be manually signed by the Attorney-in-Fact or officer of the surety company and the corporate seal affixed. The contracting officer may waive failure of the surety to affix the corporate seal as a minor informality. (See B–184120, July 2, 1975, 75–2 CPD 9.)

[74 FR 17099, Apr. 14, 2009]

Subpart 528.3—Insurance

528.310 Contract clause for work on a Government installation.

Insert the clause at 552.228–5, Government as Additional Insured, in each solicitation and contract that meets all the following conditions:

(a) The contract amount is expected to exceed the simplified acquisition threshold; and

(b) The contract will require work to be performed on Government property.

[74 FR 17099, Apr. 14, 2009]

528.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

528.311—1 Contract clause.

Use the clause at FAR 52.228–7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction and those for architect-engineer services, when a cost-reimbursement contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause.

[74 FR 17099, Apr. 14, 2009]

PART 529—TAXES

Subpart 529.4—Contract Clauses

Sec.
529.401 Domestic contracts.
529.401–70 Purchases at or under the simplified acquisition threshold.

529.401–71 Contracts for supplies and services usable by the DC Government.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37222, July 9, 1999, unless otherwise noted.

Subpart 529.4—Contract Clauses

529.401 Domestic contracts.

529.401–70 Purchases at or under the simplified acquisition threshold.

Insert 552.229–70, Federal, State, and Local Taxes, in purchases and contracts estimated to exceed the micropurchase threshold, but not the simplified acquisition threshold.

529.401–71 Contracts for supplies and services usable by the DC Government.

Insert 552.229–71, Federal Tax-DC Government, in solicitations and contracts that permit the District of Columbia Government to place orders.

PART 532—CONTRACT FINANCING

Subpart 532.1—Non-Commercial Item Purchase Financing

Sec.
532.111 Contract clauses for non-commercial purchases.

Subpart 532.8—Assignment of Claims

532.806 Contract clauses.

Subpart 532.9—Prompt Payment

532.904 Determining payment due dates.
532.905 Payment documentation and process.
532.908 Contract clauses.

Subpart 532.70—Authorizing Payment by Government Charge Card

532.7002 Solicitation requirements.
532.7003 Contract clause.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37222, July 9, 1999, unless otherwise noted.

Subpart 532.1—Non-Commercial Item Purchase Financing

532.111 Contract clauses for non-commercial purchases.

For contracts that include the clause at FAR 52.232–5, Payments Under Fixed-Price Construction Contracts, the contracting officer shall provide the contractor with GSA Form 2419, Certification of Progress Payments Under Fixed-Price Construction Contracts, to be used to make the certification required by FAR 52.232–5(c).

[74 FR 54917, Oct. 26, 2009]

Subpart 532.8—Assignment of Claims

532.806 Contract clauses.

Insert the clause at 552.232–23, Assignment of Claims, in solicitations and requirements or indefinite quantity contracts under which more than one agency may place orders.

Subpart 532.9—Prompt Payment

532.904 Determining payment due dates.

Payment due dates for construction contracts are addressed at FAR 32.904(d). The following procedures apply to construction and building service contracts:

(a) The amount of final payment must include, as appropriate, deductions to cover any of the following:

(1) Liquidated damages for late completion.

(2) Liquidated damages for labor violations.

(3) Amounts withheld for improper payment of labor wages.

(4) The amount of unilateral change orders covering defects and omissions.

(5) The agreed-upon dollar amount in a Deficiency Report, which is included in all applicable Operation and Maintenance (O&M) service contracts.

(b) When the contract is for the performance of building services, the contracting officer shall include the clause at 552.232–72, Final Payment Under Building Services Contracts.

[74 FR 54917, Oct. 26, 2009]

532.905 Payment documentation and process.

For contracts of the type shown in 532.7201(a)(1) through (4):

(a) Contractors are to submit invoices or vouchers to the contracting officer for approval. Invoices must be annotated with the date of receipt, as required by FAR 32.905. That date will be used to determine interest penalties for late payments. The contracting officer or designee must review the processing of invoices or vouchers before payment to determine if the items and amounts claimed are consistent with the contract terms and represent prudent business transactions. The contracting officer must ensure that these payments are commensurate with physical and technical progress under the contract. If the contractor has not deducted questionable amounts from the invoice or amounts required to be withheld, the contracting officer must make the required deduction, except as provided in 532.7203. Subject to 532.7201, the contracting officer must note approval of any payment on (or attached to) the invoice or voucher submitted by the contractor and forward the invoice or voucher to the appropriate contract finance office for retention after certification and scheduling for payment by a disbursing office.

(b) See GSAM 532.7203 for the handling of audit findings.

[74 FR 54917, Oct. 26, 2009]

532.908 Contract clauses.

(a) GSA has a FAR deviation that allows this agency to use the clause at 552.232–1, Payments, in lieu of the clause at FAR 52.232–1, Payments.

(b) *General.* Before exercising the authority to modify the date for constructive acceptance or constructive approval of progress payments in paragraph (a)(5)(i) of the clause at FAR 52.232–25, Prompt Payment, the contracting officer must prepare a written justification explaining why a longer period is necessary. An official one level above the contracting officer must approve the justification. The time needed should be determined on a case-by-case basis, but the specified constructive acceptance period shall not exceed 30 days.

(c) *Stock, Special Order, and Schedules Programs.* (1) GSA has obtained a FAR Deviation to authorize payment within 10 days of receipt of a proper invoice. The authority applies only to:

(i) Orders placed by GSA under the referenced programs;

(ii) That include FAR 52.232–33, Mandatory Information for Electronic Funds Transfer Payment; and

(iii) For which the order is placed, and the contractor submits invoices, using EDI in accordance with the Trading Partner Agreement.

(2) If the contract is for commercial items and will include FAR 52.212–4, use the clause with its Alternate II. If the contract is not for commercial items, use the clause at 552.232–25, Prompt Payment, instead of FAR 52.232–25.

[74 FR 54918, Oct. 26, 2009]

Subpart 532.70—Authorizing Payment by Government Charge Card

532.7002 Solicitation requirements.

(a) In solicitations for supplies and services, except FSS schedule solicitations, request offerors to indicate if they will accept payment by Governmentwide commercial purchase card. Identify the card brand(s) under the GSA SmartPay program that may be used to make payments under the contract, on the cover page or in Section L of the solicitation.

(b) For FSS schedule contracts, identify the card brand(s) under the GSA SmartPay program that may be used to make payments under the contract in the contract award letter.

(c) For orders placed by GSA, you may authorize payment by Governmentwide commercial purchase card only for orders that do not exceed $100,000 (see GSA Order, Guidance on Use of the Credit Card for Purchases (CFO 4200.1)).

(d) Consider requesting offerors to designate different levels for which they may accept payment by Governmentwide commercial purchase card, for example:

''If awarded a contract under this solicitation, the offeror agrees to accept payment by

Governmentwide commercial purchase card for orders of:

—$2,500 or less
—$25,000 or less
—$50,000 or less
—$100,000 or less''

[65 FR 11247, Mar. 2, 2000]

532.7003 Contract clause.

For indefinite-delivery, indefinite-quantity (IDIQ) contracts other than Schedules, insert the clause at 552.232–77, Payment By Government Charge Card, if the contract will provide for payment by Government charge card as an alternative method of payment for orders. For Schedule contracts that provide for payment using the Government charge card, use the clause(s) prescribed at part 538.

[74 FR 54918, Oct. 26, 2009]

PART 533—PROTESTS, DISPUTES, AND APPEALS

Subpart 533.1—Protests

Sec.
533.103 Protests to the agency.
533.103–1 Filing a protest.

Subpart 533.2—Disputes and Appeals

533.209 Suspected fraudulent claims.
533.211 Contracting officer's decision.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37224, July 9, 1999, unless otherwise noted.

Subpart 533.1—Protests

533.103 Protests to the agency.

533.103–1 Filing a protest.

(a) Any protester filing an agency protest has the choice of requesting either that the contracting officer or the Agency Protest Official decide the protest. If the protest is silent on this matter, the contracting officer will decide the protest. If a party requests a review at a level above the contracting officer, the Agency Protest Official will decide the protest. The decision by the Agency Protest Official for GSA is an alternative to a decision by the contracting officer on a protest. The Agency Protest Official for GSA will not consider an appeal of the contracting officer's decision on an agency protest.

(b) If an agency protest is filed, the deciding official uses the procedures in FAR 33.103 and this section to resolve the protest. The deciding official will provide a fair and quick review of any protest filed with the agency.

(c) The filing timeframes in FAR 33.103(e) apply. An agency protest is filed when the complete protest is received at the location the solicitation designates for serving protests. GSA's hours of operation are 8 a.m. to 4:30 p.m. Protests delivered after 4:30 p.m. will be considered received and filed the following business day.

(d) The protest must meet all the following conditions:

(1) Include the information required by FAR 33.103(d)(2).

(2) Indicate that it is a protest to the agency.

(3) Be filed in writing with the contracting officer.

(4) State whether the protester chooses to have the contracting officer or the Agency Protest Official decide the protest. If the protest does not include the protester's choice, then the contracting officer will decide the protest (see paragraph (a) of this subsection).

(e) The following procedures apply to information submitted in support of or in response to an agency protest:

(1) GSA procedures do not provide for any discovery.

(2) The deciding official has discretion to request additional information from either the agency or the protester, orally or in writing, as may be necessary to render a timely decision on the protest. However, protests are normally decided on the basis of information initially provided by the protester and the agency.

(3) To the extent permitted by law and regulations, the parties may exchange relevant information.

(4) The agency must make a written response to the protest within ten days unless another date is set by the deciding official.

(5) The agency must also provide the protester with a copy of the response on the same day it files the protest response with the deciding official. If the agency believes it needs to redact or

withhold any information in the response from the protester, it should identify and provide the information to the deciding official for *in camera* review.

(f) A protester may represent itself or be represented by legal counsel. GSA will not reimburse the protester for any legal fees related to the agency protest.

(g) GSA may dismiss or stay proceedings on an agency protest if a protest on the same or similar basis is filed with a protest forum outside of GSA.

[73 FR 74614, Dec. 9, 2008]

Subpart 533.2—Disputes and Appeals

533.209 Suspected fraudulent claims.

In GSA, the agency official responsible for investigating fraud is the Office of Inspector General.

[73 FR 74614, Dec. 9, 2008]

533.211 Contracting officer's decision.

The contracting officer's written decision must include the paragraph at FAR 33.211(a)(4)(v). The contracting officer shall state in the decision that a contractor's notice of appeal to the Civilian Board of Contract Appeals (CBCA) should include a copy of the contracting officer's decision.

[73 FR 74614, Dec. 9, 2008]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 536—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 536.1—General

Sec.
536.101 Applicability.

Subpart 536.2—Special Aspects of Contracting for Construction

536.213 Special procedures for sealed bidding in construction contracting.
536.213–3 Invitations for bids.
536.213–370 Bids that include alternates.
536.213–371 Bids that include options.
536.213–372 Bids that include both alternates and options.
536.270 Exercise of options.
536.271 Project labor agreements.

Subpart 536.5—Contract Clauses

536.570 Supplemental provisions and clauses.
536.570–1 Definitions.
536.570–2 Authorities and limitations.
536.570–3 Specialist.
536.570–4 Basis of award—construction contract.
536.570–5 Working hours.
536.570–6 Use of premises.
536.570–7 Measurements.
536.570–8 Specifications and drawings.
536.570–9 Shop drawings, coordination drawings, and schedules.
536.570–10 Samples.
536.570–11 Heat.
536.570–12 Use of equipment by the Government.
536.570–13 Subcontracts.
536.570–14 Requirement for a Project Labor Agreement.

Subpart 536.6—Architect-Engineer Services

536.602 Selection of firms for architect-engineer contracts.
536.602–1 Selection criteria.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37224, July 9, 1999, unless otherwise noted.

Subpart 536.1—General

536.101 Applicability.

If a requirement in this part is inconsistent with a requirement in another GSAR part, this part takes precedence.

Subpart 536.2—Special Aspects of Contracting for Construction

536.213 Special procedures for sealed bidding in construction contracting.

536.213–3 Invitations for bids.

536.213–370 Bids that include alternates.

(a) The base bid must include all features essential to a sound and adequate building design. If it appears that funds available for a project may be insufficient to include all desired features in the base bid, you may issue a solicitation for a base bid and include one or more alternates in the order of priority. Use alternates only if they are clearly justified and involve substantial amounts of work in relation to the base bid. Their use must be limited and should involve only ''add'' alternates.

(b) Before opening bids that include alternates, determine, and record in the contract file, the amount of funds available for the project. The amount recorded must be announced at the beginning of the bid opening. The amount is the controlling factor in determining the low bidder. This amount may be increased later when determining the alternate items to award to the low bidder if the following condition is met: the award amount of the base bid plus the combination of alternate items does not exceed the amount offered for the base bid and the same combination of alternate items by any other responsible bidder whose bid conforms to the solicitation. This requirement prevents the displacement of the low bidder by manipulating the alternates to be used.

536.213–371 Bids that include options.

(a) Subject to the limitations in paragraph (c) of this section, you may include options in contracts if it is in the Government's interest.

(b) the appropriate use of options may include, but is not limited to, any of the following:

(1) If additional work is anticipated but funds are not expected to be available at the time of award, and it would

not be practicable to award a separate contract or to permit an additional contractor to work on the same site.

(2) If fixed building equipment, e.g., elevators or escalators, will be installed under the construction contract and it is advantageous to have the installer of the equipment maintain and service the equipment during the warranty period.

(c) You must not use options under any of the following conditions:

(1) the prospective option represents known firm requirements for which funds are available unless competition for the option quantity is impracticable once the initial contract is awarded.

(2) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable.

(d) Solicitations containing option provisions must state the period within which the options may be exercised.

(e) Solicitations must state whether the basis of award is inclusive or exclusive of the options. Before issuing a solicitation that includes evaluated options, you must determine that there is reasonable certainty that funds will be made available to permit exercise of the option.

536.213–372 Bids that include both alternates and options.

(a) Solicitations may include both alternates and options if the conditions in 536.213–370, Bids that include alternates, and 536.213–371, Bids that include options, are satisfied. In these solicitations, the low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for the base bid and the alternates, in the order of priority listed in the solicitation, that provide the most work features within the funds available at bid opening, plus all options designated to be evaluated.

(b) The basis of award may require the evaluation of options associated with alternates if the related alternate is selected.

(c) Before opening bids that include both alternates and options, determine, and record in the contract file, the amount of funds available for the project (*i.e.*, for the base bid and alternate work). The amount recorded must be announced at the beginning of the bid opening. This amount may be increased later when determining the alternate items to be awarded to the low bidder if the following condition is met: the award amount of the base bid and evaluated options plus the alternate items does not exceed the amount offered for the base bid, the evaluated options, and the same combination of alternate items by any other responsible bidder whose bid conforms to the solicitation.

536.270 Exercise of options.

(a) If exercising an option, notify the contractor, in writing, within the time period specified in the contract.

(b) Exercise options only after determining that all the following conditions exist:

(1) Funds are available.

(2) The requirement covered by the option fulfills an existing Government need.

(3) Exercising the option is the most advantageous method of satisfying the Government's need, price and other factors considered.

(c) Before exercising an option, you must determine that the action complies with the option's terms and this section's requirements. Include your written determination in the contract file.

(d) The contract modification, or other written document which notifies the contractor of the exercise of the option, must cite the option clause as authority. If exercising an unpriced or unevaluated option, cite the statutory authority permitting the use of other than full and open competition (see FAR 6.302 and 517.207).

536.271 Project labor agreements.

(a) *Authority*. This subpart implements the Presidential memorandum of June 5, 1997, on using project labor agreements (PLAs) on Federal construction projects. The Presidential memorandum authorizes executive departments and agencies to require PLAs on large and significant construction projects for facilities to be owned by a Federal department or agency.

(b) *Applicability*. These policies and procedures apply to all GSA activities

authorized to award contracts for construction of facilities to be owned by a Federal department or agency. You may use a PLA in leasehold arrangement, Federally funded projects, and other appropriate circumstances.

(c) *Definitions*. *Construction* means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. The terms buildings, structures, or other real property are defined further in Federal Acquisition Regulation (FAR) 36.102.

Labor organization means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, and any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization (42 U.S.C. 2000e(d)).

Large and significant project means a Federal construction project with a total cost to the Federal Government of more than $5 million.

Project Labor Agreement (PLA) means an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor and subcontractors on a project and the union(s) agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the Government's procurement interest in cost, efficiency, and quality.

(d) *Policy*. (1) You may, on a project-by-project basis, use a PLA on a large and significant project when both of the following conditions apply:

(i) A PLA will advance the Government's procurement interests.

(ii) No laws that apply to the specific construction project preclude the use of the PLA.

(2) Do not require any contractor to enter into a PLA with any particular labor organization.

(3) The use of a PLA is not intended to create any right or benefit, substantive or procedural enforceable by a nonfederal party against the United States, its departments, and agencies, its officers or employees, or any other person.

(e) *Procedures*. (1) As part of procurement planning for construction projects with a total estimated cost to the Federal Government of more than $5 million, you may consider requiring a PLA.

(2) To require a PLA, you must determine whether use of a PLA will advance the Government's procurement interests in all the following areas:

(i) Cost, efficiency, and quality.

(ii) Promoting labor-management stability.

(iii) Promoting compliance with applicable legal requirements governing safety and health, equal employment opportunity, labor and employment standards, and other matters.

(3) In making the determination required by paragraph (b) of this section, consult with the agency project or program manager and obtain guidance from the Agency Labor Advisor and assigned legal counsel. You should consider the following factors:

(i) Whether past experience with construction projects in the location where the project will be performed indicates that a PLA will be effective.

(ii) Whether delays in performance of the construction contract would have significant adverse impact on the mission of the agency or operation of the installation or facility.

(iii) Whether any law applies to the specific construction project that would impede use of a PLA.

(iv) Whether the labor organizations in the area can provide a reliable source of skilled, experienced building trades workers in all crafts needed on the job site for the project's duration (taking into consideration other major construction work in the area).

(v) Whether the Government can benefit from uniform work rules and working conditions and established procedures for resolving labor disputes, no strike/no lock-out protections.

(vi) Whether the Government can benefit from increased stability and

labor peace that derives from greater labor-management cooperation.

(vii) Whether the requirements for a PLA will unreasonably restrict competition.

(viii) Other relevant information.

(4) Document the rationale supporting your decision to require a PLA in the contract file.

(5) Provide the following information to the Agency Labor Advisor (GSA Acquisition Policy Division (MVP)):

(i) A brief description of the project.

(ii) The estimated cost.

(iii) A copy of the document supporting your decision to require a PLA.

(iv) A copy of the solicitation.

Subpart 536.5—Contract Clauses

536.570 Supplemental provisions and clauses.

536.570–1 Definitions.

Insert 552.236–70, Definitions, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–2 Authorities and limitations.

Insert 552.236–71, Authorities and Limitations, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

536.570–3 Specialist.

Insert 552.236–72, Specialist, in solicitations and contracts for construction if the technical sections of the contract require unusual experience or specialized facilities for adequate contract performance.

536.570–4 Basis of award—construction contract.

(a) Insert a provision substantially the same as 552.236–73, Basis of Award—Construction Contract, in solicitations for fixed-price construction contracts except if any of the following conditions apply:

(1) The solicitation requires the submission of a lump-sum bid only.

(2) The solicitation is for an indefinite quantity contract.

(3) The contract amount is not expected to exceed the simplified acquisition threshold.

(b) *Instructions for use.*

If the solicitation requests the submission of a . . .	Then use the . . .
(1) Base bid and unit prices ..	Basic provision.
(2) Base bid and options	Provision with its Alternate I.
(3) Base bid and alternates ...	Provision with its Alternate II.
(4) Base bid, alternates, and options.	Provision with its Alternate III.

536.570–5 Working hours.

Insert 552.236–74, Working Hours, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

536.570–6 Use of premises.

Insert 552.236–75, Use of Premises, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–7 Measurements.

Insert 552.236–76, Measurements, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–8 Specifications and drawings.

Insert the clause at 552.236–77, Specifications and Drawings, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

536.570–9 Shop drawings, coordination drawings, and schedules.

Insert the clause at 552.236–78, Shop Drawings, Coordination Drawings, and Schedules, in solicitations and contracts if construction is contemplated and the contract amount is expected to exceed the simplified acquisition threshold.

536.570–10 Samples.

Insert the clause at 552.236–79, Samples, in solicitations and contracts for construction if the technical sections

of the contract require the submission and approval of samples.

536.570–11 Heat.

Insert the clause at 552.236–80, Heat, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated.

536.570–12 Use of equipment by the Government.

Insert the clause at 552.236–81, Use of Equipment by the Government, in contracts requiring heating and air-conditioning of existing buildings if it may be necessary for the Government to operate all or part of the equipment before final acceptance of the contract.

536.570–13 Subcontracts.

Insert 552.236–82, Subcontracts, in solicitations and contracts for construction if the contract amount is expected to exceed the simplified acquisition threshold.

536.570–14 Requirement for a Project Labor Agreement.

Insert a clause substantially the same as 552.236–83, Requirement for a Project Labor Agreement, in solicitations and contracts that will require a project labor agreement.

Subpart 536.6—Architect-Engineer Services

536.602 Selection of firms for architect-engineer contracts.

536.602–1 Selection criteria.

(a) FAR 36.602–1 requires that agencies include ''location in the general geographical area of the project and knowledge of locality of the project'' as one of several selection criteria.

(1) Do not use this evaluation factor as a minimum qualification requirement for determining whether a firm is eligible to compete for a proposed project.

(2) This factor must not exceed 5 percent of the total weight of all evaluation criteria. In order to receive maximum score for this factor, the architect-engineer firm(s) must demonstrate that at least 35 percent of the architect-engineer contract services (based on the total contract price) will be accomplished within the geographical boundaries established for the project.

(3) Under an approved class deviation from FAR 36.602–1(a)(5), this factor does not apply to projects that the Chief Architect of GSA determines have national significance.

(b) The public announcement (Commerce Business Daily notice) for a proposed project should identify the general geographical area of the project by either:

(1) A radius in miles or other appropriate unit of measure.

(2) The Standard Metropolitan Statistical Area, county(ies), state(s) surrounding the project, or other appropriate geographic boundaries.

(c) Architect-engineer selections under the Design Excellence Program must apply the geographical evaluation criteria in the second phase.

(d) The public announcement (Commerce Business Daily notice) must provide the number of calendar days the architect-engineer of record has to establish a production capability within the general geographical area of the project. You may allow the architect-engineer of record up to 45 calendar days after contract award to establish this production capability.

[65 FR 11247, Mar. 2, 2000]

PART 537—SERVICE CONTRACTING

Subpart 537.1—Service Contracts—General

Sec.
537.110 Solicitation provisions and contract clauses.

Subpart 537.2—Advisory and Assistance Services

537.201 Definitions.
537.270 Contract clause.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37226, July 9, 1999, unless otherwise noted.

Subpart 537.1—Service Contracts—General

537.110 Solicitation provisions and contract clauses.

The following provision and clauses apply to contracts for building services:

(a) If the contract is expected to exceed the simplified acquisition threshold and it is not initiated with Ability One under the Javits-Wagner-O'Day Act:

(1) Insert 552.237–70, Qualifications of Offerors, in the solicitation.

(2) Insert 552.237–71, Qualifications of Employees, in the solicitation and contract. If needed, use supplemental provisions or clauses to describe specific requirements for employees performing work on the contract.

(b) Insert 552.237–72, Prohibition Regaring ''Quasi-Military Armed Forces,'' in solicitations and contracts for guard service.

[65 FR 41379, July 5, 2000, as amended at 74 FR 20606, May 5, 2009]

Subpart 537.2—Advisory and Assistance Services

537.201 Definitions.

As used in this subpart—

Evaluation or analysis of a proposal means proposal evaluation as described in FAR 15.305. It includes: Cost or price evaluation using cost or price analysis, as defined in FAR 15.404.

Proposal means a proposal submitted for an initial contract award. (See FAR 37.203(d)). It does not include proposals submitted after contract award, such as value engineering proposals, proposals related to contract modifications, claims, or other contract administration actions.

Readily available means that employees with the requisite training and capability are employed by the agency, capable of handling additional work relating to other duties as assigned by management, and that the travel and other costs associated with using covered personnel does not exceed the projected cost of a contract for evaluation and analysis services.

Requisite training and capability means training and capability necessary to successfully perform the task or contract at issue in the time and in the manner required. It may include relevant experience, recent performance of work of similar size and scope, specific training and other factors that the contracting officer determines are necessary to the successful performance of the task or contract at issue.

[74 20606, May 5, 2009]

537.270 Contract clause.

Insert the clause at 552.237–73, Restriction on Disclosure of Information, in solicitations and contracts for proposal evaluation and analysis services.

PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

Subpart 538.2—Establishing and Administering Federal Supply Schedules

Sec.
538.270 Evaluation of multiple award schedule (MAS) offers.
538.271 MAS contract awards.
538.272 MAS price reductions.
538.273 Contract clauses.

Subpart 538.70—Cooperative Purchasing

538.7000 Scope of subpart.
538.7001 Definitions.
538.7002 General.
538.7003 Policy.
538.7004 Solicitation provisions and contract clauses.

Subpart 538.71—Recovery Purchasing

538.7100 Scope of subpart.
538.7101 Definitions.
538.7102 General.
538.7103 Policy.
538.7104 Solicitation provisions and contract clauses.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37227, July 9, 1999, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes to part 538 appear at 69 FR 28065, May 18, 2004.

Subpart 538.2—Establishing and Administering Federal Supply Schedules

538.270 Evaluation of multiple award schedule (MAS) offers.

(a) The Government will seek to obtain the offeror's best price (the best

price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.

(b) Establish negotiation objectives based on a review of relevant data and determine price reasonableness.

(c) When establishing negotiation objectives and determining price reasonableness, compare the terms and conditions of the MAS solicitation with the terms and conditions of agreements with the offeror's commercial customers. When determining the Government's price negotiation objectives, consider the following factors:

(1) Aggregate volume of anticipated purchases.

(2) The purchase of a minimum quantity or a pattern of historic purchases.

(3) Prices taking into consideration any combination of discounts and concessions offered to commercial customers.

(4) Length of the contract period.

(5) Warranties, training, and/or maintenance included in the purchase price or provided at additional cost to the product prices.

(6) Ordering and delivery practices.

(7) Any other relevant information, including differences between the MAS solicitation and commercial terms and conditions that may warrant differentials between the offer and the discounts offered to the most favored commercial customer(s). For example, an offeror may incur more expense selling to the Government than to the customer who receives the offeror's best price, or the customer (e.g., dealer, distributor, original equipment manufacturer, other reseller) who receives the best price may perform certain value-added functions for the offeror that the Government does not perform. In such cases, some reduction in the discount given to the Government may be appropriate. If the best price is not offered to the Government, you should ask the offeror to identify and explain the reason for any differences. Do not require offerors to provide detailed cost breakdowns.

(d) You may award a contract containing pricing which is less favorable than the best price the offeror extends to any commercial customer for similar purchases if you make a determination that both of the following conditions exist:

(1) The prices offered to the Government are fair and reasonable, even though comparable discounts were not negotiated.

(2) Award is otherwise in the best interest of the Government.

538.271 MAS contract awards.

(a) MAS awards will be for commercial items as defined in FAR 2.101. Negotiate contracts as a discount from established catalog prices.

(b) Before awarding any MAS contract, determine that the offered prices are fair and reasonable (see FAR subpart 15.4 and 538.270). Document the negotiation and your determination using FAR 15.406–3 as guidance.

(c) State clearly in the award document the price/discount relationship between the Government and the identified commercial customer (or category of customers) on which the award is predicated.

538.272 MAS price reductions.

(a) Section 552.238–75, Price Reductions, requires the contractor to maintain during the contract period the negotiated price/discount relationship (and/or term and condition relationship) between the eligible ordering activities and the offeror's customer or category of customers on which the contract award was predicated (see 538.271(c)). If a change occurs in the contractor's commercial pricing or discount arrangement applicable to the identified commercial customer (or category of customers) that results in a less advantageous relationship between the eligible ordering activities and this customer or category of customers, the change constitutes a ''price reduction.''

(b) Make sure that the contractor understands the requirements of section 552.238–75 and agrees to report to you all price reductions as provided for in the clause.

[64 FR 37227, July 9, 1999, as amended at 68 FR 24378, May 7, 2003]

538.273 Contract clauses.

(a) *Multiple award schedules*. Insert in solicitations and contracts:

(1) 552.238–70, Identification of Electronic Office Equipment Providing Accessibility for the Handicapped, if you include electronic office equipment items.

(2) 552.238–71, Submission and Distribution of Authorized FSS Schedule Pricelists.

(i) Use Alternate I, in solicitations and contracts for—

(A) Federal Supply Schedule 70;

(B) The Consolidated Schedule contracts containing information technology Special Item Numbers;

(C) Federal Supply Schedule 84; and

(D) Federal Supply Schedules for recovery purchasing (see 538.7102), use Alternate I.

(ii) If GSA is not prepared to accept electronic submissions for a particular schedule delete—

(A) The paragraph identifier ''(i)'' in (b)(1) and the word ''and'' at the end of paragraph (b)(1)(i); and

(B) Paragraphs (b)(1)(ii) and (b)(3).

(3) 552.238–72, Identification of Products That Have Environmental Attributes.

(4) 552.238–73, Cancellation.

(b) *Multiple and single award schedules*. Insert in solicitations and contracts:

(1) 552.238–74, Industrial Funding Fee and Sales Reportings.

(2) *552.238–75, Price Reductions*. Use Alternate I in solicitations and contracts for—

(i) Federal Supply Schedule 70;

(ii) The Consolidated Schedule containing information technology Special Item Numbers;

(iii) Federal Supply Schedule 84; and

(iv) Federal Supply Schedules for recovery purchasing (see 538.7102).

[64 FR 37227, July 9, 1999, as amended at 68 FR 24378, May 7, 2003; 68 FR 41288, July 11, 2003; 68 FR 52128, Sept. 2, 2003; 72 FR 4652, Feb. 1, 2007; 73 FR 54338, Sept. 19, 2008]

Subpart 538.70—Cooperative Purchasing

SOURCE: 68 FR 24378, May 7, 2003, unless otherwise noted.

538.7000 Scope of subpart.

This subpart prescribes policies and procedures that implement statutory provisions authorizing non-federal organizations to use—

(a) Federal Supply Schedule 70;

(b) The Consolidated Schedule contracts containing information technology Special Item Numbers (SINs); and

(c) Federal Supply Schedule 84.

[73 FR 54338, Sept. 19, 2008]

538.7001 Definitions.

Ordering activity (also called ''ordering agency'' and ''ordering office'') means an eligible ordering activity (see 552.238–78) authorized to place orders under Federal supply schedule contracts.

Schedule 70, as used in this subpart, means Schedule 70 information technology contracts, and Consolidated Products and Services Schedule contracts containing information technology SINs. The Consolidated Products and Services Schedule is a compilation of multiple individual Federal Supply Schedules; therefore, only the SINs that fall under Schedule 70 of the Consolidated Products and Services Schedule will apply to Cooperative Purchasing. No other Schedules, or SINs, containing information technology outside of Schedule 70 SINs, and Consolidated Products and Services Schedule contracts containing Schedule 70 SINs, will apply.

Schedule 84 means the Federal Supply Schedule for alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Federal Supply Classification Code Group 84 or any amended or subsequent version of that Federal supply classification group).

State and local government entities, as used in this subpart, means the states of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges

and other institutions of higher education, council of governments (incorporated or not), regional or interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments. The term does not include contractors of, or grantees of, State or local governments.

(1) *Local educational agency* has the meaning given that term in section 8013 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7713).

(2) *Institution of higher education* has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(3) *Tribal government* means—

(i) The governing body of any Indian tribe, band, nation, or other organized group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(ii) Any Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

[68 FR 24378, May 7, 2003, as amended at 73 FR 54338, Sept. 19, 2008]

538.7002 General.

(a) 40 U.S.C. 501, (the Act) authorizes the Administrator of General Services to procure and supply personal property and nonpersonal services for the use of Executive agencies. Under 40 U.S.C. 502, the goods and services available to executive agencies are also available to mixed ownership Government corporations, establishments within the legislative or judicial branches of Government (excepting the Senate, House of Representatives, Architect of the Capitol, and any activities under the direction of the Architect of the Capitol), the District of Columbia, and Qualified Non-profit Agencies.

(b) Section 211 of the E-Government Act of 2002 amends 40 U.S.C. 502 to authorize the Administrator of General Services to provide for use of certain Federal supply schedules of the GSA by a State or local government, which includes any State, local, regional, or tribal government, or any instrumentality thereof (including any local educational agency or institution of higher education).

(c) Pub.L. 110–248, The Local Preparedness Acquisition Act, authorizes the Administrator of General Services to provide for the use by state or local governments of Federal Supply Schedules of the General Services Administration (GSA) for alarm and signal systems, facility management systems, firefighting and rescue equipment, law enforcement and security equipment, marine craft and related equipment, special purpose clothing, and related services (as contained in Schedule 84).

(d) State and local governments are authorized to procure from Schedule 70 contracts, Consolidated Schedule contracts containing information technology SINs, and Schedule 84 contracts. A listing of the participating contractors and SINs for the products and services that are available through Schedule 70 contracts, the Consolidated Schedule contracts containing information technology SINs, and Schedule 84 contracts, is available in GSA's Schedules e-Library at *www.gsa.gov/elibrary*. Click on Schedules e-Library, and under Cooperative Purchasing, click on ''View authorized vendors.'' The contractors and the products and services available for Cooperative Purchasing will be labeled with the Cooperative Purchasing icon.

[68 FR 24378, May 7, 2003, as amended at 73 FR 54338, Sept. 19, 2008]

538.7003 Policy.

Preparing solicitations when schedules are open to eligible non-federal entities. When opening Schedule 70, the Consolidated Schedule containing information technology SINs, and Schedule 84, for use by eligible non-federal entities, the contracting officer must make minor modifications to certain Federal Acquisition Regulation and GSAM provisions and clauses in order to make clear distinctions between the rights and responsibilities of the U.S. Government in its management and regulatory capacity pursuant to which it awards schedule contracts and fulfills associated Federal requirements versus

the rights and responsibilities of eligible ordering activities placing orders to fulfill agency needs. Accordingly, the contracting officer is authorized to modify the following FAR provisions/clauses to delete ''Government'' or similar language referring to the U.S. Government and substitute ''ordering activity'' or similar language when preparing solicitations and contracts to be awarded under Schedule 70, and the Consolidated Schedule containing information technology SINs, and Schedule 84. When such changes are made, the word ''(DEVIATION)'' shall be added at the end of the title of the provision or clause. These clauses include but are not limited to:

(a) 52.212–4, Contract Terms and Conditions—Commercial Items.

(b) 52.216–18, Ordering.

(c) 52.216–19, Order Limitations.

(d) 52.229–1, State and Local Taxes.

(e) 52.229–3, Federal, State, and Local Taxes.

(f) 52.232–7, Payments Under Time-and-Materials and Labor-Hour Contracts.

(g) 52.232–17, Interest.

(h) 52.232–19, Availability of Funds for the Next Fiscal Year.

(i) 52.232–34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration

(j) 52.232–36, Payment by Third Party.

(k) 52.237–3, Continuity of Services.

(l) 52.246–4, Inspection of Services-Fixed Price.

(m) 52.246–6, Inspection-Time-and-Material and Labor-Hour.

(n) 52.247–34, F.O.B. Destination.

(o) 52.247–38, F.O.B. Inland Carrier Point of Exportation.

[68 FR 24378, May 7, 2003, as amended at 73 FR 54338, Sept. 19, 2008]

538.7004 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.238–77, Definition (Federal Supply Schedules), in solicitations and contracts for—

(1) Schedule 70;

(2) The Consolidated Schedule containing information technology SINs; and

(3) Schedule 84.

(b) The contracting officer shall insert the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities), in solicitations and contracts for—

(1) Schedule 70; and

(2) The Consolidated Schedule containing information technology SINs; and

(3) Schedule 84.

(c) The contracting officer shall insert the clause at 552.238–79, Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing, in solicitations and contracts for—

(1) Schedule 70;

(2) The Consolidated Schedule containing information technology SINs; and

(3) Schedule 84.

(d) See 552.101–70 for authorized FAR deviations.

[73 FR 54339, Sept. 19, 2008]

Subpart 538.71—Recovery Purchasing

SOURCE: 72 FR 4653, Feb. 1, 2007, unless otherwise noted.

538.7100 Scope of subpart.

This subpart prescribes policies and procedures to implement the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) authorizing non-federal organizations to use Federal Supply Schedule contracts to purchase products and services to be used for recovery from major disasters, terrorism or nuclear, biological, chemical, or radiological attack.

538.7101 Definitions.

The definitions in subsection 538.7001 shall apply for purposes of this subpart.

538.7102 General.

(a) Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) amends 40 U.S.C. 502 to authorize the Administrator of General Services to provide to State and local governments the use of Federal Supply Schedules of the GSA for purchase of products and services to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) or to

facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack. Section 833 requires the Secretary of Homeland Security to determine which products and services qualify before the Administrator provides for the use of the Federal Supply Schedules. Use of Federal supply schedules by State and local governments is voluntary. Agreement of a schedule contractor to offer recovery purchasing under the contract and acceptance of any order for recovery purchasing from a State or local government is voluntary.

(b) State and local governments are authorized to use Federal Supply Schedules to procure products and services determined by the Secretary of Homeland Security to be used to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack. A listing of the Federal Supply Schedules for the products and services is available in GSA's Schedules e-Library at Web site *http://www.gsaelibrary.gsa.gov*. Click on the link, ''Disaster Recovery Purchasing, State and Local.'' The participating contractors and the products and services available for recovery purchasing will be labeled with the Disaster Recovery Purchasing ICON.

(c) State and local governments that wish to use the Federal Supply Schedules to facilitate recovery from major disasters or attacks are responsible for ensuring that only authorized representatives of their governments place orders against these schedules and that procured products and services are used only for the purposes authorized by Section 833 of Public Law 109–364.

538.7103 Policy.

Preparing solicitations when schedules are open to eligible non-federal entities. When opening the Federal Supply Schedules for products and services determined by the Secretary of Homeland Security, for use by eligible non-federal entities, the contracting officer must make minor modifications to certain Federal Acquisition Regulation (FAR) and GSAM provisions and clauses in order to make clear distinctions between the rights and responsibilities of the U.S. Government in its management and regulatory capacity pursuant to which it awards schedule contracts and fulfills associated Federal requirements versus the rights and responsibilities of eligible ordering activities placing orders to fulfill agency needs. Accordingly, the contracting officer is authorized to modify the following FAR provisions/clauses to delete ''Government'' or similar language referring to the U.S. Government and substitute ''ordering activity'' or similar language when preparing solicitations and contracts to be awarded under the Federal Supply Schedules for products and services determined by the Secretary of Homeland Security. When such changes are made, the word ''(DEVIATION)'' shall be added at the end of the title of the provision or clause. These clauses include but are not limited to—

(a) 52.212–4, Contract Terms and Conditions—Commercial Items.

(b) 52.216–18, Ordering.

(c) 52.216–19, Order Limitations.

(d) 52.229–1, State and Local Taxes.

(e) 52.229–3, Federal, State, and Local Taxes.

(f) 52.232–7, Payments Under Time-and-Materials and Labor-Hour Contracts.

(g) 52.232–17, Interest.

(h) 52.232–19, Availability of Funds for the Next Fiscal Year.

(i) 52.232–34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration.

(j) 52.232–36, Payment by Third Party.

(k) 52.237–3, Continuity of Services.

(l) 52.246–4, Inspection of Services-Fixed Price.

(m) 52.246–6, Inspection-Time-and-Material and Labor-Hour.

(n) 52.247–34, F.O.B. Destination.

(o) 52.247–38, F.O.B. Inland Carrier Point of Exportation.

538.7104 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 552.238–76, Definition (Federal Supply Schedules)—Recovery Purchasing, in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear,

biological, chemical, or radiological attack.

(b) The contracting officer shall insert the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities), with Alternate I in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack.

(c) The contracting officer shall insert the clause at 552.238–80, Use of Federal Supply Schedule Contracts by Certain Entities—Recovery Purchasing, in Federal Supply Schedule solicitations and contracts which contain products and services determined by the Secretary of Homeland Security that facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack.

(d) See 552.101–70 for authorized Federal Acquisition Regulation deviations.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 541—ACQUISITION OF UTILITY SERVICES

Subpart 541.5—Solicitation Provisions and Contract Clauses

Sec.
541.501 Solicitation provision and contract clauses.

AUTHORITY: 40 U.S.C. 121(c).

Subpart 541.5—Solicitation Provisions and Contract Clauses

541.501 Solicitation provisions and contract clauses.

In addition to the solicitation terms, provisions and contract clauses at FAR 41.501(c), the contracting officer shall include the following clauses—

(a) *552.241–70, Availability of Funds for the Next Fiscal Year or Quarter*. As prescribed in 541.501, insert the clause 552.241–70, Availability of Funds for the Next Fiscal Year or Quarter, instead of FAR 52.232–19, in all utility acquisitions; and

(b) *552.241–71, Disputes (Utility Contracts)*. As prescribed in 541.501, insert clause 552.241–71, Disputes (Utility Contracts), in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

[75 FR 48873, Aug. 12, 2010]

PART 542—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 542.11—Production Surveillance and Reporting

Sec.
542.1107 Contract clause.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37228, July 9, 1999, unless otherwise noted.

Subpart 542.11—Production Surveillance and Reporting

542.1107 Contract clause.

The contracting officer shall insert 552.242–70, Status Report of Orders and Shipments, in solicitations and indefinite quantity and requirements contracts for Stock or Special Order Program items. The clause may be used in indefinite-delivery definite-quantity contracts for Stock or Special Order Program items when close monitoring is necessary because numerous shipments are involved.

[74 FR 863, Jan. 9, 2009]

PART 543—CONTRACT MODIFICATIONS

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37228, July 9, 1999, unless otherwise noted.

Subpart 543.2—Change Orders

543.205 Contract clauses.

The contracting officer shall insert 552.243–71, Equitable Adjustments, in solicitations and contracts containing FAR 52.243–4, Changes.

[74 FR 864, Jan. 9, 2009]

PART 546—QUALITY ASSURANCE

Subpart 546.3—Contract Clauses

Sec.
546.302 Fixed-price supply contracts.
546.302–70 Source inspection by Quality Approved Manufacturer for fixed-price supply contracts.
546.302–71 Source inspection.
546.302–72 Destination inspection.
546.312 Construction contracts.

Subpart 546.7—Warranties

546.708 Warranties of data.
546.710 Contract clause.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37228, July 9, 1999, unless otherwise noted.

Subpart 546.3—Contract Clauses

546.302 Fixed-price supply contracts.

546.302–70 Source inspection by Quality Approved Manufacturer for fixed-price supply contracts.

(a) For solicitations issued and contracts awarded by FAS that will exceed the simplified acquisition threshold and include the clause at 52.246–2, Inspection of Supplies—Fixed-Price:

(1) The contracting officer shall insert the clause at 552.246–70, Source Inspection by Quality Approved Manufacturer, in solicitations and contracts that provide for source inspection for the Stock and Special Order Programs.

(2) The contracting officer may authorize inspection and testing at manufacturing plants or other facilities located outside the United States, Puerto Rico, or the U.S. Virgin Islands, under paragraph (a)(1) of the clause at 552.246–70 under any of the circumstances listed below after coordinating the authorization with QVOC and documenting the authorization in the file.

(i) Inspection services are available from another Federal agency with primary inspection responsibility in the geographic area.

(ii) An inspection interchange agreement exists with another agency for inspection at a contractor's plant.

(iii) Other considerations will ensure more economical and effective inspection consistent with the Government's interest.

(b) When the estimated value of the acquisition is below the simplified acquisition threshold and will include the clause at 52.246–2, Inspection of Supplies—Fixed-Price, insert the clause at 552.246–70, Source Inspection by Quality Approved Manufacturer only:

(1) In solicitations and contracts that support the Wildfire program.

(2) In contracts when a pattern of acquisitions demonstrates an ongoing relationship with the contractor.

[74 FR 26108, June 1, 2009]

546.302–71 Source inspection.

For solicitations and contracts issued by FAS, if Government personnel at the source will perform inspection, insert 552.246–71, Source Inspection by Government.

[64 FR 37228, July 9, 1999, as amended at 74 FR 26108, June 1, 2009]

546.302–72 Destination inspection.

The contracting officer shall include the clause at 552.246–78, Inspection at Destination (JUL 09)in supply contracts that require inspection at destination.

[74 FR 26108, June 1, 2009]

546.312 Construction contracts.

Insert the clause at 552.246–72, Final Inspection and Tests, in solicitations and contracts for construction that include FAR 52.246–12, Inspection of Construction.

Subpart 546.7—Warranties

546.708 Warranties of data.

(a) The contracting officer shall use warranties of data only when both of the following conditions are applicable:

(1) Use of a warranty is in the Government's interest and is documented; and

(2) The contracting director concurs with the decision.

(b) The contracting officer shall consult with the technical or specification manager responsible for developing any warranties of data.

[74 FR 26108, June 1, 2009]

546.710 Contract clause.

The Contracting officer shall insert the clause at 552.246–77, Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature, when using the clause at 52.246–17 in solicitations and contracts.

[74 FR 26108, June 1, 2009]

PART 547 [RESERVED]

PART 549—TERMINATION OF CONTRACTS

AUTHORITY: 40 U.S.C. 121(c).

Subpart 549.5 [Reserved]

SUBCHAPTER H—CLAUSES AND FORMS

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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552.238–76 Definition (Federal Supply Schedules)—Recovery Purchasing.
552.238–77 Definition (Federal Supply Schedules).
552.238–78 Scope of Contract (Eligible Ordering Activities).
552.238–79 Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing.
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552.241–70 Availability of Funds for the Next Fiscal Year or Quarter.
552.241–71 Disputes (Utility Contracts).
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552.270–25 Substitution of Tenant Agency.
552.270–26 No Waiver.
552.270–27 Integrated Agreement.
552.270–28 Mutuality of Obligation.
552.270–29 Acceptance of Space.

AUTHORITY: 40 U.S.C. 121(c).

SOURCE: 64 FR 37229, July 9, 1999, unless otherwise noted.

552.000 Scope of part.

This part provides the text of provisions and clauses which are unique to GSA or supplement the FAR.

Subpart 552.1—Instructions for Using Provisions and Clauses

552.101–70 Using part 552.

(a) *Definition.* ''Clause,'' as used in this subpart, means provision or clause as defined in FAR 52.101(a).

(b) *Numbering.* (1) Clauses which are ''substantially'' the same as FAR clauses and clauses to be used instead of FAR clauses are identified as follows:

(i) The clause has the same title as a clause in the FAR.

(ii) The number 5 precedes the clause.

(iii) The clause appears under the same subsection number and caption as in the FAR.

(2) Supplemental clauses are numbered in the same manner as the FAR, except:

(i) The chapter number precedes the clause.

(ii) The subsection numbers begin with 70.

(iii) The clauses are sequentially numbered, e.g., 552.232–70, 552.232–71, etc.

552.102 Incorporating provisions and clauses.

You may incorporate clauses prescribed in the GSAR for solicitations and contracts by reference.

552.103 Identification of provisions and clauses.

Deviations. If the GSAR prescribes a class deviation from a FAR clause, identify the clause by the GSAR citation (e.g., 552.232–8 PROMPT PAYMENT DISCOUNT (NOV 1987) (DEVIATION FAR 552.232–8)).

552.104 Procedures for modifying and completing provisions and clauses.

(a) The procedures in FAR 52.104 apply when you modify or complete a GSAR provision or clause. Provisions and clauses shall not be modified unless the GSAR authorizes their modification.

(b) You do not need to identify modifications of clauses which result from negotiations unless you issue an amendment to the solicitation.

(c) In general, you should modify FAR or GSAR clauses only for individual cases. If a contracting activity develops a modification for repeated use, furnish a copy to the Office of GSA Acquisition Policy (MV) for potential inclusion in the GSAR.

552.105 Procedures for using alternates.

The procedures in FAR 52.105 apply to GSAR part 552.

552.107–70 Provisions and clauses prescribed in subpart 552.1.

(a) Insert the provision at 552.252–5, Authorized Deviations in Provisions, in solicitation that include any FAR or GSAR clause with an authorized deviation. You must use this provision in lieu of the FAR provision at 552.252–5.

(b) Insert the clause at 552.252–6, Authorized Deviations in Clauses, in solicitations and contracts that include any FAR or GSAR clause with an authorized deviation. You must use this clause in lieu of the FAR clause at 52.252–6.

Subpart 552.2—Text of Provisions and Clauses

552.200 Scope of subpart.

This subpart sets forth the text of all GSAR provisions and clauses. It also cross-references the location in the GSAR that prescribes the use of each provision and clause.

552.203–71 Restriction on Advertising.

As prescribed in 503.570–2, insert the following clause:

RESTRICTION ON ADVERTISING (SEP 1999)

The Contractor shall not refer to this contract in commercial advertising or similar promotions in such a manner as to state or imply that the product or service provided is endorsed or preferred by the White House, the Executive Office of the President, or any other element of the Federal Government, or is considered by these entities to be superior to other products or services. Any advertisement by the Contractor, including price-off coupons, that refers to a military resale activity shall contain the following statement: ''This advertisement is neither paid for nor sponsored, in whole or in part, by any element of the United States Government.''

(End of clause)

552.211–70—552.211–71 [Reserved]

552.211–72 Reference to Specifications in Drawings.

As prescribed in 511.204(a), insert the following clause:

REFERENCES TO SPECIFICATIONS IN DRAWINGS (FEB 1996)

If military or other drawings are made a part of this contract, any reference in the drawings to Federal specifications or standards will be considered to be a reference to the date of such Federal specification or standard identified in the contract. If the date of the Federal specification or standard is not identified in the contract, the edition, including revisions thereto, in effect on the date the solicitation is issued will apply.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–73 Marking.

As prescribed in 511.204(b)(1), insert the following clause:

MARKING (FEB 1996)

(a) *General requirements.* Interior packages, if any, and exterior shipping containers shall be marked as specified elsewhere in the contract. Additional marking requirements may be specified on delivery orders issued under the contract. If not otherwise specified, interior packages and exterior shipping containers shall be marked in accordance with the following standards:

(1) *Deliveries to civilian activities.* Supplies shall be marked in accordance with Federal Standard 123, edition in effect on the date of issuance of the solicitation.

(2) *Deliveries to military activities.* Supplies shall be marked in accordance with Military Standard 129, edition in effect on the date of issuance of the solicitation.

(b) *Improperly marked material.* When Government inspection and acceptance are at destination, and delivered supplies are not marked in accordance with contract requirements, the Government has the right, without prior notice to the Contractor, to perform the required marking, by contract or otherwise, and charge the Contractor therefor at the rate specified elsewhere in this contract. This right is not exclusive, and is in addition to other rights or remedies provided for in this contract.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–74 [Reserved]

552.211–75 Preservation, Packaging and Packing.

As prescribed in 511.204(b)(2), insert the following clause:

PRESERVATION, PACKAGING, AND PACKING (FEB 1996)

Unless otherwise specified, all items shall be preserved, packaged, and packed in accordance with normal commercial practices, as defined in the applicable commodity specification. Packaging and packing shall comply with the requirements of the Uniform Freight Classification and the National Motor Freight Classification (issue in effect at time of shipment) and each shipping container of each item in a shipment shall be of uniform size and content, except for residual quantities. Where special or unusual packing is specified in an order, but not specifically provided for by the contract, such packing details must be the subject of an agreement independently arrived at between the ordering agency and the Contractor.

(End of clause)

Alternate I (MAY 2003). As prescribed at 511.204(b)(2), insert the following sentence in place of the last sentence of the clause:

Where special or unusual packing is specified in an order, but not specifically provided for by the contract, such packing details must be the subject of an agreement independently arrived at between the ordering activity and the Contractor.

[64 FR 37229, July 9, 1999, as amended at 68 FR 24379, May 7, 2003; 74 FR 66255, Dec. 15, 2009]

552.211–76 Charges for packaging, packing, and marking.

As prescribed in 511.204(b)(3), insert a clause substantially as follows:

CHARGES FOR PACKAGING, PACKING, AND MARKING (JAN 2010)

If supplies shipped to a GSA wholesale distribution center are not packaged, packed and marked in accordance with contract requirements, the Government has the right, without prior notice to the Contractor, to perform the required repackaging/repacking/remarking, by contract or otherwise, and charge the Contractor therefore at the rate of $_____* per man-hour or fraction thereof. The Contractor will also be charged for material costs, if incurred. This right is not exclusive, and is in addition to other rights or remedies provided for in this contract.

(End of clause)

*The rate to be inserted in the above clause shall be determined by the Commissioner, Federal Acquisition Service, or a designee.

[74 FR 66255, Dec. 15, 2009]

552.211–77 Packing List.

As prescribed in 511.204(c), insert the following clause:

PACKING LIST (FEB 1996)

(a) A packing list or other suitable shipping document shall accompany each shipment and shall indicate:

(1) Name and address of the consignor;

(2) Name and complete address of the consignee;

(3) Government order or requisition number;

(4) Government bill of lading number covering the shipment (if any); and

(5) Description of the material shipped, including item number, quantity, number of containers, and package number (if any).

(b) When payment will be made by Government commercial credit card, in addition to the information in (a) above, the packing list or shipping document shall include:

(1) Cardholder name and telephone number and

(2) The term ''Credit Card.''

(End of clause)

Alternate I (MAY 2003). As prescribed at 511.204(d), substitute the following paragraphs (a)(3) and (b) for (a)(3) and (b) of the basic clause:

(a)(3) Ordering activity order or requisition number;

(b) When payment will be made by Ordering activity commercial credit card, in addition to the information in (a) above, the packing list or shipping document shall include:

(1) Cardholder name and telephone number; and

(2) The term ''Credit Card.''

[64 FR 37229, July 9, 1999, as amended at 68 FR 24379, May 7, 2003; 74 FR 66255, Dec. 15, 2009]

552.211–78 [Reserved]

552.211–79 Acceptable Age of Supplies.

As prescribed in 511.404(a)(1), insert the following clause:

ACCEPTABLE AGE OF SUPPLIES (FEB 1996)

The supplies furnished under this contract shall not be more than ____ months old, beginning with the first full month after the date of manufacture marked on the container. For the purpose of this clause, supplies shall be considered to be furnished (1) when they are offered to the Government for inspection and testing, or (2) on the date of shipment if shipment is authorized to be made without prior inspection by the Government. If the age of the supplies furnished under this contract is greater than the specified period, the Government may exercise its right to reject the supplies.

(End of clause)

Alternate I (FEB 1996). For items having a limited shelf-life, the sentence below should be substituted for the first sentence of the basic clause when authorized:

The supplies furnished under this contract shall not be more than ____ days old, beginning with the date of manufacture (month, day, year) marked on the container.

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–80 Age on Delivery.

As prescribed in 511.404(a)(2) insert the following clause:

AGE ON DELIVERY (FEB 1996)

Included in the description of each shelf-life item is a statement regarding the ''age on delivery.'' The age of the item(s) shall not exceed the number of months shown in the item description, counted from the first day of the month after the month of manufacture to the date of delivery to the specified delivery point(s). If the age of the supplies delivered under this contract is greater than the number of months shown, the Government may exercise its right to reject the supplies.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–81 Time of Shipment.

As prescribed in 511.404(b), insert the following clause:

TIME OF SHIPMENT (FEB 1996)

Shipment is required within _____ calendar days after receipt of order.

(End of clause)

Alternate I (FEB 1996). If the contract will require shipment more than 45 calendar days after receipt of the order, the following paragraph should be added to the basic clause.

Each delivery order will specify that shipment is required no later than the number of days shown above. If such order also states that ''Early Shipment is Precluded,'' the Contractor agrees to make shipment no sooner than _____ calendar days after receipt of order. Earlier shipments may result in nonacceptance of the supplies at the delivery point at the time of arrival.

(*The second number to be inserted should be 15 calendar days less than the first number.*)

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–82 [Reserved]

552.211–83 Availability for Inspection, Testing, and Shipment/Delivery.

As prescribed in 511.404(c), insert the following clause:

AVAILABILITY FOR INSPECTION, TESTING, AND SHIPMENT/DELIVERY (FEB 1996)

(a) The Government requires that the supplies be made available for inspection and testing within _____*_____ calendar days after receipt of [*Insert ''Notice of Award'' or ''order''*], and be [*Insert ''shipped'' or ''delivered''*] within _____*_____ calendar days after receipt of (1) notice of approval and release by the Government inspector or (2) authorization to ship without Government inspection.

(b) Failure to make supplies available for inspection and testing or to [*Insert ''ship'' or ''deliver''*] as required by this clause may result in termination of this contract for default.

(End of clause)

Alternate I (FEB 1996). If the contract is for stock items, the Contracting Officer shall insert ''shipped'' or ''ship'' in the basic clause, add the following paragraph (b) and redesignate paragraph (b) of the basic clause as paragraph (c).

(b) If notice of approval and release by the Government inspector or authorization to ship without Government inspection is received before _____*_____ calendar days after receipt of the [*Insert ''Notice of Award'' or ''order''*], receipt of such notice shall be deemed to be received on the _____*_____ calendar day after receipt of [*Insert ''Notice of Award'' or ''order''*]. Shipments shall not be made before the _____*_____ calendar day after receipt of the [*Insert ''Notice of Award'' or ''order''*] unless authorized in writing by the Contracting Officer.

*Entries are normally the same number of days specified for availability.

[64 FR 37229, July 9, 1999, as amended at 74 FR 66255, Dec. 15, 2009]

552.211–84 [Reserved]

552.211–85 Consistent pack and package requirements.

As prescribed in 511.204(b)(5), insert the following clause:

CONSISTENT PACK AND PACKAGE REQUIREMENTS (JAN 2010)

The Contractor is advised that the Government will, where possible, order in full shipping containers and/or unitized loads. If volume warrants, the Government may also order in truckload or carload quantities provided such quantities do not exceed the maximum order limitation of this contract.

When the number of items per unit container, intermediate container and/or shipping container is not specified for an item, the offeror will state, in the spaces provided in the schedule of items, the number of items to be provided in each container. The quantities which are accepted at the time of award shall remain in effect throughout the term of the contract unless the Contracting Officer approves in writing a request by the Contractor to change the package quantities. Requests for changes shall be directed to the Contracting Officer or Administrative Contracting Officer, whichever is applicable.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–86 Maximum weight per shipping container.

As prescribed in 511.204(b)(6), insert the following clause:

MAXIMUM WEIGHT PER SHIPPING CONTAINER (JAN 2010)

In no instance shall the weight of a shipping container and its contents exceed 23 kilograms (51 pounds), except when caused by—

(1) The weight of a single item within the shipping container;

(2) A prescribed quantity per pack for an item per shipping container; or

(3) A definite weight limitation set forth in the purchase description.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–87 Export packing.

As prescribed in 511.204(b)(7), insert the following clause:

EXPORT PACKING (JAN 2010)

(a) Offerors are requested to quote, in the pricelist accompanying their offer (or by separate attachment), additional charges or net prices covering delivery of the items furnished with commercial or military export packing. Military export packing, if offered, shall be in accordance with Mil-Std-2073–1 Level A or B as specified. If commercial export packing is offered, the offer or pricelist

shall include detailed specifications describing the packing to be furnished at the price quoted.

(b) Ordering activities will not be obligated to utilize the Contractor's services for export packing accepted under this solicitation, and they may obtain such services elsewhere if desired. However, the Contractor shall furnish items export packed when such packing is specified on the purchase order.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–88 Vehicle export preparation.

As prescribed in 511.204(b)(8), insert the following clause:

VEHICLE EXPORT PREPARATION (JAN 2010)

Vehicles shall be prepared for export on wheels, unboxed, unless otherwise specified in the Schedule of Items. All parts and equipment easily removable (subject to pilferage) shall be enclosed in a box substantially secured to the vehicle (inside body if feasible) in such a manner as to minimize the possibility of loss or damage while in transit to ultimate destination.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–89 Non-manufactured wood packaging material for export.

As prescribed in 511.204(b)(4), insert the following clause:

NON-MANUFACTURED WOOD PACKAGING MATERIAL FOR EXPORT (JAN 2010)

(a) *Definitions:*

IPPC Country: Countries of the European Union (EU) or any other country endorsing the International Plant Protection Convention (IPPC) ''Guidelines for Regulating Wood Packaging Material in International Trade,'' approved March 15, 2002. A listing of countries participating in the IPPC is found at *http://www.aphis.usda.gov/import_export/plants/plant_exports/wpm/country/index.shtml*.

Non-manufactured wood, is also called solid wood and defined as wood packing other than that comprised wholly of wood-based products such as plywood, particle board, oriented strand board, veneer, wood wool, and similar materials, which has been created using glue, heat and pressure or a combination thereof.

Packaged material, and solid wood packing material (SWPM), for purposes of this clause, is defined as each separate and distinct material that by itself or in combination with other materials forms the container providing a means of protecting and handling a product. This includes, but is not limited to, pallets, dunnage, crating, packing blocks, drums, load boards, pallet collars, and skids.

(b) Non-manufactured wood pallets and other non-manufactured wood packaging material used to pack items for delivery to or through IPPC countries must be marked and properly treated in accordance with IPPC guidelines.

(c) This requirement applies whether the shipment is direct to the end user or through a Government designated consolidation point. Packaging that does not conform to IPPC guidelines will be refused entry, destroyed or treated prior to entry.

(d) For Department of Defense distribution facilities or freight consolidation points, all non-manufactured wood pallets or packaging material with a probability of entering countries endorsing the IPPC Guidelines must be treated and marked in accordance with DLAD 47.305–1 (available at *http://www.dla.mil/j-3/j-3311/DLAD/rev5.htm*), and MIL–STD–2073–1, Standard Practice for Military Packaging (and any future revision).

(e) Pallets and packing material shipped to FAS distribution facilities designated for possible delivery to the countries endorsing the IPPC Guidelines will comply with DLAD 47.305–1, and MIL–STD–2073–1.

(f) Delays in delivery caused by non-complying pallets or wood package material will not be considered as beyond the control of the Contractor. Any applicable Government expense incurred as a result of the Contractor's failure to provide appropriate pallets or package material shall be reimbursed by the Contractor. Expenses may include the applicable cost for repackaging, handling and return shipping, or the destruction of solid wood packaging material.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–90 Small parts.

As prescribed in 511.204(b)(9), insert the following clause:

SMALL PARTS (JAN 2010)

All small parts required to be furnished with machines covered by contracts resulting from this solicitation shall be packed in envelopes, sealed, identified with part numbers and quantity on outside of envelopes. Larger parts must be individually tagged and identified with part number on face of tag.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–91 Vehicle decals, stickers, and data plates.

As prescribed in 511.204(b)(10), insert the following clause:

VEHICLE DECALS, STICKERS, AND DATA PLATES (JAN 2010)

Unless otherwise specified, caution plates/decals shall be conspicuously installed for all equipment requiring such notices. Vehicles for civil agencies shall be provided with the manufacturer's current warranty legend imprinted on decalcomania, and applied in a visible area of the engine compartment. In addition, a decal or sticker shall provide at least the following information: contract number; purchase order number; date of delivery, month and year; and the warranty time, in month and miles.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–92 Radio Frequency Identification (RFID) using passive tags.

As prescribed in 511.204(b)(11), insert the following clause:

RADIO FREQUENCY IDENTIFICATION (RFID) USING PASSIVE TAGS (JAN 2010)

Radio Frequency Identification shall be required on all non-bulk shipments to the Defense Logistics Agency (DLA) or Department of Defense (DoD) destinations. Shipments shall be tagged in accordance with 48 CFR clause 252.211–7006. Shipments to GSA Distribution Centers with final destinations to DLA and DoD shall be in compliance to 48 CFR 252.211–7006. Copies may be obtained from *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html*.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–93 Unique Item Identification (UID).

As prescribed in 511.204(b)(12), insert the following clause:

UNIQUE ITEM IDENTIFICATION (UID) (JAN 2010)

Unique Item Identification shall be required on tangible personal property in accordance with DFARS 211.274–4 as requested by the Defense Logistics Agency (DLA) or Department of Defense (DOD). Item Property that falls within this criterion shall be valuated and identified in accordance with DFARS 252.211–7003. Details shall be found in DFARS 252.211–7007. Copies can be obtained from *http://www.access.gpo.gov* the 48 Code of Federal Regulations.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.211–94 Time of delivery.

As prescribed at 511.404(d), insert the following clause:

TIME OF DELIVERY (JAN 2010)

An ''X'' mark in the left hand block shall be considered a mandatory requirement to be fulfilled by the contractor.

	The Contractor will ship contract item(s) to the Federal Acquisition Service (FAS) stocking points identified in the delivery order at its discretion in order to maintain the required stock levels within the minimum and maximum requirements provided in the weekly status report. Delivery is required to be made at destination within *_____* calendar days after receipt of order for deliveries to a GSA facility. Orders under this contract may require direct delivery to other agencies. Orders for direct delivery must be shipped and delivered within the time specified in blocks below. Shipment must be made with *_____* days after receipt of order. In addition to block above the Contractor must also ensure that delivery will be made within *_____* days after receipt of order.

(End of clause)

[74 FR 66255, Dec. 15, 2009]

552.212–4 Contract Terms and Conditions—Commercial Items.

Alternate II (FAR Deviation) (NOV 2009). When a commercial item contract is contemplated and the contract will include the clause at FAR 52.212–4,

insert this Alternate II instead of subparagraph (g)(2) of the FAR clause.

(g)(2) The due date for making invoice payments by the designated payment office is the later of the following two events:

(i) The 10th day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 10th day after the date of the Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.

(ii) The 10th day after Government acceptance of supplies delivered or services performed by the Contractor.

[74 FR 54918, Oct. 26, 2009]

552.212–70 [Reserved]

552.212–71 Contract Terms and Conditions Applicable to GSA Acquisition of Commercial Items.

As prescribed in 512.301(a)(2), insert the following clause:

CONTRACT TERMS AND CONDITIONS APPLICABLE TO GSA ACQUISITION OF COMMERCIAL ITEMS (JUL 2003)

The Contractor agrees to comply with any provision or clause that is incorporated herein by reference to implement agency policy applicable to acquisition of commercial items or components. The provision or clause in effect based on the applicable regulation cited on the date the solicitation is issued applies unless otherwise stated herein. The following provisions and clauses are incorporated by reference:

[*The contracting officer should either check the provisions and clauses that apply or delete the provisions and clauses that do not apply from the list. The contracting officer may add the date of the provision or clause if desired for clarity.*]

(a) *Provisions.*

____552.237–70 Qualifications of Offerors

(b) *Clauses.*

____552.203–71 Restriction on Advertising
____552.211–73 Marking
____552.2215–70 Examination of Records by GSA
____552.215–71 Examination of Records by GSA (Multiple Award Schedule)
____552.215–72 Price Adjustment—Failure to Provide Accurate Information
____552.219–70 Allocation of Orders—Partially Set-Aside Items
____552.228–70 Workers' Compensation Laws
____552.229–70 Federal, State, and Local Taxes
____552.232–8 Discounts for Prompt Payment
____552.232–23 Assignment of Claims
____552.232–71 Adjusting Payments
____552.232–72 Final Payment
____552.232–73 Availability of Funds
____552.232–78 Payment Information
____552.237–71 Qualifications of Employees
____552.238–71 Submission and Distribution of Authorized FSS Schedule Price List
____552.238–74 Industrial Funding Fee and Sales Reporting
____552.238–75 Price Reductions
____552.242–70 Status Report of Orders and Shipments
____552.243–72 Modifications (Multiple Award Schedule)
____552.246–73 Warranty—Multiple Award Schedule
____552.246–76 Warranty of Pesticides

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 65 FR 41379, July 5, 2000; 68 FR 41288, July 11, 2003]

552.212–72 Contract Terms and Conditions Required To Implement Statutes or Executive Orders Applicable to GSA Acquisition of Commercial Items.

As prescribed in 512.301(a)(3), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO GSA ACQUISITION OF COMMERCIAL ITEMS (SEP 2003)

The Contractor agrees to comply with any provision or clause that is incorporated herein by reference to implement provisions of law or Executive Orders applicable to acquisition of commercial items or components. The provision or clause in effect based on the applicable regulation cited on the date the solicitation is issued applies unless otherwise stated herein. The following provisions and clauses are incorporated by reference:

[*The contracting officer should either check the provisions and clauses that apply or delete the provisions and clauses that do not apply from the list. The contracting officer may add the date of the provision or clause if desired for clarity.*]

(a) *Provisions.*

____552.223–72 Hazardous Material Information

(b) *Clauses.*

____552.223–70 Hazardous Substances
____552.223–71 Nonconforming Hazardous Material
____552.238–70 Identification of Electronic Office Equipment Providing Accessibility for the Handicapped

___552.238–72 Identification of Products That Have Environmental Attributes

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 65 FR 41379, July 5, 2000; 68 FR 41288, July 11, 2003; 68 FR 52128, Sept. 2, 2003]

552.212–73 [Reserved]

552.214–70 "All or None" Bids.

As prescribed in 514.201–6, insert the following provision:

"ALL OR NONE" BIDS (OCT 2009)

(a) The Government reserves the right to evaluate bids and make awards on an "all or none" basis as provided below.

(b) A bid submitted on an "all or none" or similar basis will be evaluated as follows: The lowest acceptable bid exclusive of the "all or none" bid will be selected with respect to each item (or group of items when the solicitation provides for aggregate awards) and the total cost of all items thus determined shall be compared with the total of the lowest acceptable "all or none" bid. Award will be made to result in the lowest total cost to the Government.

(End of provision)

[64 FR 37229, July 9, 1999, as amended at 74 FR 47740, Sept. 17, 2009]

552.214–71 Progressive Awards and Monthly Quantity Allocations.

As prescribed in 514.201–7(a), insert the following clause:

PROGRESSIVE AWARDS AND MONTHLY QUANTITY ALLOCATIONS (OCT 2009)

(a) *Monthly quantity allocation.* (1) Set forth below are the Government's estimated annual and monthly requirements for each stock item covered by this solicitation. Bids shall indicate, in the spaces provided, the monthly quantity which the bidder is willing to furnish of any item or group of items involving the use of the same production facilities. In making monthly allocations, bidders are urged to group as many items as possible. Such groupings will make it possible for the Government to make fullest use of the production capabilities of each bidder.

(2) Bidders need not limit their monthly allocations to the Government's estimated monthly requirements, since additional unanticipated needs may occur during the period of the contract. If a bid does not include monthly allocation quantities, it will be deemed to offer to furnish all of the Government's requirements, even though they may exceed the stated estimated requirements.

National stock number	Estimated annual requirements	Estimated monthly requirements

BIDDERS MONTHLY QUANTITY ALLOCATIONS

Items or groups of items	Monthly allocation quantity

(b) *Progressive awards.* If the low responsive bid's monthly quantity allocation is less than the Government's estimated requirements, the Government may make progressive awards beginning with the low responsive bid and including each next low responsive bid to the extent necessary to meet the estimated requirements.

(c) *Ordering procedures.* If progressive awards are made, orders will be placed first with the Contractor offering the lowest price on each item normally up to that Contractor's maximum quantity allocation and then, in the same manner, successively to other Contractors. When cumulative orders during any month, placed with a lower priced Contractor, equal or exceed 95 percent of its monthly quantity allocation, to avoid the placement of unduly small orders or the splitting of a subsequent order, the Government reserves the right to award the full quantity of the subsequent order to the next lower priced Contractor. In no case will orders be placed with any Contractor in excess of its monthly quantity allocation.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 47740, Sept. 17, 2009]

552.214–72 Bid Sample Requirements.

As prescribed in 514.202–4(a)(3), insert the following provision:

BID SAMPLE REQUIREMENTS (OCT 2009)

This provision supplements FAR 52.214–20, which is incorporated by reference. Samples shall be from the production of the manufacturer whose products will be supplied under resultant contracts.

(a) Two bid samples are required for each of the following items in this solicitation:

(b) Two representative samples shall be submitted for each of the following items upon which a bid is submitted:

Items	Acceptable representative samples

NOTE: Bidders that propose to furnish an item or group of items from more than one manufacturer or production point must submit two samples from the production of each manufacturer or production point.

(c) Samples will be evaluated to determine compliance with all characteristics listed below:

Subjective characteristics	Objective characteristics

(d) Forward samples addressed to the Sample Room indicated below. Except for samples delivered by U.S. Mail, deliveries will be accepted between the hours of _____ Mondays through Fridays, official holidays excluded.

CAUTION: Use proper address for method of shipment selected.

Mail and Parcel Post
(Insert Address of Bid Sample Room)
Freight or Express
(Insert address of Bid Sample Room)

(e) Contracting Officer insert address.

_____

_____

_____

(End of provision)

[64 FR 37229, July 9, 1999, as amended at 74 FR 47740, Sept. 17, 2009]

552.215–70 Examination of Records by GSA.

As prescribed in 514.201–7(b) and 515.209–70(a) insert the following clause:

EXAMINATION OF RECORDS BY GSA (FEB 1996)

The Contractor agrees that the Administrator of General Services or any duly authorized representatives shall, until the expiration of 3 years after final payment under this contract, or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulation (48 CFR 4.7), whichever expires earlier, have access to and the right to examine any books, documents, papers, and records of the Contractor involving transactions related to this contract or compliance with any clauses thereunder. The Contractor further agrees to include in all its subcontracts hereunder a provision to the effect that the subcontractor agrees that the Administrator of General Services or any authorized representatives shall, until the expiration of 3 years after final payment under the subcontract, or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulation (48 CFR 4.7), whichever expires earlier, have access to and the right to examine any books, documents, papers, and records of such subcontractor involving transactions related to the subcontract or compliance with any clauses thereunder. The term ''subcontract'' as used in this clause excludes (a) purchase orders not exceeding $100,000 and (b) subcontracts or purchase orders for public utility services at rates established for uniform applicability to the general public.

(End of clause)

552.215–71 Examination of Records by GSA (Multiple Award Schedule).

As prescribed in 515.209–70(c), insert the following clause:

EXAMINATION OF RECORDS BY GSA (MULTIPLE AWARD SCHEDULE) (JUL 2003)

The Contractor agrees that the Administrator of General Services or any duly authorized representative shall have access to and the right to examine any books, documents, papers and records of the contractor involving transactions related to this contract for overbillings, billing errors, compliance with the Price Reduction clause and compliance with the Industrial Funding Fee and Sales Reporting clause of this contract. This authority shall expire 3 years after final payment. The basic contract and each option shall be treated as separate contracts for purposes of applying this clause.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 68 FR 41288, July 11, 2003]

552.215–72 Price Adjustment—Failure To Provide Accurate Information.

As prescribed in 515.408(d), insert the following clause:

PRICE ADJUSTMENT—FAILURE TO PROVIDE ACCURATE INFORMATION (AUG 1997)

(a) The Government, at its election, may reduce the price of this contract or contract modification if the Contracting Officer determines after award of this contract or contract modification that the price negotiated was increased by a significant amount because the Contractor failed to:

(1) Provide information required by this solicitation/contract or otherwise requested by the Government; or

(2) Submit information that was current, accurate, and complete; or

(3) Disclose changes in the Contractor's commercial pricelist(s), discounts or discounting policies which occurred after the original submission and prior to the completion of negotiations.

(b) The Government will consider information submitted to be current, accurate and complete if the data is current, accurate and complete as of 14 calendar days prior to the date it is submitted.

(c) If any reduction in the contract price under this clause reduces the price for items for which payment was made prior to the date of the modification reflecting the price reduction, the Contractor shall be liable to and shall pay the United States—

(1) The amount of the overpayment; and

(2) Simple interest on the amount of such overpayment to be computed from the date(s) of overpayment to the Contractor to the date the Government is repaid by the Contractor at the applicable underpayment rate effective each quarter prescribed by the Secretary of Treasury under 26 U.S.C. 6621(a)(2).

(d) Failure to agree on the amount of the decrease shall be resolved as a dispute.

(e) In addition to the remedy in paragraph (a) of this clause, the Government may terminate this contract for default. The rights and remedies of the Government specified herein are not exclusive, and are in addition to any other rights and remedies provided by law or under this contract.

(End of clause)

552.216–70 Economic Price Adjustment—FSS Multiple Award Schedule Contracts.

As prescribed in 516.203–4(a), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—FSS MULTIPLE AWARD SCHEDULE CONTRACTS (SEP 1999)

Price adjustments include price increases and price decreases. Adjustments will be considered as follows:

(a) Contractors shall submit price decreases anytime during the contract period in which they occur. Price decreases will be handled in accordance with the provisions of the Price Reduction Clause.

(b) Contractors may request price increases under the following conditions:

(1) Increases resulting from a reissue or other modification of the Contractor's commercial catalog/pricelist that was used as the basis for the contract award.

(2) Only three increases will be considered during the contract period.

(3) Increases are requested after the first 30 days of the contract period and prior to the last 60 days of the contract period.

(4) At least 30 days elapse between requested increases.

(c) The aggregate of the increases in any contract unit price under this clause shall not exceed _____* percent of the original contract unit price. The Government reserves the right to raise this ceiling where changes in market conditions during the contract period support an increase.

(d) The following material shall be submitted with the request for a price increase:

(1) A copy of the commercial catalog/pricelist showing the price increase and the effective date for commercial customers.

(2) Commercial Sales Practice format regarding the Contractor's commercial pricing practice relating to the reissued or modified catalog/price-list, or a certification that no change has occurred in the data since completion of the initial negotiation or a subsequent submission.

(3) Documentation supporting the reasonableness of the price increase.

(e) The Government reserves the right to exercise one of the following options:

(1) Accept the Contractor's price increases as requested when all conditions of (b), (c), and (d) of this clause are satisfied;

(2) Negotiate more favorable discounts from the new commercial prices when the total increase requested is not supported; or,

(3) Remove the product(s) from contract involved pursuant to the Cancellation Clause of this contract, when the increase requested is not supported.

(f) The contract modification reflecting the price adjustment shall be signed by the Government and made effective upon receipt of notification from the Contractor that the new catalog/pricelist has been mailed to the addresses previously furnished by the Contracting Officer, provided that in no event shall such price adjustment be effective prior to the effective date of the commercial price increases. The increased contract prices shall apply to delivery orders issued to the Contractor on or after the effective date of the contract modification.

(End of clause)

**Insert the percent appropriate at the time the solicitation is issued. This percentage should normally be 10 percent, unless based on a trend established by an appropriate index such as the Producer Prices and Price Index during the most recent 6-month period indicates that a different percentage is more appropriate. Any ceiling other than 10 percent must be approved by the contracting director.*

Alternate I (SEP 1999). The following is substituted for paragraphs (b) and (c) of the clause:

(b) Contractors may request price increases to be effective on or after the first 12 months of the contract period providing all of the following conditions are met:

(1) Increases resulting from a reissue or other modification of the Contractor's commercial catalog/pricelist that was used as the basis for the contract award.

(2) No more than three increases will be considered during each succeeding 12-month period of the contract. (For succeeding contract periods of less than 12 months, up to three increases will be considered subject to the other conditions of this subparagraph (b)).

(3) Increases are requested before the last 60 days of the contract period.

(4) At least 30 days elapse between requested increases.

(c) In any contract period during which price increases will be considered, the aggregate of the increases during any 12-month period shall not exceed *_____ percent of the contract unit price in effect at the end of the preceding 12-month period. The Government reserves the right to raise the ceiling when market conditions during the contract period support such a change.

**Insert the percentage appropriate at the time the solicitation is issued. This percentage should be determined based on the trend established by an appropriate index such as the Producer Prices and Price Index. A ceiling of more than 10 percent must be approved by the Contracting Director.*

[64 FR 37229, July 9, 1999; 64 FR 49844, Sept. 14, 1999]

552.216–71 Economic Price Adjustment—Special Order Program Contracts.

As prescribed in 516.203–4(a), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—SPECIAL ORDER PROGRAM CONTRACTS (AUG 2010)

(a) ''Producer Price Index'' (PPI), as used in this clause, means the originally released index, not seasonally adjusted, published by the Bureau of Labor Statistics, U.S. Department of Labor (Labor) for product code _____ found under Table _____.

(b) During the term of the contract, the award price may be adjusted once during each 12–month period upward or downward. However, if an upward adjustment, a maximum of _____*_____ percent shall apply. Any price adjustment for the product code shall be based upon the percentage change in the PPI released in the month prior to the initial month of the contract period specified in the solicitation for sealed bidding or the month prior to award in negotiation (the base index) and the PPI released 12 months later (the updated index). The formula for determining the Adjusted Contract Price (ACP) applicable to shipments for the balance of the contract period is—

$$\text{ACP} = \frac{\text{Updated Index}}{\text{Base Index}} \times \text{Award Price}$$

(c) If the PPI is not available for the month of the base index or the updated index, the month with the most recently published PPI prior to the month determining the base index or updated index shall be used.

(d) If a product code is discontinued, the Government and the Contractor will mutually agree to substitute a similar product code. If Labor designates an index with a new title and/or code number as continuous with the product code specified above, the new index shall be used.

(e) Unless the Contractor's written request for a price adjustment resulting from the application of the formula in (b) above is received by the Contracting Officer within 30 calendar days of the release of the updated index, the Contractor shall have waived its right to an upward price adjustment for the balance of the contract. Alternatively, the Contracting Officer will unilaterally adjust the award price downward when appropriate using the updated index defined in (b) above.

(f) Price adjustments shall be effective upon execution of a contract modification by the Government or on the 31st day following the release of the updated index, whichever is later, shall indicate the updated index and percent of change as well as the ACP, and shall not apply to delivery orders issued before the effective date.

(End of clause)

Alternate I (AUG 2010). As prescribed in 516.203–4(a)(1) and (2), substitute the following paragraphs (b), (e), and (f) for paragraphs (b), (e), and (f) of the basic clause:

(b) Once during each 12–month period, the contract price may be adjusted upward or downward a maximum of _____*_____ percent.

(1) For the first option period, any price adjustment for the product code shall be based upon the percentage change in the PPI released in the month prior to the initial month of the contract period specified in the solicitation for sealed bidding or the month prior to award in negotiation (the base index) and the PPI released in the third month before completion of the initial contract period stated in the solicitation (the updated index). This initial contract period may be less than 12 months. The formula for determining the Adjusted Contract Price (ACP) applicable to shipments during the first option period is—

$$ACP = \frac{\text{Updated Index}}{\text{Base Index}} \times \text{Award Price}$$

(2) For any subsequent option period, the price adjustment shall be the percentage change between the previously updated index (the new base index) and the PPI released 12 months later (the most recent updated index). This percentage shall be applied to the Current Contract Price (CCP). The formula for determining the ACP applicable to shipments for the subsequent option period(s) is—

$$ACP = \frac{\text{Most Recent Updated Index}}{\text{New Base Index}} \times CCP$$

(e) Unless the Contractor's written request for a price adjustment resulting from the application of the formulas in (b) (1) or (2) above is received by the Contracting Officer within 30 calendar days of the date of the Government's preliminary written notice of its intent to exercise the option, the Contractors shall have waived its right to an upward price adjustment for that option period. Alternatively, the Contracting Officer in its written notice shall exercise the option at the CCP or at a reduced price when appropriate using the formulas in (b) (1) or (2) above.

(f) Price adjustments shall be effected by execution of a contract modification by the Government indicating the most recent updated index and percent of change and shall apply to delivery orders placed on or after the first day of the option period.

Alternate II (AUG 2010). As prescribed in 516.203–4(a)(2), add the following paragraph (g) to the basic clause.

(g) No price adjustment will be made unless the percentage change in the PPI is at least _____*_____ percent.

The Contracting Officer should insert a lower percent than the maximum percentage stated in paragraph (b) of the clause.

** The appropriate percentage should be determined based upon the historical trend in the PPI for the product code. A ceiling of more than 10 percent must be approved by the Contracting Director.*

[64 FR 37229, July 9, 1999, as amended at 75 FR 41096, July 15, 2010]

552.216–72 Placement of Orders.

As prescribed in 516.506(a), insert the following clause:

PLACEMENT OF ORDERS (AUG 2010)

(a) Delivery orders (orders) will be placed by:

[Contracting Officer insert names of Federal agencies]

(b) Orders may be placed through Electronic Data Interchange (EDI) or mailed in paper form. EDI orders shall be placed using the American National Standards Institute (ANSI) X12 Standard for Electronic Data Interchange (EDI) format.

(c) If the Contractor agrees, General Services Administration's Federal Acquisition Service (FAS) will place all orders by EDI using computer-to-computer EDI. If computer-to-computer EDI is not possible, FAS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission. Subject to the Contractor's agreement, other agencies may place orders by EDI.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into one or more Trading Partner Agreements (TPA) with each Federal agency placing orders electronically in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify, among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation. Federal agencies may obtain a sample format to customize as needed from the office specified in (g) below.

(e) The Contractor shall be responsible for providing its own hardware and software necessary to transmit and receive data electronically. Additionally, each party to the TPA shall be responsible for the costs associated with its use of third party provider services.

(f) Nothing in the TPA will invalidate any part of this contract between the Contractor and the General Services Administration. All terms and conditions of this contract that otherwise would be applicable to a mailed order shall apply to the electronic order.

(g) The basic content and format of the TPA will be provided by: General Services Administration, Office of the Chief Information Officer (QI), 2100 Crystal Drive, Arlington, VA 22202, Telephone: (703) 605–9444.

(End of clause)

Alternate I (AUG 2010). As prescribed in 516.506(a), substitute the following paragraphs (a), (b), (c), and (d) for paragraphs (a), (b), (c), and (d) of the basic clause:

(a) All delivery orders (orders) under this contract will be placed by the General Services Administration's Federal Acquisition Service (FAS). The Contractor is not authorized to accept orders from any other agency.

Violation of this restriction may result in termination of the contract pursuant to the default clause of this contract.

(b) All orders shall be placed by Electronic Data Interchange (EDI) using the American National Standards Institute (ANSI) X12 Standard for Electronic Data Interchange (EDI) format.

(c) If the Contractor agrees, transmission will be computer-to-computer EDI. If computer-to-computer EDI is not possible, FAS will use an alternative EDI method allowing the Contractor to receive orders by facsimile transmission.

(d) When computer-to-computer EDI procedures will be used to place orders, the Contractor shall enter into a Trading Partner Agreement (TPA) with FAS in order to ensure mutual understanding by the parties of certain electronic transaction conventions and to recognize the rights and responsibilities of the parties as they apply to this method of placing orders. The TPA must identify among other things, the third party provider(s) through which electronic orders are placed, the transaction sets used, security procedures, and guidelines for implementation.

[64 FR 37229, July 9, 1999, as amended at 68 FR 24380, May 7, 2003; 69 FR 28065, May 18, 2004; 72 FR 4654, Feb. 1, 2007; 75 FR 41096, July 15, 2010]

552.216–73 Ordering Information.

As prescribed in 516.506(c), insert the following provision:

ORDERING INFORMATION (AUG 2010)

(a) In accordance with the Placement of Orders clause of this solicitation, the offeror elects to receive orders placed by GSA's Federal Acquisition Service (FAS) by either ☐ facsimile transmission or ☐ computer-to-computer Electronic Data Interchange (EDI).

(b) An offeror electing to receive computer-to-computer EDI is requested to indicate below the name, address, and telephone number of the representative to be contacted regarding establishment of an EDI interface.

_____

_____

_____

(c) An offeror electing to receive orders by facsimile transmission is requested to indicate below the telephone number(s) for facsimile transmission equipment where orders should be forwarded.

_____

_____

_____

(d) For mailed orders, the offeror is requested to include the postal mailing address(es) where paper form orders should be mailed.

_____

_____

_____

(e) Offerors marketing through dealers are requested to indicate below whether those dealers will be participating in the proposed contract.

Yes ( ) No ( )

If ''yes'' is checked, ordering information to be inserted above shall reflect that in addition to offeror's name, address, and facsimile transmission telephone number, orders can be addressed to the offeror's name, c/o nearest local dealer. In this event, two copies of a list of participating dealers shall accompany this offer, and shall also be included in Contractor's Federal Supply Schedule pricelist.

(End of provision)

Alternate I (SEP 1999). As prescribed in 516.506(c), delete paragraph (d) of the basic provision.

[64 FR 37229, July 9, 1999, as amended at 72 FR 4654, Feb. 1, 2007; 75 FR 41096, July 15, 2010]

552.216–74 Task–Order and Delivery–Order Ombudsman.

As prescribed in 516.506(b), insert the following clause:

TASK–ORDER AND DELIVERY–ORDER OMBUDSMAN (AUG 2010)

GSA has designated a Task–Order and Delivery–Order Ombudsman who will review complaints from contractors and ensure that they are afforded a fair opportunity for consideration in the award of task or delivery orders under Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts, consistent with the procedures in the contract. Written complaints shall be submitted to the Ombudsman, with a copy to the Contracting Officer.

In the case that the contractor is not satisfied with the resolution of the complaint by the GSA Task–Order and Delivery–Order Ombudsman, the contractor may follow the procedures outlined in subpart 33.1.

The GSA Ombudsman is the Director, Office of Acquisition Integrity located at: General Services Administration (GSA), Office of Governmentwide Policy (OGP), Office of Acquisition Policy (MV), Acquisition Integrity Division (MVA), 1800 F Street, NW., Room 4014, Washington, D.C. 20405, Telephone: (202) 219–3454, Fax: (202) 219–3615, E-mail:*joseph.neurauter@gsa.gov*.

[75 FR 41096, July 15, 2010]

552.217–70 Evaluation of Options.

As prescribed in 517.208(a), insert the following provision:

EVALUATION OF OPTIONS (AUG 1990)

(a) The Government will evaluate offers for award purposes by determining the lowest base period price. When option year pricing is based on a formula (e.g., changes in the Producer Price Index or other common standard); option year pricing is automatically considered when evaluating the base year price, as any change in price will be uniformly related to changes in market conditions. All options are therefore considered to be evaluated. Evaluation of options will not obligate the Government to exercise the option(s).

(b) The Government will reject the offer if exceptions are taken to the price provisions of the Economic Price Adjustment clause, unless the exception results in a lower maximum option year price. Such offers will be evaluated without regard to the lower option year(s) maximum. However, if the offeror offering a lower maximum is awarded a contract, the award will reflect the lower maximum.

552.217–71 Notice Regarding Option(s).

As prescribed in 517.208(b), insert the following provision:

NOTICE REGARDING OPTION(S) (NOV 1992)

The General Services Administration (GSA) has included an option to [*Insert ''purchase additional quantities of supplies or services'' or ''extend the term of this contract'' or ''purchase additional quantities of supplies or services and to extend the term of this contract''*] in order to demonstrate the value it places on quality performance by providing a mechanism for continuing a contractual relationship with a successful Offeror that performs at a level which meets or exceeds GSA's quality performance expectations as communicated to the Contractor, in writing, by the Contracting Officer or designated representative. When deciding whether to exercise the option, the Contracting Officer will consider the quality of the Contractor's past performance under this contract in accordance with 48 CFR 517.207.

(End of provision)

552.219–70 Allocation of Orders—Partially Set-Aside Items.

As prescribed in 519.508, insert the following clause:

ALLOCATION OF ORDERS—PARTIALLY SET-ASIDE ITEMS (SEP 1999)

Where the set-aside portion of an item or group of items is awarded to a Contractor other than the one receiving the award on the corresponding non-set-aside portion, the Government will divide the requirements to be ordered between the two Contractors with the objective of achieving, as nearly as possible, a 50/50 division of the total value of orders placed after the award of the set-aside portion. In no case will this division vary by more than a 60/40 division (with either the non-set-aside or set-aside Contractor receiving the larger portion) from the time of the award of the set-aside portion.

(End of clause)

552.219–71 Notice to Offerors of Subcontracting Plan Requirements.

As prescribed in 519.708–70(a), insert the following provision:

NOTICE TO OFFERORS OF SUBCONTRACTING PLAN REQUIREMENTS (JUN 2005)

The General Services Administration (GSA) is committed to assuring that maximum practicable opportunity is provided to small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns to participate in the performance of this contract consistent with its efficient performance. GSA expects any subcontracting plan submitted pursuant to FAR 52.219–9, Small Business Subcontracting Plan, to reflect this commitment. Consequently, an offeror, other than a small business concern, before being awarded a contract exceeding $500,000 ($1,000,000 for construction), must demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns as subcontractors in the performance of this contract.

(End of provision)

[64 FR 37229, July 9, 1999, as amended at 70 FR 32522, 32523, June 3, 2005]

552.219–72 Preparation, Submission, and Negotiation of Subcontracting Plans.

As prescribed in 519.708–70(b), insert the following provision:

PREPARATION, SUBMISSION, AND NEGOTIATION OF SUBCONTRACTING PLANS (JUN 2005)

(a) An offeror, other than a small business concern, submitting an offer that exceeds $500,000 ($1,000,000 for construction) shall submit a subcontracting plan with its initial offer. The subcontracting plan will be negotiated concurrently with price and any required technical and management proposals, unless the offeror submits a previously-approved commercial plan.

(b) Maximum practicable utilization of small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits. The General Services Administration (GSA) expects that an offeror's subcontracting plan will reflect a commitment to assuring that small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran owned small business concerns are provided the maximum practicable opportunity, consistent with efficient contract performance, to participate as subcontractors in the performance of the resulting contract. An offeror submitting a commercial plan can reflect this commitment through subcontracting opportunities it provides that relate to the offeror's production generally; *i.e.,* for both its commercial and Government business.

(c) GSA believes that this potential contract provides significant opportunities for the use of small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns as subcontractors. Consequently, in addressing the eleven elements described at FAR 52.219–9(d) of the clause in this contract entitled Small Business Subcontracting Plan, the offeror shall:

(1) Demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns in performing the contract.

(2) Include a description of the offeror's subcontracting strategies used in any previous contracts, significant achievements, and how this plan will build upon those earlier achievements.

(3) Demonstrate through its plan that it understands the small business subcontracting program's objectives and GSA's expectations, and it is committed to taking those actions necessary to meet these goals or objectives.

(d) In determining the acceptability of any subcontracting plan, the Contracting Officer will take each of the following actions:

(1) Review the plan to verify that the offeror demonstrates an understanding of the small business subcontracting program's objectives and GSA's expectations with respect to the program and has included all the information, goals, and assurances required by FAR 52.219–9.

(2) Consider previous goals and achievements of contractors in the small industry.

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns.

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns. The offeror's description can apply to commercial as well as previous Government contracts.

(e) Failure to submit an acceptable subcontracting plan and/or correct deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of provision)

[64 FR 37229, July 9, 1999, as amended at 70 FR 32522, 32523, June 3, 2005]

552.219–73 Goals for Subcontracting Plan.

As prescribed in 519.708–70(c), insert the following provision:

GOALS FOR SUBCONTRACTING PLAN (JUN 2005)

(a) Maximum practicable utilization of small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits.

(1) The General Service Administration's (GSA's) commitment to ensuring that maximum practicable opportunity is provided to small, HUBZone small, small disdvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns to participate as subcontractors in the performance of this contract, consistent with its efficient performance, must be reflected in the offeror's subcontracting plan submitted pursuant to the clause of this contract at FAR 52.219–9, Small Business Subcontracting Plan.

(2) In addressing the eleven elements described at FAR 52.219–9(d), the offeror shall

demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran owned small business concerns in performing this contract. An offeror submitting a commercial plan can demonstrate its commitment in providing maximum practicable opportunities through subcontracting opportunities it provides to small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran owned small business concerns that relate to the offeror's production generally; *i.e.*, for both its commercial and Government business.

(3) The subcontracting plan shall include a description of the offeror's subcontracting strategies used in previous contracts and significant achievements, with an explanation of how this plan will build upon those earlier achievements. Additionally, the offeror shall demonstrate through its plan that it understands the small business subcontracting program's objectives, GSA's expectations, and is committed to taking those actions necessary to meet these goals or objectives.

(b) GSA believes that this contract provides significant opportunities for the use of small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns as subcontractors. Accordingly, it is anticipated that an acceptable subcontracting plan will contain at least the following goals:

Small Business	____ percent.
HUBZone Small Business	____ percent.
Small Disadvantaged Business	____ percent.
Women-Owned Small Business	____ percent.
Veteran-Owned Small Business	____ percent.
Service-Disabled Veteran-Owned Small Business	____ percent.

NOTE: Target goals are expressed as a percentage of planned subcontracting dollars.

(c) In determining the acceptability of any subcontracting plan, the Contracting Officer will—

(1) Review the plan to verify that the offeror has demonstrated an understanding of the small business subcontracting program's objectives and GSA's expectations with respect to the programs and has included all the information, goals, and assurances required by FAR 52.219–9;

(2) Consider previous goals and achievements of contractors in the same industry;

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns; and

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, HUBZone small, small disadvantaged, women-owned, veteran-owned, and service-disabled veteran-owned small business concerns. The offeror's description can apply to commercial as well as previous Government contracts.

(d) Failure to submit an acceptable subcontracting plan and/or correct deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of provision)

Alternate I (SEP 1999). As prescribed in 519.708–70(c)(2), delete paragraph (b) of the basic provision and redesignate paragraphs (c) and (d) as paragraphs (b) and (c).

[64 FR 37229, July 9, 1999, as amended at 70 FR 32522, 32523, June 3, 2005]

552.219–74 Section 8(a) Direct Award.

As prescribed in 519.870–8, insert the following clause:

SECTION 8(a) DIRECT AWARD (SEP 1999)

(a) This contract is issued as a direct award between the contracting activity and the 8(a) Contractor pursuant to the Memorandum of Understanding between the Small Business Administration (SBA) and the General Services Administration. SBA retains the responsibility for 8(a) certifications, 8(a) eligibility determinations, and related issues, and will provide counseling and assistance to the 8(a) contractor under the 8(a) program. The cognizant SBA district office is: [*Complete at time of award*]

(b) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall also coordinate with SBA prior to processing any advance payments or novation agreements. The contracting activity may assign contract administration functions to a contract administration office.

(c) The Contractor agrees:

(1) To notify the Contracting Officer, simultaneous with its notification to SBA (as required by SBA's 8(a) regulations), when the

owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership and control.

(2) To the requirements of 52.219–14, Limitations on Subcontracting.

(End of clause)

552.219–75 GSA Mentor-Protégé Program.

As prescribed in 519.7017(a), insert the following clause:

GSA MENTOR-PROTÉGÉ PROGRAM (SEP 2009)

(a) Prime contractors, including small businesses, are encouraged to participate in the GSA Mentor-Protégé Program for the purpose of providing developmental assistance to eligible protégé entities to enhance their capabilities and increase their participation in GSA contracts.

(b) The Program consists of:

(1) Mentor firms are large prime contractors with at least one active subcontracting plan, or that are eligible small businesses;

(2) Protégés are subcontractors to the prime contractor, and include small business concerns, small disadvantaged business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, and women-owned small business concerns meeting the qualifications specified in Subpart 519.70; and

(3) Mentor-protégé Applications and Agreements, approved by the Mentor-Protégé Program Manager in the GSA Office of Small Business Utilization (OSBU).

(c) *Mentor participation in the Program* means providing technical, managerial and financial assistance to aid protégés in developing requisite high-tech expertise and business systems to compete for and successfully perform GSA contracts and subcontracts.

(d) Contractors interested in participating in the Program are encouraged to read FAR Subpart 19.7 and to contact the GSA Office of Small Business Utilization (E), Washington, DC 20405, (202) 501–1021, for further information.

(End of clause)

[74 FR 41066, Aug. 14, 2009]

552.219–76 Mentor Requirements and Evaluation.

As prescribed in 519.7017(b), insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (SEP 2009)

(a) The purpose of the GSA Mentor-Protégé Program is for a GSA prime contractor to provide developmental assistance to certain subcontractors qualifying as protégés. Eligible protégés include small business concerns, small disadvantaged business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, and women-owned small business concerns meeting the qualifications specified in section 519.7007. The Program requires an Application process and an Agreement between the mentor and the protégé. See GSAR Subpart 519.70 for more information.

(b) GSA will evaluate a GSA mentor's performance on the following factors:

(1) Specific actions taken by the contractor, during the evaluation period, to increase the participation of its protégé as a subcontractor and supplier;

(2) Specific actions taken by the contractor during this evaluation period to develop the technical and corporate administrative expertise of its protégé as defined in the Agreement;

(3) To what extent the protégé has met the developmental objectives in the Agreement; and

(4) To what extent the firm's participation in the Mentor-Protégé Program resulted in the protégé receiving competitive contract(s) and subcontract(s) from private firms other than the mentor, and from agencies.

(c) Semi-annual reports shall be submitted by a GSA mentor to the GSA Mentor-Protégé Program Manager, GSA Office of Small Business Utilization (E), Washington, DC 20405. The reports must include information as outlined in paragraph (b) of this section. The semi-annual report may include a narrative describing the forms of developmental assistance a mentor provides to a protégé and any other types of permissible, mutually beneficial assistance.

(d) A GSA mentor will notify the GSA Mentor-Protégé Program Manager and the contracting officer, in writing, at least 30 days in advance of the mentor firm's intent to voluntarily withdraw from the GSA Program or terminate the Agreement, or upon receipt of a protégé's notice to withdraw from the Program.

(e) GSA mentor and protégé firms will submit a ''Lessons Learned'' evaluation to the GSA Mentor-Protégé Program Manager at the conclusion of the Mentor-Protégé Agreement. At the end of each year in the Mentor-Protégé Program, the mentor and protégé, as appropriate, will formally brief the GSA Mentor-Protégé Program manager, the technical program manager, and the contracting

officer during a formal Program review regarding Program accomplishments as they pertain to the approved Agreement.

(f) GSA has the authority to exclude mentor or protégé firms from participating in the GSA Program. If GSA excludes a mentor or a protégé from the Program, the GSA Office of Small Business Utilization will deliver to the contractor a Notice specifying the reason for Program exclusion and the effective date. The exclusion from the Program does not constitute a termination of the subcontract between the mentor and the protégé. A plan for accomplishing the subcontract effort should the Agreement be terminated shall be submitted with the Agreement as required in section 519.7011(j).

(g) Subcontracts awarded to GSA protégé firms under this Program are exempt from competition requirements, notwithstanding FAR 52.244–5. However, price reasonableness should still be determined.

(End of clause)

[74 FR 41066, Aug. 14, 2009]

552.223–70 Hazardous Substances.

As prescribed in 523.303(a), insert the following clause:

HAZARDOUS SUBSTANCES (MAY 1989)

(a) If the packaged items to be delivered under this contract are of a hazardous substance and ordinarily are intended or considered to be for use as a household item, this contract is subject to the Federal Hazardous Materials Act, as amended (15 U.S.C. 1261–1276), implementing regulations thereof (16 CFR Chapter II), and Federal Standard No. 123, Marking for Shipment (Civil Agencies), issue in effect on the date of this solicitation.

(b) The packaged items to be delivered under this contract are subject to the preparation of shipping documents, the preparation of items for transportation, shipping container construction, package making, package labeling, when required, shipper's certification of compliance, and transport vehicle placarding in accordance with Parts 171 through 178 of 49 CFR and the Hazardous Materials Transportation Act.

(c) The minimum packaging acceptable for packaging Department of Transportation regulated hazardous materials shall be those in 49 CFR 173.

(End of clause)

552.223–71 Nonconforming Hazardous Materials.

As prescribed in 523.303(b), insert the following clause:

NONCONFORMING HAZARDOUS MATERIALS (SEP 1999)

(a) Nonconforming supplies that contain hazardous material or that may expose persons who handle or transport the supplies to hazardous material and which require replacement under the inspection and/or warranty clauses of this contract shall be reshipped to the Contractor at the Contractor's expense. The Contractor agrees to accept return of these nonconforming supplies and to pay all costs occasioned by their return.

(b) ''Hazardous materials,'' as used in this clause, includes any material defined as hazardous under the latest version of Federal Standard No. 313 (including revisions adopted during the term of the contract).

(c) If the Contractor fails to provide acceptable disposition instructions for the nonconforming supplies within 10 days from the date of the Government's request (or such longer period as may be agreed to between the Contracting Officer and the Contractor), or fails to accept return of the reshipped nonconforming supplies, such failure:

(1) may be interpreted as a willful failure to perform,

(2) may result in termination of the contract for default and

(3) shall be considered by the Contracting Officer in determining the responsibility of the Contractor for any future award (see FAR 9.104–3(b) and 9.406–2).

(d) Pending final resolution of any dispute, the Contractor shall promptly comply with the decision of the Contracting Officer.

(End of clause)

552.223–72 Hazardous Material Information.

As prescribed in 523.370, insert the following provision:

HAZARDOUS MATERIAL INFORMATION (SEP 1999)

Offeror shall indicate for each national stock number (NSN) the following information:

NSN	DOT shipping name	DOT hazard class	DOT label required
			Yes [ ] No [ ] Yes [ ] No [ ] Yes [ ] No [ ]

(End of provision)

552.227–70 Government Rights (Unlimited).

As prescribed in 527.409, insert the following clause:

GOVERNMENT RIGHTS (UNLIMITED) (MAY 1989)

The Government shall have unlimited rights in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

552.227–71 Drawings and Other Data To Become Property of Government.

As prescribed in 527.409(b), substitute the following clause:

DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT (MAY 1989)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the ''person for whom the work was prepared'' for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of works beyond such period.

(End of clause)

552.228–5 Government as Additional Insured.

As prescribed in 528.310, insert the following clause:

GOVERNMENT AS ADDITIONAL INSURED (MAY 2009)

(a) This clause supplements the requirements set forth in FAR clause 52.528–5, Insurance—Work on a Government Installation.

(b) Each insurance policy required under this contract, other than workers' compensation insurance, shall contain an endorsement naming the United States as an additional insured with respect to operations performed under this contract. The insurance carrier is required to waive all subrogation rights against any of the named insured.

(End of clause)

[74 FR 17099, Apr. 14, 2009]

552.229–70 Federal, State, and Local Taxes.

As prescribed in 529.401–70, insert the following clause:

FEDERAL, STATE, AND LOCAL TAXES (APR 1984)

The contract price includes all applicable Federal, State, and local taxes. No adjustment will be made to cover taxes which may subsequently be imposed on this transaction or changes in the rates of currently applicable taxes. However, the Government will, upon the request of the Contractor, furnish evidence appropriate to establish exemption from any tax from which the Government is exempt and which was not included in the contract price.

(End of clause)

552.229–71 Federal Excise Tax—DC Government.

As prescribed in 529.401–71, insert the following clause:

FEDERAL EXCISE TAX—DC GOVERNMENT (SEP 1999)

If the District of Columbia cites an Internal Revenue Tax Exempt Certificate Number on orders placed under this contract, the Contractor shall bill shipments to the District of Columbia at prices exclusive of Federal excise tax and show the amount of such tax on the invoice.

(End of clause)

552.232–1 Payments.

As prescribed in 532.7104, insert the following clause:

PAYMENTS (NOV 2009) (DEVIATION FAR 52.232–1)

(a) The Government shall pay the Contractor, without submission of invoices or vouchers, 30 days after the service period, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.

(b) Unless otherwise specified in this contract, the Government will make payment

on partial deliveries accepted by the Government if either:

(1) The amount due on the deliveries warrants it.

(2) The Contractor requests it and the amount due on the deliveries is at least $1,000 or 50 percent of the total contract price.

(c) When processing payment, GSA's Finance Office will automatically generate the 12 digit invoice number using the PDN assigned to the contract, followed by an abbreviated month and year of service (e.g., 84261554JUN7, for June 2007). The PDN appears on the contract award document.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 54918, Oct 26, 2009]

552.232–23 Assignment of Claims.

As prescribed in 532.806, insert the following clause:

ASSIGNMENT OF CLAIMS (SEP 1999)

Because this is a requirements or indefinite quantity contract under which more than one agency may place orders, paragraph (a) of the Assignment of Claims clause (FAR 52.232–23) is inapplicable and the following is substituted therefor:

In order to prevent confusion and delay in making payment, the Contractor shall not assign any claim(s) for amounts due or to become due under this contract. However, the Contractor is permitted to assign separately to a bank, trust company, or other financial institution, including any Federal lending agency, under the provisions of the Assignment of Claims Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15 (hereinafter referred to as ''the Act''), all amounts due or to become due under any order amounting to $1,000 or more issued by any Government agency under this contract. Any such assignment takes effect only if and when the assignee files written notice of the assignment together with a true copy of the instrument of assignment with the contracting officer issuing the order and the finance office designated in the order to make payment. Unless otherwise stated in the order, payments to an assignee of any amounts due or to become due under any order assigned may, to the extent specified in the Act, be subject to reduction or set-off.

(End of clause)

552.232–25 Prompt Payment.

As prescribed in 532.908(c)(2), insert the following clause:

PROMPT PAYMENT (NOV 2009) (DEVIATION FAR 52.232–25)

Notwithstanding any other payment clause in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or the date of an electronic funds transfer. Definitions of pertinent terms are set forth in section 32.902 of the Federal Acquisition Regulation. All days referred to in this clause are calendar days, unless otherwise specified. (However, see subparagraph (a)(4) of this clause concerning payments due on Saturdays, Sundays, and legal holidays.)

(a) *Invoice payments.* (1) The due date for making invoice payments by the designated payment office is:

(i) For orders placed electronically by the General Services Administration (GSA) Federal Acquisition Service (FAS), and to be paid by GSA through electronic funds transfer (EFT), the later of the following two events:

(A) The 10th day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 10th day after the date of the Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.

(B) The 10th day after Government acceptance of supplies delivered or services performed by the Contractor.

(ii) For all other orders, the later of the following two events:

(A) The 30th day after the designated billing office receives a proper invoice from the Contractor. If the designated billing office fails to annotate the invoice with the date of receipt at the time of receipt, the invoice payment due date shall be the 30th day after the date ofthe Contractor's invoice; provided the Contractor submitted a proper invoice and no disagreement exists over quantity, quality, or Contractor compliance with contract requirements.

(B) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor.

(iii) On a final invoice, if the payment amount is subject to contract settlement actions, acceptance occurs on the effective date of the contract settlement.

(2) The General Services Administration will issue payment on the due date in (a)(1)(i) above if the Contractor complies with full cycle electronic commerce. Full cycle electronic commerce includes all the following elements:

(i) The Contractor must receive and fulfill electronic data interchange (EDI) purchase orders (transaction set 850).

(ii) The Contractor must generate and submit to the Government valid EDI invoices (transaction set 810) or submit invoices through the GSA Finance Center Internet-based invoice process. Internet-based invoices must be submitted using procedures provided by GSA.

(iii) The Contractor's financial institution must receive and process, on behalf of the Contractor, EFT payments through the Automated Clearing House (ACH) system.

(iv) The EDI transaction sets in (i) through (iii) above must adhere to implementation conventions provided by GSA.

(3) If any of the conditions in(a)(2) above do not occur, the 10 day payment due dates in (a)(1) become 30 day payment due dates.

(4) *Certain food products and other payments.* (i) Due dates on Contractor invoices for meat, meat food products, or fish; perishable agricultural commodities; and dairy products, edible fats or oils, and food products prepared from edible fats or oils are—

(A) For meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182 (3)), and as further defined in Pub. L. 98–181, including any edible fresh or frozen poultry meat, any perishable poultry meat food product, fresh eggs, an any perishable egg product, as close as possible to, but not later than, the 7th day after product delivery.

(B) For fresh or frozen fish, as defined in section 204(3) of the Fish and Seafood Promotion Act of 1986 (16 U.S.C. 4003(3)), as close as possible to, but not later than, the 7th day after product delivery.

(C) For perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), as close as possible to, but not later than, the 10th day after product delivery, unless another date is specified in the contract.

(D) For daily products, as defined in section 111(e) of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4502(e)), edible fats or oils, and food products prepared from edible fats or oils, as close as possible to, but not later than, the 10th day after the date on which a proper invoice has been received. Liquid milk, cheese, certain processed cheese products, butter, yogurt, ice cream, mayonnaise, salad dressing, and other similar products, fall within this classification. Nothing in the Act limits this classification to refrigerated products. When questions arise regarding the proper classification of a specific product, prevailing industry practices will be followed in specifying a contract payment due date. The burden of proof that a classification of a specific product is, in fact, prevailing industry practice is upon the Contractor making the representation.

(ii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(5) *Contractor's invoice.* The Contractor shall prepare and submit invoices to the designated billing office specified in the contract. Notwithstanding paragraph (g) of the clause at FAR 52.212–4, Contract Terms and Conditions—Commercial Items, if the Contractor submits hard-copy invoices, submit only an original invoice. No copies of the invoice are required. A proper invoice must include the items listed in subdivisions (a)(5)(i) through (a)(5)(viii) of this clause. If the invoice does not comply with these requirements, it shall be returned within 7 days after the date the designated billing office received the invoice (3 days for meat, meat food products, or fish; 5 days for perishable agricultural commodities, edible fats or oils, and food products prepared from edible fats or oils), with a statement of the reasons why it is not a proper invoice. Untimely notification will be taken into account in computing any interest penalty owed the Contractor in the manner described in subparagraph (a)(5) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date. (The Contractor is encouraged to date invoices as close as possible to the date of the mailing or transmission.)

(iii) Contract number or other authorization for supplies delivered or services preformed (including order number and contract line item number).

(iv) Description, quantity, unit of measure, unit price, an extended prices of supplies delivered or services performed.

(v) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills or lading.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in the event of a defective invoice.

(viii) Any other information or documentation required by the contract (such as evidence of shipment).

(ix) While not required, the Contractor is strongly encouraged to assign an identification number to each invoice.

(6) *Interest penalty.* An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made by the due date and the conditions listed in subdivisions (a)(6)(i) through (a)(6)(iii) of this clause are met, if applicable. However, when the due date falls on a Saturday, Sunday, or legal holiday when Federal Government offices are closed and Government business is

not expected to be conducted, payment may be made on the following business day without incurring a late payment interest penalty.

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed, and there was no disagreement over quantity, quality, or Contractor compliance with any contract term or condition.

(iii) In the case of a final invoice for any balance of funds due the Contractor for supplies delivered or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(7) *Computing penalty amount.* The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the day after the due date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). This rate is referred to as the ''Renegotiation Board Interest Rate,'' and it is published in the FEDERAL REGISTER semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice principal payment amount approved by the Government until the payment date of such approved principal amount; and will be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice principal payment amount and will be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(5) of this clause, the due date on the corrected invoice will be adjusted by subtracting from such date the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance shall be deemed to have occurred constructively on the 7th day (unless otherwise specified in this contract) after the Contractor delivered the supplies or performed the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality or Contractor compliance with a contract provision. In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does, not however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 7 days (3 days for meat, meat food products, or fish; 5 days for perishable agricultural commodities, dairy products, edible fats or oils, and food products prepared from edible fats or oils).

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(C) For incorrect electronic funds transfer (EFT) information, in accordance with the EFT clause of this contract.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233–1, Disputes, or for more than 1 year. Interest penalties of less than $1 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and the Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233–1, Disputes.

(8) *Prompt payment discounts.* An interest penalty also shall be paid automatically by the designated payment office, without request from the Contractor, if a discount for prompt payment is taken improperly. The interest penalty will be calculated as described in subparagraph (a)(7) of this clause on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(9) *Additional interest penalty.* (i) If this contract was awarded on or October 1, 1989, a penalty amount, calculated in accordance with subdivision (a)(9)(iii) of this clause, shall be paid in addition to the interest penalty amount if the Contractor—

(A) Is owed an interest penalty of $1 or more;

(B) Is not paid the interest penalty within 10 days after the date the invoice amount is paid; and

(C) Makes a written demand to the designated payment office for additional penalty payment, in accordance with subdivision (a)(9)(ii) of this clause, postmarked not later than 40 days after the invoice amount is paid.

(ii)(A) Contractors shall support written demands for additional penalty payments

with the following data. No additional data shall be required. Contractors shall—

(1) Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalty and such additional penalty as may be required;

(2) Attach a copy of the invoice on which the unpaid late payment interest was due; and

(3) State that payment of the principal has been received, including the date of receipt.

(B) Demands must be postmarked on or before the 40th day after payment was made, except that—

(1) If the postmark is illegible or nonexistent, the demand must have been received and annotated with the date of receipt by the designated payment office on or before the 40th day after payment was made; or

(2) If the postmark is illegible or nonexistent and the designated payment office fails to make the required annotation, the demand's validity will be determined by the date the Contractor has placed on the demand; provided such date is no later than the 40th day after payment was made.

(iii)(A) The additional penalty shall be equal to 100 percent of any original late payment interest penalty, except—

(1) The additional penalty shall not exceed $5,000;

(2) The additional penalty shall never be less than $25; and

(3) No additional penalty is owed if the amount of the underlying interest penalty is less than $1.

(B) If the interest penalty ceases to accrue in accordance with the limits stated in subdivision (a)(5)(iii) of this clause, the amount of the additional penalty shall be calculated on the amount of interest penalty that would have accrued in the absence of these limits, subject to the overall limits on the additional penalty specified in subdivision (a)(7)(iii)(A) of this clause.

(C) For determining the maximum and minimum additional penalties, the test shall be the interest penalty due on each separate payment made for each separate contract. The maximum and minimum additional penalty shall not be based upon individual invoices unless the invoices are paid separately. Where payments are consolidated for disbursing purposes, the maximum and minimum additional penalty determination shall be made separately for each contract therein.

(D) The additional penalty does not apply to payments regulated by other Government regulations (e.g., payments under utility contracts subject to tariffs and regulation).

(b) *Contract financing payments*—(1) *Due dates for recurring financing payments.* If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the [insert day as prescribed by Agency head; if not prescribed, insert 30th day] day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(2) *Due dates for other contract financing.* For advance payments, loans, or other arrangements that do not involve recurring submissions of contract financing requests, payment shall be in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(3) *Interest penalty not applicable.* Contract financing payments shall not be assessed an interest penalty for payment delays.

(c) *Fast payment procedure due dates.* If this contract contains the clause at 52.213–1, Fast Payment Procedure, payments will be made within 15 days after the date of receipt of the invoice.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 54918, Oct. 26, 2009]

552.232–72 Final Payment Under Building Services Contracts.

As prescribed in 532.904(c), insert the following clause:

FINAL PAYMENT UNDER BUILDING SERVICES CONTRACTS (NOV 2009)

Before final payment is made, the Contractor shall furnish the Contracting Officer with a release of all claims against the Government relating to this contract, other than claims in stated amounts that are specifically excepted by the Contractor from the release. If the Contractor's claim to amounts payable under the contract has been assigned under Assignment of Claims Act of 1940, as amended (31 U.S. 3727, 41 U.S.C. 15), a release may also be required of the assignee.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 54918, Oct. 26, 2009]

552.232–77 Payment By Government Charge Card.

As prescribed in 532.7003, insert the following clause:

PAYMENT BY GOVERNMENT CHARGE CARD (NOV 2009)

(a) *Definitions.* ''Governmentwide commercial purchase card'' means a uniquely numbered charge card issued by a contractor under the GSA SmartPay® program contract for Fleet, Travel, and Purchase Card Services to named individual Government employees or entities to pay for official Government purchases.

''Oral order'' means an order placed orally either in person or by telephone.

(b) At the option of the Government and if agreeable to the Contractor, payments of _____*__ or less for oral or written orders may be made using the Governmentwide commercial purchase card.

(c) The Contractor shall not process a transaction for payment using the charge card until the purchased supplies have been shipped or services performed. Unless the cardholder requests correction or replacement of a defective or faulty item under other contract requirements, the Contractor must immediately credit a cardholder's account for items returned as defective or faulty.

(d) Payments made using the Governmentwide commercial purchase card are not eligible for any negotiated prompt payment discount. Payment made using a Government debit card will receive the applicable prompt payment discount.

(End of clause)

* *Enter amount not to exceed $100,000.*

[65 FR 11248, Mar. 2, 2000, as amended at 74 FR 54918, Oct. 26, 2009]

552.236–70 Definitions.

As prescribed in 536.570–1, insert the following clause:

DEFINITIONS (APR 1984)

The terms ''Administration'' and ''Service'' as used in this contract shall mean the General Services Administration (GSA) and the Public Buildings Service (PBS), respectively.

(End of clause)

552.236–71 Authorities and Limitations.

As prescribed in 536.570–2, insert the following clause:

AUTHORITIES AND LIMITATIONS (APR 1984)

(a) All work shall be performed under the general direction of the Contracting Officer, who alone shall have the power to bind the Government and to exercise the rights, responsibilities, authorities and functions vested in him by the contract documents, except that he shall have the right to designate authorized representatives to act for him. Wherever any provision in this contract specifies an individual (such as, but not limited to, Construction Engineer, Resident Engineer, Inspector or Custodian) or organization, whether governmental or private, to perform any act on behalf of or in the interests of the Government, that individual or organization shall be deemed to be the Contracting Officer's authorized representative under this contract but only to the extent so specified. The Contracting Officer may, at any time during the performance of this contract, vest in any such authorized representatives additional power and authority to act for him or designate additional representatives, specifying the extent of their authority to act for him; a copy of each document vesting additional authority in an authorized representative or designating an additional authorized representative shall be furnished to the Contractor.

(b) The Contractor shall perform the contract in accordance with any order (including but not limited to instruction, direction, interpretation, or determination) issued by an authorized representative in accordance with his authority to act for the Contracting Officer; but the Contractor assumes all the risk and consequences of performing the contract in accordance with any order (including but not limited to instruction, direction, interpretation, or determination) of anyone not authorized to issue such order.

(End of clause)

552.236–72 Specialist.

As prescribed in 536.570–3, insert the following clause:

SPECIALIST (APR 1984)

The term ''Specialist,'' as used in the contract specification, shall mean an individual or firm of established reputation (or, if newly organized, whose personnel have previously established a reputation in the same field), which is regularly engaged in, and which maintains a regular force of workmen skilled in either (as applicable) manufacturing or fabricating items required by the contract, installing items required by the contract, or otherwise performing work required by the contract. Where the contract specification requires installation by a specialist, that term shall also be deemed to mean either the manufacturer of the item, an individual or firm licensed by the manufacturer, or an individual or firm who will perform the work under the manufacturer's direct supervision.

(End of clause)

552.236–73 Basis of Award—Construction Contract.

As prescribed in 536.570–4, insert the following provision or the appropriate Alternate:

BASIS OF AWARD—CONSTRUCTION CONTRACT (APR 1985)

(a) The low bidder for purposes of award is the responsible bidder offering the lowest price for the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form). See Standard Form 1442, Solicitation, Offer, and Award and the provision entitled ''Contract Award—Sealed Bidding.''

(b) A bid may be rejected as nonresponsive if the bid is materially unbalanced as to bid prices. A bid is unbalanced when the bid is based on prices significantly less than cost for some work and significantly overstated for other work.

(End of provision)

Alternate I (APR 1985). if the solicitation includes a base bid and options, the Contracting Officer shall delete paragraph (a) of the basic provision and insert paragraph (a) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) all options designated to be evaluated. The evaluation of options will not obligate the Government to exercise the options. See Standard Form 1442, Solicitation, Offer, and Award and the provision entitled ''Contract Award—Sealed Bidding.''

Alternate II (APR 1985). If the solicitation includes a base bid and alternates, the Contracting Officer shall delete paragraph (a) of the basic provision and insert paragraphs (a), (c), and (d) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) those alternates in the order of priority listed in the solicitation that provide the most features of work within the funds available at bid opening. See the provision entitled ''Contract Award—Sealed Bidding.''

(c) Alternates will be added to the base bid in the order listed in the solicitation (see Standard Form 1442, Solicitation, Offer, and Award). If the addition of an alternate would make all bids exceed the funds available at bid opening, that alternate shall be skipped and the next subsequent alternate in a lower amount shall be added, provided that the aggregate of base bid and the selected alternates do not exceed the funds available at bid opening. For example, when the amount available is $100,000 and a bidder's base bid is $85,000, with its separate bids on four successive alternatives being $10,000, $8,000, $6,000, and $4,000, the aggregate amount of the bid for purposes of selecting the alternates would be $99,000 (base bid plus the first and four alternates). The second and third alternates are skipped because each of them would cause the aggregate of the base bid and alternates to exceed the $100,000 amount available when considered with the first alternate. All bids shall be evaluated on the basis of the same alternates.

(d) After the low bidder has been determined in accordance with paragraph (a), an award may be made to that low bidder on the base bid, plus any combination of alternates for which funds are available at the time of award, but only if the award amount does not exceed the amount offered by any other responsible bidder. If the base bid plus the proposed combination of alternates exceed the amount offered by any other responsible bidder for the same combination of alternates, the award cannot be made on that combination of alternates.

Alternate III (APR 1985). If the solicitation includes a base bid, alternates, and options, the Contracting Officer shall delete paragraph (a) of the basic provision and insert paragraphs (a), (c), and (d) substantially as follows:

(a) The low bidder for purposes of award is the responsible bidder offering the lowest aggregate price for (1) the base bid (consisting of the lump sum bid and any associated unit price bids extended by the applicable number of units shown on the bid form) plus (2) those alternates in the order of priority listed in the solicitation that provide the most features of work within the funds available at bid opening plus (3) all options designated to be evaluated except those options associated with alternates which are skipped during the selection process outlined in paragraph (c) below. The evaluation of options will not obligate the Government to exercise the options. See the provision entitled ''Contract Award—Sealed Bidding.''

(c) Alternates will be added to the base bid in the order listed in the solicitation (see Standard Form 1442, Solicitation, Offer, or Award). If the addition of an alternate would make all bids exceed the funds available at

bid opening, that alternate shall be skipped and the next subsequent alternate in a lower amount shall be added, provided that the aggregate of base bid and the selected alternates do not exceed the funds available at bid opening. For example, when the amount available is $100,000 and a bidder's base bid is $85,000, with its separate bids on four successive alternates being $10,000, $8,000, $6,000, and $4,000, the aggregate amount of the bid for purposes of selecting the alternates would be $99,000 (base bid plus the first and fourth alternates). The second and third alternates are skipped because each of them would cause the aggregate of the base bid and alternates to exceed the $100,000 amount available when considered with the first alternate. All bids shall be evaluated on the basis of the same alternates.

(d) After the low bidder has been determined in accordance with paragraph (a), award may be made to that low bidder on the base bid and evaluated options plus any combination of alternates for which funds are available at the time of award, but only if that low bidder is still low on the sum thereof plus any previously unevaluated options designated to be evaluated which are associated with proposed alternates that were skipped during the selection under paragraph (c). If that low bidder is not still low, award cannot be made on the proposed combination of alternates.

552.236–74 Working Hours.

As prescribed in 536.570–5, insert the following clause:

WORKING HOURS (APR 1984)

(a) It is contemplated that all work will be performed during the customary working hours of the trades involved unless otherwise specified in this contract. Work performed by the Contractor at his own volition outside such customary working hours shall be at no additional expense to the Government.

(b) Any requests received by the Contractor from occupants of existing buildings to change the hours of work shall be referred to the Contracting Officer for determination.

(End of clause)

552.236–75 Use of Premises.

As prescribed in 536.570–6, insert the following clause:

USE OF PREMISES (APR 1984)

(a) If the premises are occupied, the Contractor, his subcontractors, and their employees shall comply with the regulations governing access to, operation of, and conduct while in or on the premises and shall perform the work required under this contract in such a manner as not to unreasonably interrupt or interfere with the conduct of Government business.

(b) Any request received by the Contractor from occupants of existing buildings to change the sequence of work shall be referred to the Contracting Officer for determination.

(c) If the premises are occupied, the Contractor, his subcontractors and their employees shall not have access to or be admitted into any building outside the scope of this contract except with official permission.

(End of clause)

552.236–76 Measurements.

As prescribed in 536.570–7, insert the following clause:

MEASUREMENTS (APR 1984)

All dimensions shown of existing work and all dimensions required for work that is to connect with work now in place, shall be verified by the Contractor by actual measurement of the existing work. Any discrepancies between the contract requirements and the existing conditions shall be referred to the Contracting Officer before any work affected thereby has been performed.

(End of clause)

552.236–77 Specifications and Drawings

As prescribed in 536.570–8, insert the following clause:

SPECIFICATIONS AND DRAWINGS (SEP 1999)

The requirements of the clause entitled ''Specifications and Drawings for Construction'' at FAR 52.236–21, are supplemented as follows:

(a) In case of difference between small and large-scale drawings, the large-scale drawings shall govern. Schedules on any contract drawing shall take precedence over conflicting information on that or any other contract drawing. On any of the drawings where a portion of the work is detailed or drawn out and the remainder is shown in outline, the parts detailed or drawn out shall apply also to all other like portions of the work.

(b) Where the word ''similar'' occurs on the drawings, it shall have a general meaning and not be interpreted as being identical, and all details shall be worked out in relation to their location and their connection with other parts of the work.

(c) Standard Details or Specification Drawings are applicable when listed, bound with the specifications, noted on the drawings or referenced elsewhere in the specifications. Where the notes on the drawings indicate

modifications, such modifications shall govern.

(d) In case of difference between Standard Details or Specification Drawings and the specifications, the specifications will govern. In case of difference between the Standard Details or Specification Drawings and their drawings prepared specifically for this contract, the later shall govern.

(End of clause)

552.236–78 Shop Drawings, Coordination Drawings, and Schedules.

As prescribed in 536.570–9, insert the following clause:

SHOP DRAWINGS, COORDINATION DRAWINGS, AND SCHEDULES (SEP 1999)

The requirements, of the clause entitled ''Specifications and Drawings for Construction'' at FAR 52.236–21, are supplemented as follows:

(a) The Contractor shall submit shop drawings, coordination drawings, and schedules for approval as required by the specifications or requested by the Contracting Officer as follows:

(b) Show drawings shall include fabrication, erection and setting drawings, schedule drawings, manufacturers' scale drawings, wriring and control diagrams, cuts or entire catalogs, pamphlets, descriptive literature, and performance and test data.

(c) Drawings and schedules, other than catalogs, pamphlets and similar printed material, shall be submitted in reproducible form with two prints made by a process approved by the Contracting Officer. Upon approval, the reproducible form will be returned to the Contractor who shall then furnish the number of additional prints, not to exceed 10, required by the specifications. The Contractor shall submit shop drawings in catalog, pamphlet and similar printed form in a minimum of four copies plus as many additional copies as the Contractor may desire or need for his use or use by subcontractors.

(d) Before submitting shop drawings on the mechanical and electrical work, the Contractor shall submit and obtain the Contracting Officer's approval of such lists of mechanical and electrical equipment and materials as may be required by the specifications.

(e) Each shop drawing or coordination drawing shall have a blank area 5 by 5 inches, located adjacent to the title block. The title block shall display the following:

Number and title of drawing
Date of drawing or revision
Name of project building or facility
Name of Contractor and (if appropriate) name of subcontractor submitting drawing
Clear identify of contents and location on the work
Project title and contract number

(f) Unless otherwise provided in this contract, or otherwise directed by the Contracting Officer, shop drawings, coordination drawings and schedules shall be submitted to the Contracting Officer, with a letter in triplicate, sufficiently in advance of construction requirements to permit no less than 10 working days for checking and appropriate action.

(g) Approval of drawings and schedules will be general and shall not be construed as permitting any departure from the contract requirements, or as approving departures from full-size details furnished by the Contracting Officer.

(End of clause)

552.236–79 Samples.

As prescribed in 536.570–10, insert the following clause:

SAMPLES (APR 1984)

(a) After the award of the contract, the Contractor shall furnish for the approval of the Contracting Officer samples required by the specifications or by the Contracting Officer. Samples shall be delivered to the Contracting Officer or to the Architect as specified or as directed. The Contractor shall prepay all shipping charges on samples. Materials or equipment for which samples are required shall not be used in the work until approved in writing by the Contracting Officer.

(b) Each sample shall have a label indicating:

(1) Name of project building or facility, project title and contract number.

(2) Name of Contractor and, if appropriate, name of subcontractor.

(3) Identification of material or equipment with specification requirement.

(4) Place of origin.

(5) Name of producer and brand (if any).

Samples of finished materials shall have additional markings that will identify them under the finish schedules.

(c) The Contractor shall mail under separate cover a letter in triplicate submitting each shipment of samples and containing the information required in paragraph (b) of this clause. He shall enclose a copy of this letter with the shipment and send a copy to the Government representative on the project. Approval of a sample shall be only for the characteristics or use named in such approval and shall not be construed to change or modify any contract requirement. Substitutions will not be permitted unless they are approved in writing by the Contracting Officer.

(d) Approved samples not destroyed in testing will be sent to the Government representative at the project. Approved samples of hardware in good condition will be marked for identification and may be used in the work. Materials and equipment, incorporated in the work shall match the approved samples. Other samples not destroyed in testing or not approved will be returned to the Contractor at his expense if so requested at time of submission.

(e) Failure of any material to pass the specified tests will be sufficient cause for refusal to consider, under this contract, any further samples of the same brand or make of that material or equipment which previously has proved unsatisfactory in service.

(f) Samples of various materials or equipment delivered on the site or in place may be taken by the Government representative for testing. Samples failing to meet contract requirements, or there shall be a proper adjustment of the contract price as determined by the Contracting Officer.

(g) Unless otherwise specified, when tests are required only one test of each sample proposed for use will be made at the expense of the Government. Samples which do not meet specification requirements will be rejected. Testing of additional samples will be made by the Government at the expense of the Contractor.

(End of clause)

552.236–80 Heat.

As prescribed in 536.570–11, insert the following clause:

HEAT (APR 1984)

Unless otherwise specified or unless already provided by the Government the Contractor shall;

(a) Provide heat, as necessary to protect all work, materials, and equipment against injury from dampness and cold;

(b) Protect, cover and/or heat as may be necessary, to provide and maintain a temperature of not less than 50 degrees Fahrenheit (1) in the concrete during the placing, setting and curing of concrete, and (2) in the plaster during the application, setting and curing of plaster; and

(c) Provide heat as necessary in the area where work is to be done to provide the minimum temperature recommended by the supplier or manufacturer of the material, but in no case less than 50 degrees Fahrenheit, for a period beginning 10 days before placing or interior finishes and finish materials and continuing until completion or beneficial occupancy of the area, whichever is earlier.

(End of clause)

552.236–81 Use of Equipment by the Government.

As prescribed in 536.570–12, insert the following clause:

USE OF EQUIPMENT BY THE GOVERNMENT (APR 1984)

(a) The Government may take over and operate, with Government employees, such equipment as is necessary for heating or cooling such areas of the building as require the service, as soon as the installation is sufficiently complete.

(b) The Contracting Officer will advise the Contractor by letter, prior to the use of equipment, which items of equipment will be operated, and the date and time such operation will begin.

(c) Government operation of equipment will not relieve the Contractor of the one-year guarantee on materials and workmanship elsewhere provided for in this contract.

(d) The guarantee period, elsewhere provided for in this contact, for each piece of equipment shall be in accordance with the ''Guarantees'' clause of this contract.

(End of clause)

552.236–82 Subcontracts.

As prescribed in 536.570–13, insert the following clause:

SUBCONTRACTS (APR 1984)

(a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and the Government. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors, or to limit the work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of his own employees and of subcontractors and their employees. He shall also be responsible for the coordination of the work of the trades, subcontractors and suppliers.

(c) The Government will not undertake to settle any differences between or among the Contractor, subcontractors, or suppliers.

(End of clause)

552.236–83 Requirement for a Project Labor Agreement.

As prescribed in 536.570–14, insert a clause substantially the same as the following:

REQUIREMENT FOR A PROJECT LABOR AGREEMENT (SEP 1999)

(a) Definition. ''Project Labor Agreement'' (PLA) means an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor and subcontractors on a project and the union(s) agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the Government's procurement interest in cost, efficiency, and quality.

(b) The Contractor shall, after contract award, enter into a PLA for performance of [*Insert project or contract name*]. The PLA binds the Contractor and subcontractors of whatever tier engaged in onsite construction work. The PLA shall include all the following terms:

(1) Guarantees against strikes, lockouts, and similar work disruptions.

(2) Effective, prompt and mutually binding procedures for resolving labor disputes arising during the project.

(3) Other mechanisms for labor-management cooperation on matters of mutual interest and concern, including productivity, quality of work, safety, and health.

(4) The PLA shall fully conform to all applicable statutes, regulations, and Executive Orders.

(c) Any PLA reached under this clause shall not change the terms of this contract or provide for any pricing adjustment by the Government.

(d) The Government shall not participate in the negotiations of any PLA.

(e) Nothing in this clause precludes contractors or subcontractors from competing for contracts or subcontracts on this project without discrimination based on union or non-union status.

(End of clause)

552.237–70 Qualifications of Offerors.

As prescribed in 537.110(a), insert the following provision:

QUALIFICATIONS OF OFFERORS (MAY 2009)

(a) Offers will be considered only from responsible organizations or individuals now or recently engaged in the performance of building service contracts comparable to those described in this solicitation. To determine an Offeror's qualifications, the Offeror may be requested to furnish a narrative statement listing comparable contracts which it has performed; a general history of its operating organization; and its complete experience. An Offeror may also be required to furnish a statement of its financial resources; show that it has the ability to maintain a staff of regular employees adequate to ensure continuous performance of the work; and, demonstrate that its equipment and/or plant capacity for the work contemplated is sufficient, adequate, and suitable.

(b) Competency in performing comparable building service contracts, demonstration of acceptable financial resources, personnel staffing, plant, equipment, and supply sources will be considered in determining whether an Offeror is responsible.

(c) Prospective Offerors are advised that in evaluating these areas involving any small business concern(s), any negative determinations are subject to the Certificate of Competency procedures set forth in the Federal Acquisition Regulation.

(End of provision)

[64 FR 37229, July 9, 1999, as amended at 74 FR 20606, May 5, 2009]

552.237–71 Qualifications of Employees.

As prescribed in 537.110(a), insert the following clause:

QUALIFICATIONS OF EMPLOYEES (MAY 1989)

(a) The contracting officer or a designated representative may require the Contractor to remove any employee(s) from GSA controlled buildings or other real property should it be determined that the individual(s) is either unsuitable for security reasons or otherwise unfit to work on GSA controlled property.

(b) The Contractor shall fill out and cause all of its employees performing work on the contract work to fill out, for submission to the Government, such forms as may be necessary for security or other reasons. Upon request of the Contracting Officer, the Contractor and its employees shall be fingerprinted.

(c) Each employee of the Contractor shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by Alien Registration Receipt Card Form I–151, or, who presents other evidence from the Immigration and Naturalization Service that employment will not affect his immigration status.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 20606, May 5, 2009]

552.237–72 Prohibition Regarding "Quasi-Military Armed Forces."

As prescribed in 537.110(b), insert the following clause:

PROHIBITION REGARDING ''QUASI-MILITARY ARMED FORCES'' (SEP 1999)

The Contractor must not, during the term of this contract, offer for hire ''Quasi-Military Armed Forces'' within the meaning of the court decision in United States ex. rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977).

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 20606, May 5, 2009]

552.237–73 Restriction on Disclosure of Information.

As prescribed in 537.270, insert the following clause:

RESTRICTION ON DISCLOSURE OF INFORMATION (MAY 2009)

(a) The Contractor shall, in the performance of this contract, keep all information contained in source documents or other media furnished by the Government in the strictest confidence. The Contractor shall not publish or otherwise divulge such information in whole or in part, in any manner or form, nor authorize or permit others to do so. The Contractor shall take such reasonable measures as are necessary to restrict access to such information, while in the Contractor's possession, to those employees needing such information to perform the work provided herein, *i.e.,* on a ''need to know'' basis. The Contractor shall immediately notify, in writing, the Contracting Officer in the event that the Contractor determines or has reason to suspect a breach of this requirement.

(b) The Contractor shall not disclose any information concerning the work under this contract to any persons or entity unless the Contractor obtains prior written approval from the Contracting Officer.

(c) The Contractor shall insert the substance of this clause in any consultant agreement or subcontract under this contract.

(d) Any unauthorized disclosure of information may result in termination of this contract for cause.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 20606, May 5, 2009]

552.238–70 Identification of Electronic Office Equipment Providing Accessibility for the Handicapped.

As prescribed in 538.273(a)(1), insert the following clause:

IDENTIFICATION OF ELECTRONIC OFFICE EQUIPMENT PROVIDING ACCESSIBILITY FOR THE HANDICAPPED (SEP 1991)

(a) *Definitions.* ''Electronic office equipment accessiblity'' means the application/configuration of electronic office equipment (includes hardware, software and firmware) in a manner that accommodates the functional limitations of individuals with disabilities (*i.e.,* handicapped individuals) so as to promote productivity and provide access to work related and/or public information resources.

''Handicapped individuals'' mean qualified individuals with impairments as cited in 29 CFR 1613.702(f) who can benefit from electronic office equipment accessibility.

''Special peripheral'' means a special needs aid that provides access to electronic equipment that is otherwise inaccessible to a handicapped individual.

(b) The offeror is encouraged to identify in its offer, and include in any commercial catalogs and pricelists accepted by the Contracting Officer, office equipment, including any special peripheral, that will facilitate electronic office equipment accessibility for handicapped individuals. Identification should include the type of disability accommodated and how the users with that disability would be helped.

(End of clause)

552.238–71 Submission and Distribution of Authorized FSS Schedule Pricelists.

As prescribed in 538.273(a)(2), insert the following clause:

SUBMISSION AND DISTRIBUTION OF AUTHORIZED FSS SCHEDULE PRICELISTS (SEP 1999)

(a) Definition. For the purposes of this clause, the Mailing List is [Contracting officer shall insert either: ''the list of addressees provided to the Contractor by the Contracting Officer'' or ''the Contractor's listing of its Federal Government customers''].

(b) The Contracting Officer will return one copy of the Authorize FSS Schedule Pricelist to the Contractor with the notification of contract award.

(c)(1) The Contractor shall provide to the GSA Contracting Officer:

(i) Two paper copies of Authorized FSS Schedule Pricelist; and

(ii) The Authorized FSS Schedule Pricelist on a common-use electronic medium.

The Contracting Officer will provide detailed instructions for the electronic submission with the award notification. Some structured data entry in a prescribed format may be required.

(2) The Contractor shall provide to each addressee on the mailing list either:

(i) One paper copy of the Authorized FSS Schedule Price List; or

(ii) A self-addressed, postage-paid envelope or postcard to be returned by addressee that want to receive a paper copy of the pricelist. The Contractor shall distribute price lists within 20 calendar days after receipt of returned requests.

(3) The Contractor shall advise each addressee of the availability of pricelist information through the on-line Multiple Award Schedule electronic data base.

(d) The Contractor shall make all of the distributions required in paragraph (c) at least 15 calendar days before the beginning of the contract period, or within 30 calendar days after receipt of the Contracting Officer's approval for printing, whichever is later.

(e) During the period of the contract, the Contractor shall provide one copy of its Authorized FSS Schedule Pricelist to any authorized schedule user, upon request. Use of the mailing list for any other purpose is not authorized.

(End of clause)

Alternate I (MAY 2003). As prescribed in 538.273(a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) *Definition.* For the purposes of this clause, the Mailing List is [*Contracting officer shall insert either: ''the list of addressees provided to the Contractor by the Contracting Officer'' or ''the Contractor's listing of its ordering activity customers''*].

[64 FR 37229, July 9, 1999, as amended at 68 FR 24381, May 7, 2003]

552.238–72 Identification of Products That Have Environmental Attributes.

As prescribed in 538.273(a)(3), insert the following clause:

IDENTIFICATION OF PRODUCTS THAT HAVE ENVIRONMENTAL ATTRIBUTES (SEP 2003)

(a) Several laws, Executive orders, and Agency directives require Federal buyers to purchase products that are less harmful to the environment, when they are life cycle cost-effective (*see* FAR Subpart 23.7). The U.S. General Services Administration (GSA) requires contractors to highlight environmental products under Federal Supply Service schedule contracts in various communications media (e.g., publications and electronic formats).

(b) *Definitions.* As used in this clause—

Energy-efficient product means a product that—

(1) Meets Department of Energy and Environmental Protection Agency criteria for use of the ENERGY STAR® trademark label; or

(2) Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program.

GSA Advantage! is an on-line shopping mall and ordering system that provides customers with access to products and services under GSA contracts.

Other environmental attributes refers to product characteristics that provide environmental benefits, excluding recovered materials and energy and water efficiency. Several examples of these characteristics are biodegradable, recyclable, reduced pollutants, ozone safe, and low volatile organic compounds (VOCs).

Post-consumer material means a material or finished product that has served its intended use and has been discarded for disposal or recovery, having completed its life as a consumer item. Post-consumer material is part of the broader category of ''recovered material.'' The Environmental Protection Agency (EPA) has developed a list of EPA-designated products in their Comprehensive Procurement Guidelines (CPGs) to provide Federal agencies with purchasing recommendations on specific products in a Recovered Materials Advisory Notice (RMAN). The RMAN contains recommended recovered and post-consumer material content levels for the specific products designated by EPA (40 CFR part 247 and *http://www.epa.gov/cpg/*).

Recovered materials means waste materials and by-products recovered or diverted from solid waste, but the term does not include those materials and by-products generated from, and commonly reused within, an original manufacturing process (Executive Order 13101 and 42 U.S.C. 6903(19) and *http://www.epa.gov/cpg/*). For paper and paper products, see the definition at FAR 11.301 (42 U.S.C. 6962(h)).

Remanufactured means factory rebuilt to original specifications.

Renewable energy means energy produced by solar, wind, geothermal, and biomass power.

Renewable energy technology means—

(1) Technologies that use renewable energy to provide light, heat, cooling, or mechanical or electrical energy for use in facilities or other activities; or

(2) The use of integrated whole-building designs that rely upon renewable energy resources, including passive solar design.

(c)(1) The offeror must identify products that—

(i) Are compliant with the recovered and post-consumer material content levels recommended in the Recovered Materials Advisory Notices (RMANs) for EPA-designated products in the CPG program (*http://www.epa.gov/cpg/*);

(ii) Contain recovered materials that either do not meet the recommended levels in the RMANs or are not EPA-designated products in the CPG program (*see* FAR 23.401 and *http://www.epa.gov/cpg/*);

(iii) Are energy-efficient, as defined by either ENERGY STAR® and/or FEMP's designated top 25th percentile levels (*see* ENERGY STAR® at *http://www.energystar.gov/* and FEMP at *http://www.eere.energy.gov/femp/procurement/*);

(iv) Are water-efficient;

(v) Use renewable energy technology;

(vi) Are remanufactured; and

(vii) Have other environmental attributes.

(2) These identifications must be made in each of the offeror's following mediums:

(i) The offer itself.

(ii) Printed commercial catalogs, brochures, and pricelists.

(iii) Online product website.

(iv) Electronic data submission for GSA *Advantage!* submitted via GSA's Schedules Input Program (SIP) software or the Electronic Data Inter-change (EDI). Offerors can use the SIP or EDI methods to indicate environmental and other attributes for each product that is translated into respective icons in GSA *Advantage!*.

(d) An offeror, in identifying an item with an environmental attribute, must possess evidence or rely on a reasonable basis to substantiate the claim (*see* 16 CFR part 260, Guides for the Use of Environmental Marketing Claims). The Government will accept an offeror's claim of an item's environmental attribute on the basis of—

(1) Participation in a Federal agency-sponsored program (e.g., the EPA and DOE ENERGY STAR® product labeling program);

(2) Verification by an independent organization that specializes in certifying such claims; or

(3) Possession of competent and reliable evidence. For any test, analysis, research, study, or other evidence to be ''competent and reliable,'' it must have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

(End of clause)

[68 FR 52128, Sept. 2, 2003]

552.238–73 Cancellation.

As prescribed in 538.273(a)(4), insert the following clause:

CANCELLATION (SEP 1999)

Either party may cancel this contract in whole or in part by providing written notice. The cancellation will take effect 30 calendar days after the other party receives the notice of cancellation. If the Contractor elects to cancel this contract, the Government will not reimburse the minimum guarantee.

(End of clause)

552.238–74 Industrial Funding Fee and Sales Reporting.

As prescribed in 538.273(b)(1), insert the following clause:

INDUSTRIAL FUNDING FEE AND SALES REPORTING (JUL 2003)

(a) *Reporting of Federal Supply Schedule Sales.* The Contractor shall report all contract sales under this contract as follows:

(1) The Contractor shall accurately report the dollar value, in U.S. dollars and rounded to the nearest whole dollar, of all sales under this contract by calendar quarter (January 1–March 31, April 1–June 30, July 1–September 30, and October 1–December 31). The dollar value of a sale is the price paid by the Schedule user for products and services on a Schedule task or delivery order. The reported contract sales value shall include the Industrial Funding Fee (IFF). The Contractor shall maintain a consistent accounting method of sales reporting, based on the Contractor's established commercial accounting practice. The acceptable points at which sales may be reported include—

(i) Receipt of order;

(ii) Shipment or delivery, as applicable;

(iii) Issuance of an invoice; or

(iv) Payment.

(2) Contract sales shall be reported to FSS within 30 calendar days following the completion of each reporting quarter. The Contractor shall continue to furnish quarterly reports, including ''zero'' sales, through physical completion of the last outstanding task order or delivery order of the contract.

(3) Reportable sales under the contract are those resulting from sales of contract items to authorized users unless the purchase was conducted pursuant to a separate contracting authority such as a Government-wide Acquisition Contract (GWAC); a separately awarded FAR Part 12, FAR Part 13, FAR Part 14, or FAR Part 15 procurement; or a non-FAR contract. Sales made to state and local governments under Cooperative Purchasing authority shall be counted as reportable sales for IFF purposes.

(4) The Contractor shall electronically report the quarterly dollar value of sales, including ''zero'' sales, by utilizing the automated reporting system at an Internet website designated by the General Services Administration (GSA)'s Federal Supply Service (FSS). Prior to using this automated system, the Contractor shall complete contract registration with the FSS Vendor Support Center (VSC). The website address, as well as registration instructions and reporting procedures, will be provided at the time

of award. The Contractor shall report sales separately for each National Stock Number (NSN), Special Item Number (SIN), or subitem.

(5) The Contractor shall convert the total value of sales made in foreign currency to U.S. dollars using the ''Treasury Reporting Rates of Exchange'' issued by the U.S. Department of Treasury, Financial Management Service. The Contractor shall use the issue of the Treasury report in effect on the last day of the calendar quarter. The report is available from Financial Management Service, International Funds Branch, Telephone: (202) 874–7994, Internet: *http://www.fms.treas.gov/intn.html*.

(b) The Contractor shall remit the IFF at the rate set by GSA's FSS.

(1) The Contractor shall remit the IFF to FSS in U.S. dollars within 30 calendar days after the end of the reporting quarter; final payment shall be remitted within 30 days after physical completion of the last outstanding task order or delivery order of the contract.

(2) The IFF represents a percentage of the total quarterly sales reported. This percentage is set at the discretion of GSA's FSS. GSA's FSS has the unilateral right to change the percentage at any time, but not more than once per year. FSS will provide reasonable notice prior to the effective date of the change. The IFF reimburses FSS for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering activities. Offerors must include the IFF in their prices. The fee is included in the award price(s) and reflected in the total amount charged to ordering activities. FSS will post notice of the current IFF at *http://72a.fss.gsa.gov/* or successor website as appropriate.

(c) Within 60 days of award, an FSS representative will provide the Contractor with specific written procedural instructions on remitting the IFF. FSS reserves the unilateral right to change such instructions from time to time, following notification to the Contractor.

(d) Failure to remit the full amount of the IFF within 30 calendar days after the end of the applicable reporting period constitutes a contract debt to the United States Government under the terms of FAR Subpart 32.6. The Government may exercise all rights under the Debt Collection Improvement Act of 1996, including withholding or setting off payments and interest on the debt (see FAR clause 52.232–17, Interest). Should the Contractor fail to submit the required sales reports, falsify them, or fail to timely pay the IFF, this is sufficient cause for the Government to terminate the contract for cause.

(End of clause)

[68 FR 41288, July 11, 2003]

552.238–75 Price Reductions.

As prescribed in 538.273(b)(2), insert the following clause:

PRICE REDUCTIONS (MAY 2004)

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained through out the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

(b) During the contract period, the Contractor shall report to the Contracting Officer all price reductions to the customer (or category of customers) that was the basis of award. The Contractor's report shall include an explanation of the conditions under which the reductions were made.

(c)(1) A price reduction shall apply to purchases under this contract if, after the date negotiations conclude, the Contractor—

(i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;

(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or

(iii) Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award.

(2) The Contractor shall offer the price reduction to the Government with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

(d) There shall be no price reduction for sales—

(1) To commercial customers under firm, fixed-price definite quantity contracts with specified delivery in excess of the maximum order threshold specified in this contract;

(2) To Federal agencies;

(3) Made to State and local government entities when the order is placed under this contract (and the State and local government entity is the agreed upon customer or category of customer that is the basis of award); or

(4) Caused by an error in quotation or billing, provided adequate documentation is furnished by the Contractor to the Contracting Officer.

(e) The Contractor may offer the Contracting Officer a voluntary Government-wide price reduction at any time during the contract period.

(f) The Contractor shall notify the Contracting Officer of any price reduction subject to this clause as soon as possible, but not later than 15 calendar days after its effective date.

(g) The contractor will be modified to reflect any price reduction which becomes applicable in accordance with this clause.

(End of clause)

Alternate I (MAY 2003). As prescribed in 538.273(b)(2), substitute the following paragraph (c)(2) for paragraph (c)(2) of the basic clause, and substitute the following paragraph (d)(2) for paragraph (d)(2) of the basic clause.

(c)(2) The Contractor shall offer the price reduction to the eligible ordering activities with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

(d)(2) To eligible ordering activities under this contract; or

[64 FR 37229, July 9, 1999, as amended at 68 FR 24381, May 7, 2003; 69 FR 28065, May 18, 2004]

552.238–76 Definition (Federal Supply Schedules)—Recovery Purchasing.

As prescribed in 538.7104(a), insert the following clause:

DEFINITION (FEDERAL SUPPLY SCHEDULES)—RECOVERY PURCHASING (FEB 2007)

Ordering activity (also called ''ordering agency'' and ''ordering office'') means an eligible ordering activity (see 552.238–78, Alternate I) authorized to place orders under Federal Supply Schedule contracts.

(End of clause)

[72 FR 4654, Feb. 1, 2007]

552.238–77 Definition (Federal Supply Schedules).

As prescribed in 538.7004(a), insert the following clause:

DEFINITION (FEDERAL SUPPLY SCHEDULES) (MAY 2003)

Ordering activity (also called ''ordering agency'' and ''ordering office'') means an eligible ordering activity (see 552.238–78) authorized to place orders under Federal Supply Schedule contracts.

(End of clause)

[68 FR 24381, May 7, 2003]

552.238–78 Scope of Contract (Eligible Ordering Activities).

As prescribed in 538.7004(b), insert the following clause:

SCOPE OF CONTRACT (ELIGIBLE ORDERING ACTIVITIES) (SEP 2008)

(a) This solicitation is issued to establish contracts which may be used on a non-mandatory basis by the agencies and activities named below, as a source of supply for the supplies or services described herein, for domestic and/or overseas delivery. For Special Item Number 132–53, Wireless Services ONLY, limited geographic coverage (consistent with the Offeror's commercial practice) may be proposed.

(1) Executive agencies (as defined in FAR Subpart 2.1) including nonappropriated fund activities as prescribed in 41 CFR 101–26.000);

(2) Government contractors authorized in writing by a Federal agency pursuant to FAR 51.1;

(3) Mixed ownership Government corporations (as defined in the Government Corporation Control Act);

(4) Federal Agencies, including establishments in the legislative or judicial branch of government (except the Senate, the House of Representatives and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol).

(5) The District of Columbia;

(6) Tribal governments when authorized under 25 U.S.C. 450j(k);

(7) Qualified Nonprofit Agencies as authorized under 40 U.S.C. 502(b); and

(8) Organizations, other than those identified in paragraph (d) of this clause, authorized by GSA pursuant to statute or regulation to use GSA as a source of supply.

(b) *Definitions. Domestic delivery* is delivery within the 48 contiguous states, Alaska, Hawaii, Puerto Rico, Washington, DC, and U.S. territories. Domestic delivery also includes a port or consolidation point, within the aforementioned areas, for orders received from overseas activities.

Overseas delivery is delivery to points outside of the 48 contiguous states, Washington, DC, Alaska, Hawaii, Puerto Rico, and U.S. territories.

(c) Offerors are requested to check one of the following boxes:

☐ Contractor will provide domestic and overseas delivery.

☐ Contractor will provide overseas delivery only.

☐ Contractor will provide domestic delivery only.

(d) The following activities may place orders against Schedule 70 contracts, and Consolidated Schedule contracts containing information technology Special Item Numbers, and Schedule 84 contracts, on an optional basis; PROVIDED, the Contractor accepts order(s) from such activities: State and local government, includes any state, local, regional or tribal government or any instrumentality thereof (including any local educational agency or institution of higher learning).

(e) Articles or services may be ordered from time to time in such quantities as may be needed to fill any requirement, subject to the Order Limitations thresholds which will be specified in resultant contracts. Overseas activities may place orders directly with schedule contractors for delivery to CONUS port or consolidation point.

(f)(1) The Contractor is obligated to accept orders received from activities within the Executive branch of the Federal Government.

(2) The Contractor is not obligated to accept orders received from activities outside the Executive branch; however, the Contractor is encouraged to accept such orders. If the Contractor elects to accept such orders, all provisions of the contract shall apply, including clause 552.232–79, Payment by Credit Card. If the Contractor is unwilling to accept such orders, and the proposed method of payment is not through the Credit Card, the Contractor shall return the order by mail or other means of delivery within 5 workdays from receipt. If the Contractor is unwilling to accept such orders, and the proposed method of payment is through the Credit Card, the Contractor must so advise the ordering activity within 24 hours of receipt of order. (Reference clause 552.232–79, Payment by Credit Card.) Failure to return an order or advise the ordering activity within the time frames of this paragraph shall constitute acceptance whereupon all provisions of the contract shall apply.

(g) The Government is obligated to purchase under each resultant contract a guaranteed minimum of $2,500 (two thousand, five hundred dollars) during the contract term.

Alternate I (FEB 2007). As prescribed in 538.7104(b), substitute the following paragraphs (a) and (d) for paragraphs (a) and (d) of the basic clause:

(a) This solicitation is issued to establish contracts which may be used on a nonmandatory basis by the agencies and activities named below, as a source of supply for the supplies or services described herein, for domestic delivery.

(1) Executive agencies (as defined in Federal Acquisition Regulation Subpart 2.1) including nonappropriated fund activities as prescribed in 41 CFR 101–26.000;

(2) Government contractors authorized in writing by a Federal agency pursuant to Federal Acquisition Regulation Subpart 51.1;

(3) Mixed ownership Government corporations (as defined in the Government Corporation Control Act);

(4) Federal Agencies, including establishments in the legislative or judicial branch of government (except the Senate, the House of Representatives and the Architect of the Capitol and any activities under the direction of the Architect of the Capitol);

(5) The District of Columbia;

(6) Tribal governments when authorized under 25 U.S.C. 450j(k);

(7) Qualified Nonprofit Agencies as authorized under 40 U.S.C. 502(b); and

(8) Organizations, other than those identified in paragraph (d) of this clause, authorized by GSA pursuant to statute or regulation to use GSA as a source of supply.

(d) The following activities may place orders against Federal Supply Schedules for products and services determined by the Secretary of Homeland Security to facilitate recovery from major disasters, terrorism, or nuclear, biological, chemical, or radiological attack, on an optional basis; PROVIDED, the Contractor accepts order(s) from such activities: State and local government entities, includes any state, local, regional or tribal government or any instrumentality thereof (including any local educational agency or institution of higher learning).

State and local government entities, means the states of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges and other institutions of higher education, council of governments (incorporated or not), regional or interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments. The term does not include contractors of, or grantees of, State or local governments.

(1) *Local educational agency* has the meaning given that term in section 8013 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7713).

(2) *Institution of higher education* has the meaning given that term in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(3) *Tribal government* means—

(i) The governing body of any Indian tribe, band, nation, or other organized group or community located in the continental United States (excluding the State of Alaska) that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(ii) Any Alaska Native regional or village corporation established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*).

(End of clause)

[68 FR 24381, May 7, 2003, as amended at 69 FR 28065, May 18, 2004; 72 FR 4654, Feb. 1, 2007; 73 FR 54339, Sept. 19, 2008]

552.238–79 Use of Federal Supply Schedule Contracts by Certain Entities—Cooperative Purchasing.

As prescribed in 538.7004(c), insert the following clause:

USE OF FEDERAL SUPPLY SCHEDULE CONTRACTS BY CERTAIN ENTITIES—COOPERATIVE PURCHASING (MAY 2004)

(a) If an entity identified in paragraph (d) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities), elects to place an order under this contract, the entity agrees that the order shall be subject to the following conditions:

(1) When the Contractor accepts an order from such an entity, a separate contract is formed which incorporates by reference all the terms and conditions of the Schedule contract except the Disputes clause, the patent indemnity clause, and the portion of the Commercial Item Contract Terms and Conditions that specifies ''Compliance with laws unique to Government contracts'' (which applies only to contracts with entities of the Executive branch of the U.S. Government). The parties to this new contract which incorporates the terms and conditions of the Schedule contract are the individual ordering activity and the Contractor. The U.S. Government shall not be liable for the performance or nonperformance of the new contract. Disputes which cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations and case law, and, if pertinent, the Uniform Commercial Code. To the extent authorized by law, parties to this new contract are encouraged to resolve disputes through Alternative Dispute Resolution. Likewise, a Blanket Purchase Agreement (BPA), although not a contract, is an agreement that may be entered into by the Contractor with such an entity and the Federal Government is not a party.

(2) Where contract clauses refer to action by a Contracting Officer or a Contracting Officer of GSA, that shall mean the individual responsible for placing the order for the ordering activity (e.g., FAR 52.212–4 at paragraph (f) and FSS clause I-FSS-249 B.)

(3) As a condition of using this contract, eligible ordering activities agree to abide by all terms and conditions of the Schedule contract, except for those deleted clauses or portions of clauses mentioned in paragraph (a)(1) of this clause. Ordering activities may include terms and conditions required by statute, ordinance, regulation, order, or as otherwise allowed by State and local government entities as a part of a statement of work (SOW) or statement of objective (SOO) to the extent that these terms and conditions do not conflict with the terms and conditions of the Schedule contract. The ordering activity and the Contractor expressly acknowledge that, in entering into an agreement for the ordering activity to purchase goods or services from the Contractor, neither the ordering activity nor the Contractor will look to, primarily or in any secondary capacity, or file any claim against the United States or any of its agencies with respect to any failure of performance by the other party.

(4) The ordering activity is responsible for all payments due the Contractor under the contract formed by acceptance of the ordering activity's order, without recourse to the agency of the U.S. Government, which awarded the Schedule contract.

(5) The Contractor is encouraged, but not obligated, to accept orders from such entities. The Contractor may, within 5 days of receipt of the order, decline to accept any order, for any reason. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

(6) The supplies or services purchased will be used for governmental purposes only and will not be resold for personal use. Disposal of property acquired will be in accordance with the established procedures of the ordering activity for the disposal of personal property.

(b) If the Schedule Contractor accepts an order from an entity identified in paragraph (d) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities), the Contractor agrees to the following conditions:

(1) The ordering activity is responsible for all payments due the Contractor for the contract formed by acceptance of the order, without recourse to the agency of the U.S. Government, which awarded the Schedule contract.

(2) The Contractor is encouraged, but not obligated, to accept orders from such entities. The Contractor may, within 5 days of receipt of the order, decline to accept any order, for any reason. The Contractor shall decline the order using the same means as those used to place the order. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

(c) In accordance with clause 552.238–74, Industrial Funding Fee and Sales Reporting, the Contractor must report the quarterly dollar value of all sales under this contract.

When submitting sales reports, the Contractor must report two dollar values for each Special Item Number:

(1) The dollar value for sales to entities identified in paragraph (a) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities), and

(2) The dollar value for sales to entities identified in paragraph (d) of clause 552.238–78.

(End of clause)

[68 FR 24381, May 7, 2003, as amended at 68 FR 41289, July 11, 2003; 69 FR 28066, May 18, 2004]

552.238–80 Use of Federal Supply Schedule Contracts by Certain Entities—Recovery Purchasing.

As prescribed in 538.7104(c), insert the following clause:

USE OF FEDERAL SUPPLY SCHEDULE CONTRACTS BY CERTAIN ENTITIES—RECOVERY PURCHASING (FEB 2007)

(a) If an entity identified in paragraph (d) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities)—Alternate I, elects to place an order under this contract, the entity agrees that the order shall be subject to the following conditions:

(1) When the Contractor accepts an order from such an entity, a separate contract is formed which incorporates by reference all the terms and conditions of the Schedule contract except the Disputes clause, the patent indemnity clause, and the portion of the Commercial Item Contract Terms and Conditions that specifies ''Compliance with laws unique to Government contracts'' (which applies only to contracts with entities of the Executive branch of the U.S. Government). The parties to this new contract which incorporates the terms and conditions of the Schedule contract are the individual ordering activity and the Contractor. The U.S. Government shall not be liable for the performance or nonperformance of the new contract. Disputes which cannot be resolved by the parties to the new contract may be litigated in any State or Federal court with jurisdiction over the parties, applying Federal procurement law, including statutes, regulations and case law, and, if pertinent, the Uniform Commercial Code. To the extent authorized by law, parties to this new contract are encouraged to resolve disputes through Alternative Dispute Resolution. Likewise, a Blanket Purchase Agreement (BPA), although not a contract, is an agreement that may be entered into by the Contractor with such an entity and the Federal Government is not a party.

(2) Where contract clauses refer to action by a Contracting Officer or a Contracting Officer of GSA, that shall mean the individual responsible for placing the order for the ordering activity (e.g., Federal Acquisition Regulation 52.212–4 at paragraph (f) and FSS clause I–FSS–249 B).

(3) As a condition of using this contract, eligible ordering activities agree to abide by all terms and conditions of the Schedule contract, except for those deleted clauses or portions of clauses mentioned in paragraph (a)(1) of this clause. Ordering activities may include terms and conditions required by statute, ordinance, regulation, order, or as otherwise allowed by State and local government entities as a part of a statement of work (SOW) or statement of objective (SOO) to the extent that these terms and conditions do not conflict with the terms and conditions of the Schedule contract. The ordering activity and the Contractor expressly acknowledge that, in entering into an agreement for the ordering activity to purchase goods or services from the Contractor, neither the ordering activity nor the Contractor will look to, primarily or in any secondary capacity, or file any claim against the United States or any of its agencies with respect to any failure of performance by the other party.

(4) The ordering activity is responsible for all payments due the Contractor under the contract formed by acceptance of the ordering activity's order, without recourse to the agency of the U.S. Government, which awarded the Schedule contract.

(5) The Contractor is encouraged, but not obligated, to accept orders from such entities. The Contractor may, within 5 days of receipt of the order, decline to accept any order, for any reason. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

(6) The supplies or services purchased will be used for governmental purposes only and will not be resold for personal use. Disposal of property acquired will be in accordance with the established procedures of the ordering activity for the disposal of personal property.

(7) The state or local government ordering activity will be responsible for purchasing products or services to be used to facilitate recovery from a major disaster declared by the President under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 *et seq.*) or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.

(b) If the Schedule Contractor accepts an order from an entity identified in paragraph (d) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities)—Alternate I, the Contractor agrees to the following conditions—

(1) The ordering activity is responsible for all payments due the Contractor for the contract formed by acceptance of the order,

without recourse to the agency of the U.S. Government, which awarded the Schedule contract.

(2) The Contractor is encouraged, but not obligated, to accept orders from such entities. The Contractor may, within 5 days of receipt of the order, decline to accept any order, for any reason. The Contractor shall decline the order using the same means as those used to place the order. The Contractor shall fulfill orders placed by such entities, which are not declined within the 5-day period.

(c) In accordance with clause 552.238–74, Industrial Funding Fee and Sales Reporting, the Contractor must report the quarterly dollar value of all sales under this contract. When submitting sales reports, the Contractor must report two dollar values for each Special Item Number—

(1) The dollar value for sales to entities identified in paragraph (a) of the clause at 552.238–78, Scope of Contract (Eligible Ordering Activities)—Alternate I; and

(2) The dollar value for sales to entities identified in paragraph (d) of clause 552.238–78, Alternate I.

(d) A listing of the Federal Supply Schedule contracts for the products and services available for disaster recovery purchasing is accessible in GSA's Schedules e-Library at Web site *http://www.gsaelibrary.gsa.gov*. Click on the link, ''Disaster Recovery Purchasing, State and Local.'' The participating Contractors and the products and services available for disaster recovery purchasing will be labeled with the Disaster Recovery Purchasing icon.

(End of clause)

[72 FR 4654, Feb. 1, 2007]

552.241–70, Availability of Funds for the Next Fiscal Year or Quarter.

As prescribed in 541.501, insert the clause 552.241–70, Availability of Funds for the Next Fiscal Year or Quarter, instead of FAR 52.232–19, in all utility acquisitions.

AVAILABILITY OF FUNDS FOR THE NEXT FISCAL YEAR OR QUARTER (AUG 2010)

Funds are not presently available for performance under this contract beyond _____. The Government's obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.

(End of clause)

[75 FR 48873, Aug. 12, 2010]

552.241–71 Disputes (Utility Contracts).

As prescribed in 541.501, insert clause 552.241–71, Disputes (Utility Contracts), in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

DISPUTES (UTILITY CONTRACTS) (AUG 2010)

The requirements of the Disputes clause at FAR 52.233–1 are supplemented to provide that matters involving the interpretation of tariffed retail rates, tariff rate schedules, and tariffed terms provided under this contract are subject to the jurisdiction and regulation of the utility rate commission having jurisdiction.

(End of clause)

[75 FR 48873, Aug. 12, 2010]

552.242–70 Status Report of Orders and Shipments.

As prescribed in 542.1107, insert the following clause:

STATUS REPORT OF ORDERS AND SHIPMENTS (FEB 9, 2009)

(a) The Contractor shall furnish to the Administrative Contracting Officer (ACO) a report covering orders received and shipments made during each calendar month of contract performance. The information required by the Government shall be reported on GSA Form 1678, Status Report of Orders and Shipments, in accordance with instructions on the form. The information required by the GSA Form 1678 may also be submitted in an automated printout form if authorized by the ACO. Alternatively, the required information may be reported by electronic data interchange using ANSI standards. For further information, contact GSA, Contract Administration Division [*Insert appropriate telephone number of QVOC*] Reports shall be forwarded to the ACO no later than the seventh workday of the succeeding month.

(b) A copy of GSA Form 1678 will be forwarded to the Contractor with the contract. Additional copies of the form, if needed, may be reproduced by the Contractor.

(End of clause)

[64 FR 37229, July 9, 1999, as amended at 74 FR 863, Jan. 9, 2009]

552.243–71 Equitable Adjustments.

As prescribed in 543.205, insert the following clause:

EQUITABLE ADJUSTMENTS (JAN 2009)

(a) This clause governs the determination of equitable adjustments to which the Contractor may be entitled under the ''Changes'' clause prescribed by FAR 52.243–4, the ''Differing Site Conditions'' clause prescribed by FAR 52.236–2, and any other provision of this contract allowing entitlement to an equitable adjustment. This clause does not govern determination of the Contractor's relief allowable under the ''Suspension of Work'' clause prescribed by FAR 52.242–14.

(b) At the written request of the Contracting Officer, the Contractor shall submit a proposal, in accordance with the requirements set forth herein, for an equitable adjustment to the contract for changes or other conditions that may entitle a Contractor to an equitable adjustment. If the Contractor deems an oral or written order to be a change to the contract, it shall promptly submit to the Contracting Officer a proposal for equitable adjustment attributable to such deemed change. The proposal shall also conform to the requirements set forth herein.

(c) The proposal shall be submitted within the time specified in the ''Changes'' clause, or such other time as may reasonably be required by the Contracting Officer. In the case of a proposal submitted based on the ''Differing Site Conditions'' clause, the notice requirement of that clause shall be met.

(d) Proposals for equitable adjustments, including no cost requests for adjustment of the contract's required completion date, shall include a detailed breakdown of the following elements, as applicable:

(1) Direct costs.

(2) Markups.

(3) Change to the time for completion specified in the contract.

(e) *Direct costs*. The Contractor shall separately identify each item of deleted and added work associated with the change or other condition giving rise to entitlement to an equitable adjustment, including increases or decreases to unchanged work impacted by the change. For each item of work so identified, the Contractor shall propose for itself and, if applicable, its first two tiers of subcontractors, the following direct costs:

(1) Material cost broken down by trade, supplier, material description, quantity of material units, and unit cost (including all manufacturing burden associated with material fabrication and cost of delivery to site, unless separately itemized);

(2) Labor cost broken down by trade, employer, occupation, quantity of labor hours, and burdened hourly labor rate, together with itemization of applied labor burdens (exclusive of employer's overhead, profit, and any labor cost burdens carried in employer's overhead rate);

(3) Cost of equipment required to perform the work, identified with material to be placed or operation to be performed;

(4) Cost of preparation and/or revision to shop drawings and other submittals with detail set forth in paragraphs (e)(1) and (e)(2) of this clause;

(5) Delivery costs, if not included in material unit costs;

(6) Time-related costs not separately identified as direct costs, and not included in the Contractor's or subcontractors' overhead rates, as specified in paragraph (g) of this clause; and

(7) Other direct costs.

(f) Marked-up costs of subcontractors below the second tier may be treated as other direct costs of a second tier subcontractor, unless the Contracting Officer requires a detailed breakdown under paragraph (i) of this clause.

(g) Extensions of Time and Time-Related Costs. The Contractor shall propose a daily rate for each firm's time-related costs during the affected period, and, for each firm, the increase or decrease in the number of work days of performance attributable to the change or other condition giving rise to entitlement to an equitable adjustment, with supporting analysis. Entitlement to time and time-related costs shall be determined as follows:

(1) Increases or decreases to a firm's time-related costs shall be allowed only if such increase or decrease necessarily and exclusively results from the change or other condition giving rise to entitlement to an equitable adjustment.

(2) The Contractor shall not be entitled to an extension of time or recovery of its own time-related costs except to the extent that such change or other condition necessarily and exclusively causes its duration of performance to extend beyond the completion date specified in the contract.

(3) Costs may be characterized as time-related costs only if they are incurred solely to support performance of this contract and the increase or decrease in such costs is solely dependent upon the duration of a firm's performance of work.

(4) Costs may not be characterized as time-related costs if they are included in the calculation of a firm's overhead rate.

(5) Equitable adjustment of time and time-related costs shall not be allowed unless the analysis supporting the proposal complies with provisions specified elsewhere in this

contract regarding the Contractor's project schedule.

(h) *Markups*. For each firm whose direct costs are separately identified in the proposal, the Contractor shall propose an overhead rate, profit rate, and where applicable, a bond rate and insurance rate. Markups shall be determined and applied as follows:

(1) Overhead rates shall be negotiated, and may be subject to audit and adjustment.

(2) Profit rates shall be negotiated, but shall not exceed ten percent, unless entitlement to a higher rate of profit may be demonstrated.

(3) The Contractor and its subcontractor[s] shall not be allowed overhead or profit on the overhead or profit received by a subcontractor, except to the extent that the subcontractor's costs are properly included in other direct costs as specified in paragraph (f) of this clause.

(4) Overhead rates shall be applied to the direct costs of work performed by a firm, and shall not be allowed on the direct costs of work performed by a subcontractor to that firm at any tier except as set forth below in paragraphs (h)(6) and (h)(7) of this clause.

(5) Profit rates shall be applied to the sum of a firm's direct costs and the overhead allowed on the direct costs of work performed by that firm.

(6) Overhead and profit shall be allowed on the direct costs of work performed by a subcontractor within two tiers of a firm at rates equal to only fifty percent of the overhead and profit rates negotiated pursuant to paragraphs (h)(1) and (h)(2) of this clause for that firm, but not in excess of ten percent when combined.

(7) Overhead and profit shall not be allowed on the direct costs of a subcontractor more than two tiers below the firm claiming overhead and profit for subcontractor direct costs.

(8) If changes to a Contractor's or subcontractor's bond or insurance premiums are computed as a percentage of the gross change in contract value, markups for bond and insurance shall be applied after all overhead and profit is applied. Bond and insurance rates shall not be applied if the associated costs are included in the calculation of a firm's overhead rate.

(9) No markup shall be applied to a firm's costs other than those specified herein.

(i) At the request of the Contracting Officer, the Contractor shall provide such other information as may be reasonably necessary to allow evaluation of the proposal. If the proposal includes significant costs incurred by a subcontractor below the second tier, the Contracting Officer may require the same detail for those costs as required for the first two tiers of subcontractors, and markups shall be applied to these subcontractor costs in accordance with paragraph (h).

(j) *Proposal Preparation Costs*. If performed by the firm claiming them, proposal preparations costs shall be included in the labor hours proposed as direct costs. If performed by an outside consultant or law firm, proposal preparation costs shall be treated as other direct costs to the firm incurring them. Requests for proposal preparation costs shall include the following:

(1) A copy of the contract or other documentation identifying the consultant or firm, the scope of the services performed, the manner in which the consultant or firm was to be compensated, and if compensation was paid on an hourly basis, the fully burdened and marked-up hourly rates for the services provided.

(2) If compensation was paid on an hourly basis, documentation of the quantity of hours worked, including descriptions of the activities for which the hours were billed, and applicable rates.

(3) Written proof of payment of the costs requested. The sufficiency of the proof shall be determined by the Contracting Officer.

(k) Proposal preparation costs shall be allowed only if—

(1) The nature and complexity of the change or other condition giving rise to entitlement to an equitable adjustment warrants estimating, scheduling, or other effort not reasonably foreseeable at the time of contract award;

(2) Proposed costs are not included in a firm's time-related costs or overhead rate; and

(3) Proposed costs were incurred prior to a Contracting Officer's unilateral determination of an equitable adjustment under the conditions set forth in paragraph (o), or were incurred prior to the time the request for equitable adjustment otherwise became a matter in dispute.

(l) Proposed direct costs, markups, and proposal preparation costs shall be allowable in the determination of an equitable adjustment only if they are reasonable and otherwise consistent with the contract cost principles and procedures set forth in part 31 of the Federal Acquisition Regulation (48 CFR part 31) in effect on the date of this contract. Characterization of costs as direct costs, time-related costs, or overhead costs must be consistent with the requesting firm's accounting practices on other work under this contract and other contracts.

(m) If the Contracting Officer determines that it is in the Government's interest that the Contractor proceed with a change before negotiation of an equitable adjustment is completed, the Contracting Officer may order the Contractor to proceed on the basis of a unilateral modification to the contract increasing or decreasing the contract price by an amount to be determined later. Such

increase or decrease shall not exceed the increase or decrease proposed by the Contractor.

(n) If the parties cannot agree to an equitable adjustment, the Contracting Officer may determine the equitable adjustment unilaterally.

(o) The Contractor shall not be entitled to any proposal preparation costs incurred subsequent to the date of a unilateral determination or denial of the request if the Contracting Officer issues a unilateral determination or denial under any of the following circumstances:

(1) The Contractor fails to submit a proposal within the time required by this contract or such time as may reasonably be required by the Contracting Officer.

(2) The Contractor fails to submit additional information requested by the Contracting Officer within the time reasonably required.

(3) Agreement to an equitable adjustment cannot be reached within 60 days of submission of the Contractor's proposal or receipt of additional requested information, despite the Contracting Officer's diligent efforts to negotiate the equitable adjustment.

(End of clause)

[74 FR 864, Jan. 9, 2009]

552.246–70 Source Inspection by Quality Approved Manufacturer.

As prescribed in 546.302–70, insert the following clause:

SOURCE INSPECTION BY QUALITY APPROVED MANUFACTURER (JUL 09)

(a) *Inspection system and inspection of facilities.* (1) The inspection system maintained by the Contractor under the Inspection of Supplies—Fixed Price clause (FAR 52.246–2) of this contract shall be maintained throughout the contract period. Unless otherwise authorized in writing by the Contracting Officer, the Contractor shall comply with all requirements of editions in effect on the date of the solicitation of either Federal Standard 368 or the International Organization for Standardization (ISO) Standard 9001:2000 (Quality Management Systems—Requirements). A documented description of the inspection system shall be made available to the Government before contract award. At the sole discretion of the Contracting Officer, he/she may authorize in writing exceptions to the quality assurance standards identified above. The Contractor shall immediately notify the Administrative Contracting Officer (ACO) of any changes made in the inspection system during the contract period. As used herein, the term ''inspection system'' means the Contractor's own facility or any other facility acceptable to the Government that will be used to perform inspections or tests of materials and components before incorporation into end articles and for inspection of such end articles before shipment. When the manufacturing plant is located outside of the United States, the Contractor shall arrange delivery of the items from a plant or warehouse located in the United States (including Puerto Rico and the U.S. Virgin Islands) equipped to perform all inspections and tests required by the contract or specifications to evidence conformance therewith, or shall arrange with a testing laboratory or other facility in the United States, acceptable to the Government, to perform the required inspections and tests.

(2) In addition to the requirements in Federal Standard 368, ISO 9001:2000 or as otherwise approved by the Government, records shall include the date inspection and testing were performed. These records shall be available for (i) 3 years after final payment; or (ii) 4 years from the end of the Contractor's fiscal year in which the record was created, whichever period expires first.

(3) Offerors are required to specify, in the space provided elsewhere in this solicitation, the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies.

(4) The Contractor shall provide the Administrative Contracting Officer ACO with the name(s) of the individual and an alternate responsible for the inspection system. In the event that the designated individual(s) becomes unavailable to oversee the inspection system, the Contractor, within 10 calendar days of such event, shall provide the ACO with the names of the replacement individual(s).

(b) *Inspection by the Contractor.* The Contractor is required to demonstrate that the supplies in the shipment have been subject to and have passed all inspections and tests required by the contract and meet the requirements of the contract.

(c) *Inspection by Government personnel.* (1) Although the Government will normally rely upon the Contractor's representation as to the quality of supplies shipped, it reserves the right under the Inspection of Supplies—Fixed Price clause to inspect and test all supplies called for by this contract, before acceptance, at all times and places, including the point of manufacture. When the Government notifies the Contractor of its intent to inspect supplies before shipment, the Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. Shipment shall not be made until inspection by the Government is completed and shipment is authorized by the Government.

(2) The offeror shall indicate, in the spaces provided below, the location(s) at which the supplies will be inspected or made available for inspection.

INSPECTION POINT

ITEM NO(S).	NAME OF MANUFACTURER	NAME, ADDRESS (Including County), and	TELEPHONE NUMBER
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

NOTE: If additional space is needed, the offeror may furnish the requested information by an attachment to the offer.

(3) During the contract period, a Government representative may periodically select samples of supplies produced under this contract for Government verification, inspection, and testing. Samples selected for testing will be disposed of as follows: Samples from an accepted lot, not damaged in the testing process, will be returned promptly to the Contractor after completion of tests. Samples damaged in the testing process will be disposed of as requested by the Contractor. Samples from a rejected lot will be returned to the Contractor or disposed of in a time and manner agreeable to both the Contractor and the Government.

(d) *Quality deficiencies.* (1) Notwithstanding any other clause of this contract concerning the conclusiveness of acceptance by the Government, any supplies or production lots shipped under this contract found to be defective in material or workmanship, or otherwise not in conformity with the requirements of this contract within a period of _____*_____ months after acceptance shall, at the Government's option, be replaced, repaired, or otherwise corrected by the Contractor at no cost to the Government within 30 calendar days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice to replace or correct. The Contractor shall remove, at its own expense, supplies rejected or required to be replaced, repaired, or corrected. When the nature of the defect affects an entire batch or lot of supplies, and the Contracting Officer determines that correction can best be accomplished by retaining the nonconforming supplies, and reducing the contract price by an equitable amount under the circumstances, then the equitable price adjustment shall apply to the entire batch or lot of supplies from which the nonconforming item was taken.

(2) The Contractor may be issued a Quality Deficiency Notice (QDN) if:

(i) Supplies in process, shipped, or awaiting shipment to fill Government orders are found not to comply with contract requirements, or (ii) deficiencies in either plant quality or process controls are found. Upon receipt of a QDN, the Contractor shall take immediate corrective action and shall suspend shipment of the supplies covered by the QDN until such time as corrective action has been completed. The Contractor shall notify the Government representative, within 5 workdays, of the action plan or the corrective action taken. The Government may elect to verify the corrective action at the Contractor location(s). Shipments of nonconforming supplies will be returned at the Contractor's expense and may constitute cause for termination of the contract. Delays due to the insurance of a QDN do not constitute excusable delay under the default clause of this contract. Failure to complete corrective action in a timely manner may result in termination of the contract.

(3) This contract may be terminated for default if subsequent Government inspection discloses that plant quality or process controls are not being maintained, supplies that do not meet the requirements of the contract are being shipped, or if the contractor fails to comply with any other requirement of this clause.

(e) *Additional cost for inspection and testing.* The Contractor shall be charged for any additional cost of inspection/testing or reinspecting/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246–2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of $_____**_____ per man-hour or fraction thereof if the inspection is at a GSA distribution center; $_____**_____ per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and $_____**_____ per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies*. When the Contractor fails to remove or provide instructions for the removal of rejected supplies under paragraph (d) of this clause, pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246–2, supplies may be—

(1) Stored and charged against the Contractor's account;

(2) Reshipped to the Contractor at its expense (any additional expense incurred by the Government or the freight carrier caused by the refusal of the Contractor to accept their return shall also be charged against the Contractor's account);

(3) Sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and other costs, including the cost of the sale; or

(4) Otherwise disposed of by the Government.

(g) *Subcontracting requirements*. The Contractor shall insert in any subcontracts the inspection or testing provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause of this contract. The Contractor shall be responsible for compliance by any subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause and the Inspection of Supplies—Fixed Price clause.

(End of clause)

*Normally insert 12 months as the period during which defective or otherwise nonconforming supplies must be replaced. However, when the supplies being bought have a shelf life of less than 1 year, you should use the shelf-life period, or in the instance where you reasonably expect a longer period to be available, you should use the longer period.

**The rates to be inserted are established by the Commissioner of the Federal Acquisition Service or a designee.

[74 FR 26108, June 1, 2009]

552.246–71 Source Inspection by Government.

As prescribed in 546.302–71, insert the following clause:

SOURCE INSPECTION BY GOVERNMENT (JUNE 1, 2009)

(a) *Inspection by Government personnel*. (1) Supplies to be furnished under this contract will be inspected at source by the Government before shipment from the manufacturing plant or other facility designated by the Contractor, unless the Contractor is otherwise notified in writing by the Contracting Officer or a designated representative. Notwithstanding the foregoing, the Government may perform any or all tests contained in the contract specifications at a Government facility without prior written notice by the Contracting Officer before release of the supplies for shipment. Samples sent to a Government resting facility will be disposed of as follows: Samples from an accepted lot, not damaged in the testing process, will be returned promptly to the Contractor after completion of tests. Samples damaged in the testing process will be disposed of as requested by the Contractor. Samples from a rejected lot will be returned to the Contractor or disposed of in a time and manner agreeable to both the Contractor and the Government.

(2) Government inspection responsibility will be assigned to the GSA quality assurance office which has jurisdiction over the State in which the Contractor's subcontractor's plant or other designated point for inspection is located. The Contractor shall notify or arrange for subcontractors to notify the designated GSA quality assurance office 7 workdays before the date when supplies will be ready for inspection. Shipment shall not be made until after inspection by the Government is completed and shipment is authorized by Government.

(b) *Inspection and receiving reports*. For each shipment, the Contractor shall be responsible for preparation and distribution of inspection documents as follows: (1) DD Form 250, Material Inspection and Receiving Report, or computer formatted equivalent for deliveries to military agencies; or (2) GSA Form 308, Notice of Inspection for deliveries to GSA or other civilian agencies. When required, the Contractor will be furnished a supply of GSA Form 308 and/or DD Form 250, and complete instructions for their reparation and distribution.

(c) *Inspection facilities*. (1) The inspection system required to be maintained by the Contractor in accordance with FAR 52.246–2, Inspection of Supplies—Fixed Price, may be the Contractor's own facilities or any other facilities acceptable to the Government. The facilities shall be utilized to perform all inspections and tests of materials and components before incorporation into end articles, and for the inspection of such end articles before shipment. The Government reserves the right to evaluate the acceptability and effectiveness of the Contractor's inspection system before award and periodically during the contract period.

(2) Offerors are required to specify, in the spaces provided elsewhere in the solicitation, the name and address of each manufacturing plant or other facility where supplies will be available for inspection, indicating the item number(s) to which each applies.

(3) The Contractor shall deliver the items specified in this contract from a plant or warehouse located within the United States

(including Puerto Rico and the U.S. Virgin Islands) that is equipped to perform all inspections and tests required by this contract or specifications to evidence conformance therewith, or shall arrange with a testing laboratory or other facility in the United States, acceptable to the Government, to perform the required inspections and tests.

(d) *Availability of records.* (1) In addition to any other requirement of this contract, the Contractor shall maintain records showing the following information for each order received under the contract: (i) order number; (ii) date order received by the Contractor; (iii) quantity ordered; (iv) date scheduled into production; (v) batch or lot number, if applicable; (vi) date inspected and/or tested; (vii) date available for shipment; (viii) date shipped or date service completed; and (ix) National Stock Number (NSN), or if none is provided in the contract, the applicable item number or other contractual identification.

(2) These records should be maintained at the point of source inspection and shall be available to the Contracting Officer, or an authorized representative, for (i) 3 years after final payment; or (ii) 4 years from the end of the Contractor's fiscal year in which the record was created, whichever period expires first.

(e) *Additional cost for inspection and testing.* The Contractor will be charged for any additional cost for inspecting/testing or reinspection/retesting supplies for the reasons stated in paragraph (e) of FAR 52.246–2, Inspection of Supplies—Fixed Price. When inspection or testing is performed by or under the direction of GSA, charges will be at the rate of $_____*_____ per man-hour or fraction thereof if the inspection is at a GSA distribution center; $_____*_____ per man-hour or fraction thereof, plus travel costs incurred, if the inspection is at any other location; and $_____*_____ per man-hour or fraction thereof for laboratory testing, except that when a testing facility other than a GSA laboratory performs all or part of the required tests, the Contractor shall be assessed the actual cost incurred by the Government as a result of testing at such facility. When inspection is performed by or under the direction of any agency other than GSA, the charges indicated above may be used, or the agency may assess the actual cost of performing the inspection and testing.

(f) *Responsibility for rejected supplies.* When the Contractor fails to remove or provide instructions for the removal of rejected supplies under FAR 52.246–2(h) pursuant to the Contracting Officer's instructions, the Contractor shall be liable for all costs incurred by the Government in taking such measures as are expedient to avoid unnecessary loss to the Contractor. In addition to the remedies provided in FAR 52.246–2, supplies may be—

(1) Stored for the Contractor's account;

(2) Reshipped to the Contractor at its expense (any additional expense incurred by the Government or the freight carrier caused by the refusal of the Contractor to accept their return also shall be for the Contractor's account); or

(3) Sold to the highest bidder on the open market and the proceeds applied against the accumulated storage and other costs, including the cost of the sale.

(End of clause)

* *The rates to be inserted are established by the Commissioner of the Federal Acquisition Service or a designee.*

[64 FR 37229, July 9, 1999, as amended at 74 FR 26110, June 1, 2009]

552.246–72 Final Inspection and Tests.

As prescribed in 546.312, insert the following clause:

FINAL INSPECTION AND TESTS (SEP 1999)

The Contractor shall give written notice to the Contracting Officer at least 10 calendar days before the date the work will be completed and ready for final inspection and tests. Final inspection and tests will begin within 10 calendar days after the date specified in the Contractor's notice unless the Contracting Officer determines that the work is not ready for final inspection and so informs the Contractor.

(End of clause)

552.246–77 Additional Contract Warranty Provisions for Supplies of a Noncomplex Nature.

As prescribed in 546.710(a), insert the following clause in solicitations and contracts that include FAR 52.246–17, Warranty of Supplies of a Noncomplex Nature.

ADDITIONAL CONTRACT WARRANTY PROVISIONS FOR SUPPLIES OF A NONCOMPLEX NATURE (JUL 09)

(a) *Definitions. Correction*, as used in this clause, means the elimination of a defect.

(b) *Contractor's obligations.* When return, correction, or replacement is required, the Contractor shall be responsible for all costs attendant to the return, correction, or replacement of the nonconforming supplies. Any removal in connection with the above shall be done by the Contractor at its expense.

(c) *Remedies available to the Government.* When the nature of the defect in the nonconforming item is such that the defect affects an entire batch or lot of material, then the equitable price adjustment shall apply to the

entire batch or lot of material from which the nonconforming item was taken.

(End of clause)

[74 FR 26110, June 1, 2009]

552.246–78 Inspection at Destination.

As prescribed in 546.302–72 insert the following clause:

INSPECTION AT DESTINATION (JUL 09)

Inspection of all purchases under this contract will be made at destination by an authorized Government representative.

(End of clause)

[74 FR 26110, June 1, 2009]

552.252–5 Authorized Deviations in Provisions.

As prescribed in 552.107–70(a), insert the following provision:

AUTHORIZED DEVIATIONS IN PROVISIONS (DEVIATION FAR 52.252–5) (SEP 1999)

(a) *Deviations to FAR provisions.* (1) This solicitation indicates any authorized deviation to a Federal Acquisition Regulation (48 CFR chapter 1) provision by the addition of ''(DEVIATION)'' after the date of the provision, if the provision is not published in the General Services Administration Acquisition Regulation (48 CFR chapter 5).

(2) This solicitation indicates any authorized deviation to a Federal Acquisition Regulation (FAR) provision that is published in the General Services Administration Acquisition Regulation by the addition of ''(DEVIATION (FAR provision no.))'' after the date of the provision.

(b) *Deviations to GSAR provisions.* This solicitation indicates any authorized deviation to a General Services Administration Acquisition Regulation provision by the addition of ''(DEVIATION)'' after the date of the provision.

(c) ''*Substantially the same as*'' *provisions.* Changes in wording of provisions prescribed for use on a ''substantially the same as'' basis are not considered deviations.

(End of provision)

552.252–6 Authorized Deviations in Clauses.

As prescribed in 552.107–70(b), insert the following clause:

AUTHORIZED DEVIATIONS IN CLAUSES (DEVIATION FAR 52.252–6) (SEP 1999)

(a) *Deviations to FAR clauses.* (1) This solicitation or contract indicates any authorized deviation to a Federal Acquisition Regulation (48 CFR chapter 1) clause by the addition of ''(DEVIATION)'' after the date of the clause, if the clause is not published in the General Services Administration Acquisition Regulation (48 CFR chapter 5).

(2) This solicitation indicates any authorized deviation to a Federal Acquisition Regulation (FAR) clause that is published in the General Services Administration Acquisition Regulation by the addition of ''(DEVIATION (FAR clause no.))'' after the date of the clause.

(b) *Deviations to GSAR clauses:* This solicitation indicates any authorized deviation to a General Services Administration Acquisition Regulation clause by the addition of ''(DEVIATION)'' after the date of the clause.

(c) ''*Substantially the same as*'' *clauses.* Changes in wording of clauses prescribed for use on a ''substantially the same as'' basis are not considered deviations.

(End of clause)

552.270–1 Instructions to Offerors—Acquisition of Leasehold Interests in Real Property.

As prescribed in 570.602, insert the following provision:

INSTRUCTIONS TO OFFERORS—ACQUISITION OF LEASEHOLD INTERESTS IN REAL PROPERTY (MAR 1998)

(a) *Definitions.* As used in this provision—

''Discussions'' are negotiations that occur after establishment of the competitive range that may, at the contracting Officer's discretion, result in the offeror being allowed to revise its proposal.

''In Writing'' or ''Written'' means any worded or numbered expression which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.

''Proposal modification'' is a change made to a proposal before the solicitation's closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

''Proposal revision'' is a change to a proposal made after the solicitation closing date, at the request of as allowed by a Contracting Officer as the result or of negotiations.

''Time,'' if stated as a number of days, is calculated using calendar days, unless otherwise specified, and will include Saturdays, Sundays, and legal holidays. However, if the last day falls on a Saturday, Sunday, or legal holiday, then the period shall include the next working day.

(b) *Amendments to solicitations.* If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any

amendment to this solicitation by the date and time specified in the amendment(s).

(c) *Submission, modification, revision, and withdrawal of proposals.* (1) Unless other methods (e.g., electronic commerce or facsimile) are permitted in the solicitation, proposals and modifications to proposals shall be submitted in paper media in sealed envelopes or packages. Offers must be:

(i) Submitted on the forms prescribed and furnished by the Government as a part of this solicitation or on copies of those forms, and

(ii) Signed. The person signing an offer must initial each erasure or change appearing on any offer form. If the offeror is a partnership, the names of the partners composing the firm must be included with the offer.

(2) Late proposals and revisions. (i) The Government will not consider any proposal received at the office designated in the solicitation after the exact time specified for receipt of offers unless it is received before the Government makes award and it meets at least one of the following conditions:

(A) It was sent by registered or certified mail not later than the 5th calendar day before the date specified for receipt of offers (e.g., an offer submitted in response to solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th).

(B) It was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation.

(C) It was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of proposals. The term ''working days'' excludes weekends and U.S. Federal holidays.

(D) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry of the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals.

(E) There is acceptable evidence to establish that it was received at the activity designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers, and the Contracting Officer determines that accepting the late offer would not unduly delay the procurement.

(F) It is the only proposal received.

(ii) Any modification or revision of a proposal or response to request for information, including any final proposal revision, is subject to the same conditions as in subparagraphs (c)(2)(i)(A) through (c)(2)(i)(E) of this provision.

(iii) The only acceptable evidence to establish the date of mailing of a late proposal or modification or revision sent either by registered or certified mail is the U.S. or Canadian Postal Service postmark both on the envelope or wrapper and on the original receipt from the U.S. or Canadian Postal Service. Both postmarks must show a legible date or the proposal, response to a request for information, or modification or revision shall be processed as if mailed late. ''Postmark'' means a printed, stamped, or otherwise placed impression (exclusive of a postage meter machine impression) that is readily identifiable without further action as having been supplied and affixed by employees of the U.S. or Canadian Postal Service on the date of mailing. Therefore, offerors or respondents should request the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(iv) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(v) The only acceptable evidence to establish the date of mailing of a late offer, modification or revision, or withdrawal sent by Express Mail Next Day Service-Post Office to Addressee is the date entered by the post office receiving clerk on the ''Express Mail Next Day Service-Post Office to Addressee'' label and the postmark on both the envelope or wrapper and on the original receipt from the U.S. Postal Service, ''Postmark'' has the same meaning as defined in paragraph (c)(2)(iii) of this provision, excluding postmarks of the Canadian Postal Service. Therefore, offerors or respondents should request the postal clerk to place a legible hand cancellation bull's eye postmark on both the receipt and the envelope or wrapper.

(vi) Notwithstanding paragraph (c)(2)(i) of this provision, a late modification or revision of an otherwise successful proposal that makes its terms more favorable to the Government will be considered at any time it is received and may be accepted.

(vii) An offeror may withdraw its proposal by written notice or telegram (including mailgram) received at any time before award. If the solicitation authorizes facsimile proposals, an offeror may withdraw its proposal via facsimile received at any time before award, subject to the conditions specified in the provision entitled ''Facsimile Proposals.'' Proposals may be withdrawn in person by an offeror or an authorized representative, if the representative's

identity is made known and the representative signs a receipt for the proposal before award.

(viii) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation or other notice of an extension of the closing date, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office.

(3) Any information given to a prospective offeror concerning this solicitation will be furnished promptly to all other prospective offerors, if that information is necessary in submitting offers or if the lack of it would be prejudicial to any other prospective offeror.

(4) Offerors may submit modifications to their proposals at any time before the solicitation closing date and time, and may submit modifications in response to an amendment, or to correct a mistake at any time before award.

(5) Offerors may submit revised proposals only if requested or allowed by the Contracting Officer.

(6) The Government will construe an offer to be in full and complete with this solicitation unless the offer describes any deviation in the offer.

(7) Offerors may submit proposals that depart from stated requirements. Such a proposal shall clearly identify why the acceptance of the proposal would be advantageous to the Government. The proposal must clearly identify and explicitly define any deviations from the terms and conditions of the solicitation, as well as the comparative advantage to the Government. The Government reserves the right to amend the solicitation to allow all offerors an opportunity to submit revised proposals based on the revised requirements.

(d) *Restriction on disclosure and use of data.* An offeror that includes in its proposal data that it does not want disclosed to the public for any purpose, or use by the Government except for evaluation purposes, must meet both of the following conditions:

(1) Mark the title page with the following legend:

This proposal includes data that shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed—in whole or in part—for any purpose other than to evaluate this proposal. If, however, a lease is awarded to this offeror as a result of—or in connection with—the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the resulting contract. This restriction does not limit the Government's right to use information contained in this data if it is obtained from another source without restriction. The data subject to this restriction are contained in sheets [insert numbers or other identification of sheets].

(2) Mark each sheet of data it wishes to restrict with the following legend:

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

(e) *Lease award.* (1) The Government intends to award a lease resulting from this solicitation to the responsible offeror whose proposal represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive informalities and minor irregularities in proposals received.

(4) The Government intends to evaluate proposals and award a lease after conducting discussions with offerors whose proposals have been determined to be within the competitive range. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals. Therefore, the offeror's initial proposal should contain the offeror's best terms from a price and technical standpoint.

(5) Exchanges with offerors after receipt of a proposal do not constitute a rejection or counteroffer by the Government.

(6) The Government may determine that a proposal is unacceptable if the price proposed are materially unbalanced between line terms or subline items. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly overstated or understand as indicated by the application of cost or price analysis techniques. A proposal may be rejected if the Contracting Officer determines that the lack of balance poses an unacceptable risk to the Government.

(7) The unconditional written acceptance of an offer establishes a valid contract.

(8) The Government may disclose the following information in postaward debriefings to other offerors:

(i) The overall evaluated cost or price and technical rating of the successful offeror;

(ii) The overall making of all offerors, when any making was developed by the agency during source selection; and

(iii) A summary of the rationale for award.

(End of provision)

Alternate I (MAR 1998). As prescribed in 570.602, substitute the following paragraph for paragraph (c)(2)(i) of the basic provision:

(i) Any offer received at the office designated in the solicitation after the exact time specified for receipt of final proposal revisions will not be considered unless it is received before award is made and it meets one of the following conditions—

Alternate II (MAR 1998). As prescribed in 570.602, substitute the following paragraph for paragraph (e)(4) of the basic provision:

(4) The Government intends to evaluate proposals and award a lease without discussions with offerors (except clarifications as described in FAR 15.306(a)). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint. The Government reserves the right to conduct discussions if the Contracting Officer later determines them to be necessary. If the Contracting Officer determines that the number of proposals that would otherwise be in the competitive range exceeds the number at which an efficient competition can be conducted, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

552.270–2 Historic Preference.

As prescribed in 570.602, insert the following provision:

HISTORIC PREFERENCE (SEP 2004)

(a) The Government will give preference to offers of space in historic properties following this hierarchy of consideration:

(1) Historic properties within historic districts.

(2) Non-historic developed and non-historic undeveloped sites within historic districts.

(3) Historic properties outside of historic districts.

(b) *Definitions*. (1) *Determination of eligibility* means a decision by the Department of the Interior that a district, site, building, structure or object meets the National Register criteria for evaluation although the property is not formally listed in the National Register (36 CFR 60.3(c)).

(2) *Historic district* means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development. A district may also comprise individual elements separated geographically but linked by association or history (36 CFR 60.3(d)). The historic district must be included in or be determined eligible for inclusion in the National Register of Historic Places.

(3) *Historic property* means any pre-historic or historic district, site, building, structure, or object included in or been determined eligible for inclusion in the National Register of Historic Places maintained by the Secretary of the Interior (36 CFR 800.16(l)).

(4) *National Register of Historic Places* means the National Register of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture that the Secretary of the Interior is authorized to expand and maintain under the National Historic Preservation Act (36 CFR 60.1).

(c) The offer of space must meet the terms and conditions of this solicitation. The Contracting Officer has discretion to accept alternatives to certain architectural characteristics and safety features defined elsewhere in this solicitation to maintain the historical integrity of an historic building, such as high ceilings and wooden floors, or to maintain the integrity of an historic district, such as setbacks, floor-to-ceiling heights, and location and appearance of parking.

(d) When award will be based on the lowest price technically acceptable source selection process, the Government will give a price evaluation preference, based on the total annual square foot (ANSI/BOMA Office Area) cost to the Government, to historic properties as follows:

(1) First to suitable historic properties within historic districts, a 10 percent price preference.

(2) If no suitable historic property within an historic district is offered, or the 10 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(3) If no suitable non-historic developed or undeveloped site within an historic district is offered, or the 2.5 percent preference does not result in such property being the lowest price technically acceptable offer, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(4) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

(e) When award will be based on the best value tradeoff source selection process, which permits tradeoffs among price and non-price factors, the Government will give

a price evaluation preference, based on the total annual square foot (ANSI/BOMA Office Area) cost to the Government, to historic properties as follows:

(1) First to suitable historic properties within historic districts, a 10 percent price preference.

(2) If no suitable historic property within a historic district is offered or remains in the competition, the Government will give a 2.5 percent price preference to suitable non-historic developed or undeveloped sites within historic districts.

(3) If no suitable non-historic developed or undeveloped site within an historic district is offered or remains in the competition, the Government will give a 10 percent price preference to suitable historic properties outside of historic districts.

(4) Finally, if no suitable historic property outside of historic districts is offered, no historic price preference will be given to any property offered.

(f) The Government will compute price evaluation preferences by reducing the price(s) of the offerors qualifying for a price evaluation preference by the applicable percentage provided in this provision. The price evaluation preference will be used for price evaluation purposes only. The Government will award a contract in the amount of the actual price(s) proposed by the successful offeror and accepted by the Government.

(g) To qualify for a price evaluation preference, offerors must provide satisfactory documentation in their offer that their property qualifies as one of the following:

(1) An historic property within an historic district.

(2) A non-historic developed or undeveloped site within an historic district.

(3) An historic property outside of an historic district.

(End of provision)

[69 FR 55938, Sept. 16, 2004]

552.270–3 Parties To Execute Lease.

As prescribed in 570.602, insert the following provision:

PARTIES TO EXECUTE LEASE (SEP 1999)

(a) If the lease is executed by an attorney, agent, or trustee on behalf of the Lessor, an authenticated copy of his power of attorney, or other evidence to act on behalf of the Lessor, shall accompany the lease.

(b) If the Lessor is a partnership, the lease shall be signed with the partnership name, followed by the name of the legally authorized partner signing the same, and, if requested by the Government, a copy of either the partnership agreement or current Certificate of Limited Partnership shall accompany the lease.

(c) If the Lessor is a corporation, the lease shall be signed with the corporate name, followed by the signature and title of the officer or other person signing the lease on its behalf, duly attested, and, if requested by the Government, evidence of this authority to so act shall be furnished.

(End of provision)

552.270–4 Definitions.

As prescribed in 570.603, insert the following clause:

DEFINITIONS (SEP 1999)

The following terms and phrases (except as otherwise expressly provided or unless the context otherwise requires) for all purposes of this lease shall have the respective meanings hereinafter specified:

(a) ''Commencement Date'' means the first day of the term.

(b) ''Contract'' and ''Contractor'' means ''Lease'' and ''Lessor,'' respectively.

(c) ''Contracting Officer'' means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(d) ''Delivery Date'' means the date specified in or determined pursuant to the provisions of this lease for delivery of the premises to the Government, improved in accordance with the provisions of this lease and substantially complete, as such date may be modified in accordance with the provisions of this lease.

(e) ''Delivery Time'' means the number of days provided by this lease for delivery of the premises to the Government, as such number may be modified in accordance with the provision so this lease.''

(f) ''Excusable Delays'' means delays arising without the fault or negligence of Lessor and Lessor's subcontractors and suppliers at any tier, and shall include, without limitation:

(1) acts of God or of the public enemy,

(2) acts of the United States of America in either its sovereign or contractual capacity,

(3) acts of another contractor in the performance of a contract with the Government,

(4) fires,

(5) floods,

(6) epidemics,

(7) quarantine restrictions,

(8) strikes,

(9) freight embargoes,

(10) unusually severe weather, or

(11) delays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or

negligence of both the Lessor and any such subcontractor or supplier.

(g) ''Lessor'' means the sub-lessor if this lease is a sublease.

(h) ''Lessor shall provide'' means the Lessor shall furnish and install at Lessor's expense.

(i) ''Notice'' means written notice sent by certified or registered mail, Express Mail or Comparable service, or delivered by hand. Notice shall be effective on the date delivery is accepted or refused.

(j) ''Premises'' means the space described in this lease.

(k) ''Substantially complete'' and ''substantial completion'' means that the work, the common and other areas of the building, and all other things necessary for the Government's access to the premises and occupancy, possession, use and enjoyment thereof, as provided in this lease, have been completed or obtained, excepting only such minor matters as do not interfere with or materially diminish such access, occupancy, possession, use of enjoyment.

(l) ''Usable square feet'' means the ANSI/BOMA Z65.1–1996 definition for BOMA usable office area, which means ''The area where a tenant normally houses personnel and/or furniture, for which a measurement is to be computed.''

(m) ''Work'' means all alterations, improvements, modifications, and other things required for the preparation or continued occupancy of the premises by the Government as specified in this lease.

(End of clause)

552.270–5 Subletting and Assignment.

As prescribed in 570.603, insert the following clause:

SUBLETTING AND ASSIGNMENT (SEP 1999)

The Government may sublet any part of the premises but shall not be relieved from any obligations under this lease by reason of any such subletting. The Government may at any time assign this lease, and be relieved from all obligations to Lessor under this lease excepting only unpaid rent and other liabilities, if any that have accrued to the date of said assignment. Any assignment shall be subject to prior written consent of Lessor, which shall not be unreasonably withheld.

(End of clause)

552.270–6 Maintenance of Building and Premises—Right of Entry.

As prescribed in 570.603, insert the following clause:

MAINTENANCE OF BUILDING AND PREMISES—RIGHT OF ENTRY (SEP 1999)

Except in case of damage arising out of the willful act or negligence of a Government employee, Lessor shall maintain the premises, including the building and all equipment, fixtures, and appurtenances furnished by the lessor under this lease, in good repair and condition so that they are suitable in appearance and capable of supplying such heat, air conditioning, light, ventilation, access and other things to the premises, without reasonably preventable or recurring disruption, as is required for the Government's access to, occupancy, possession, use and enjoyment of the premises as provided in this lease. For the purpose of so maintaining the premises, the Lessor may at reasonable times enter the premises with the approval of the authorized Government representative in charge.

(End of clause)

552.270–7 Fire and Casualty Damage.

As prescribed in 570.603, insert the following clause:

FIRE AND CASUALTY DAMAGE (SEP 1999)

If the entire premises are destroyed by fire or other casualty, this lease will immediately terminate. In case of partial destruction or damage, so as to render the premises untenantable, as determined by the Government, the Government may terminate the lease by giving written notice to the Lessor within 15 calendar days of the fire or other casualty; if so terminated, no rent will accrue to the Lessor after such partial destruction or damage; and if not so terminated, the rent will be reduced proportionately by supplemental agreement hereto effective from the date of such partial destruction or damage. Nothing in this lease shall be construed as relieving Lessor from liability for damage to or destruction of property of the United States of America caused by the willful or negligent act or omission of Lessor.

(End of clause)

552.270–8 Compliance with Applicable Law.

As prescribed in 570.603, insert the following clause:

COMPLIANCE WITH APPLICABLE LAW (SEP 1999)

Lessor shall comply with all Federal, state and local laws applicable to the Lessor as owner or lessor, or both, of the building or premises, including, without limitation, laws applicable to the construction, ownership, alteration or operation of both or either

thereof, and will obtain all necessary permits, licenses and similar items at Lessor's expense. The Government will comply with all Federal, state and local laws applicable to and enforceable against it as a tenant under this lease; provided that nothing in this lease shall be construed as a waiver of any sovereign immunity of the Government. This lease shall be governed by Federal law.

(End of clause)

552.270–9 Inspection—Right of Entry.

As prescribed in 570.603, insert the following clause:

INSPECTION—RIGHT OF ENTRY (SEP 1999)

(a) At any time and from time to time after receipt of an offer (until the same has been duly withdrawn or rejected), after acceptance thereof and during the term, the agents, employees and contractors of the Government may, upon reasonable prior notice to Offeror or Lessor, enter upon the offered premises or the premises, and all other areas of the building access to which is necessary to accomplish the purposes of entry, to determine the potential or actual compliance by the Offeror or Lessor with the requirements of the solicitation or this lease, which purposes shall include, but not be limited to:

(1) Inspecting, sampling and analyzing suspected asbestos-containing materials and air monitoring for asbestos fibers;

(2) Inspecting the heating, ventilation and air conditioning system, maintenance records, and mechanical rooms for the offered premises or the premises;

(3) Inspecting for any leaks, spills, or other potentially hazardous conditions which may involve tenant exposure to hazardous or toxic substances; and

(4) Inspecting for any current or past hazardous waste operations, to ensure that appropriate mitigative actions were taken to alleviate any environmentally unsound activities in accordance with Federal, State and local law.

(b) Nothing in this clause shall be construed to create a Government duty to inspect for toxic materials or to impose a higher standard of care on the Government than on other lessees. The purpose of this clause is to promote the ease with which the Government may inspect the building. Nothing in this clause shall act to relieve the Lessor of any duty to inspect or liability which might arise as a result of Lessor's failure to inspect for or correct a hazardous condition.

(End of clause)

552.270–10 Failure in Performance.

As prescribed in 570.603, insert the following clause:

FAILURE IN PERFORMANCE (SEP 1999)

The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. In the event of any failure by the Lessor to provide any service, utility, maintenance, repair or replacement required under this lease the Government may, by contract or otherwise, perform the requirement and deduct from any payment or payments under this lease, then or thereafter due, the resulting cost to the Government, including all administrative costs. If the Government elects to perform any such requirement, the Government and each of its contractors shall be entitled to access to any and all areas of the building, access to which is necessary to perform any such requirement, and the Lessor shall afford and facilitate such access. Alternatively, the Government may deduct from any payment under this lease, then or thereafter due, an amount which reflects the reduced value of the contract requirement not performed. No deduction from rent pursuant to this clause shall constitute a default by the Government under this lease. These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.

(End of clause)

552.270–11 Successors Bound.

As prescribed in 570.603, insert the following clause:

SUCCESSORS BOUND (SEP 1999)

This lease shall bind, and inure to the benefit of, the parties and their respective heirs, executors, administrators, successors and assigns.

(End of clause)

552.270–12 Alterations.

As prescribed in 570.603, insert the following clause:

ALTERATIONS (SEP 1999)

The Government shall have the right during the existence of this lease to make alterations, attach fixtures, and erect structures or signs in or upon the premises hereby leased, which fixtures, additions or structures so placed in, on, upon, or attached to the said premises shall be and remain the

property of the Government and may be removed or otherwise disposed of by the Government. If the lease contemplates that the Government is the sole occupant of the building, for purposes of this clause, the leased premises include the land on which the building is sited and the building itself. Otherwise, the Government shall have the right to tie into or make any physical connection with any structure located on the property as is reasonably necessary for appropriate utilization of the leased space.

(End of clause)

552.270–13 Proposals for Adjustment.

As prescribed in 570.603, insert the following clause:

PROPOSALS FOR ADJUSTMENT (SEP 1999)

(a) The Contracting Officer may, from time to time during the term of this lease, require changes to be made in the work or services to be performed and in the terms or conditions of this lease. Such changes will be required under the Changes clause.

(b) If the Contracting Officer makes a change within the general scope of the lease, the Lessor shall submit, in a timely manner, an itemized cost proposal for the work to be accomplished or services to be performed when the cost exceeds $100,000. The proposal, including all subcontractor work, will contain at least the following details—

(1) Material quantities and unit costs;

(2) Labor costs (identified with specific item or material to be placed or operation to be performed);

(3) Equipment costs;

(4) Worker's compensation and public liability insurance;

(5) Overhead;

(6) Profit; and

(7) Employment taxes under FICA and FUTA.

(c) The following Federal Acquisition Regulation (FAR) provisions also apply to all proposals exceeding $500,000 in cost—

(1) The Lessor shall provide cost or pricing data including subcontractor cost or pricing data (48 CFR 15.403–4); and

(2) The Lessor's representative, all Contractors, and subcontractors whose portion of the work exceeds $500,000 must sign and return the ''Certificate of Current Cost or Pricing Data'' (48 CFR 15.406–2).

(d) Lessors shall also refer to 48 CFR Part 31, Contract Cost Principles, for information on which costs are allowable, reasonable, and allocable in Government work.

(End of clause)

552.270–14 Changes.

As prescribed in 570.603, insert the following clause:

CHANGES (SEP 1999)

(a) The Contracting Officer may at any time, by written order, make changes within the general scope of this lease in any one or more of the following:

(1) Specifications (including drawings and designs).

(2) Work or services.

(3) Facilities or space layout.

(4) Amount of space, provided the Lessor consents to the change.

(b) If any such change causes an increase or decrease in Lessor's cost of or the time required for performance under this lease, whether or not changed by the order, the Contracting Officer shall modify this lease to provide for one or more of the following:

(1) A modification of the delivery date.

(2) An equitable adjustment in the rental rate.

(3) A lump sum equitable adjustment.

(4) An equitable adjustment of the annual operating costs per usable square foot specified in this lease.

(c) The Lessor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the change order and must submit a proposal for adjustment. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause excuses the lessor from proceeding with the change as directed.

(d) Absent such written change order, the Government is not liable to Lessor under this clause.

(End of clause)

552.270–15 Liquidated Damages.

As prescribed in 570.603, insert the following clause:

LIQUIDATED DAMAGES (SEP 1999)

In case of failure on the part of the Lessor to complete the work within the time fixed in the lease contract or letter of award, the Lessor shall pay the Government as fixed and agreed liquidated damages, pursuant to this clause, the sum $_____ for each and every calendar day that the delivery is delayed beyond the date specified for delivery of all the space ready for occupancy by the Government. this remedy is not exclusive and is in addition to any other remedies which may be available under this lease or at law.

(End of clause)

552.270–16 Adjustment for Vacant Premises.

As prescribed in 570.603, insert the following clause:

ADJUSTMENT FOR VACANT PREMISES (SEP 1999)

(a) If the Government fails to occupy any portion of the leased premises or vacates the premises in whole or in part before the lease term expires, the rental rate will be reduced.

(b) The rental rate will be reduced by that portion of the costs per usable square foot of operating expenses not required to maintain the space. The reduction takes effect 30 calendar days after the Government gives notice to the Lessor, and continues in effect until the Government occupies the premises or the lease expires or is terminated.

(End of clause)

552.270–17 Delivery and Condition.

As prescribed in 570.603, insert the following clause:

DELIVERY AND CONDITION (SEP 1999)

(a) Unless the Government elects to have the space occupied in increments, the space must be delivered ready for occupancy as a complete unit. The Government reserves the right to determine when the space is substantially complete.

(b) If the premises do not in every respect comply with the provisions of this lease the Contracting Officer may, in accordance with the Failure in Performance clause of this lease, elect to reduce the rent payments.

(End of clause)

552.270–18 Default in Delivery—Time Extensions.

As prescribed in 570.603, insert the following clause:

DEFAULT IN DELIVERY—TIME EXTENSIONS (SEP 1999)

(a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date, time is of the essence. If the Lessor fails to work diligently to ensure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease. Such termination is effective when received by Lessor. The Lessor and the Lessor's sureties, if any, are jointly and severally liable for any damages to the Government resulting from such termination, as provided in this clause. The Government is entitled to the following damages:

(1) The Government's aggregate rent, estimated real estate tax, and operating cost adjustments for the firm term and all option terms of its replacement lease or leases, in excess of the aggregate rent and estimated real estate tax and operating cost adjustments for the term. If the Government procures replacement premises for a term (including all option terms) in excess of this lease term, the Lessor is not liable for excess Government rent or adjustments during such excess lease term.

(2) All administrative and other costs the Government incurs in procuring a replacement lease or leases.

(3) Other, additional relief provided for in this lease, at law, or in equity.

(b) Damages to which the Government is entitled under this clause are due and payable thirty (30) days following the date Lessor receives notice from the Contracting Officer specifying such damages.

(c) Delivery by Lessor of less than the minimum usable square footage required by this lease shall in no event be construed as substantial completion, except as the Contracting Officer permits.

(d) The Government shall not terminate this lease under this clause nor charge the Lessor with damages under this clause, if (1) the delay in substantially completing the work arises from excusable delays, and (2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If the facts warrant, the Contracting Officer shall extend the delivery date, to the extent of such delay at no additional costs to the Government. A time extension is the sole remedy of the Lessor.

(End of clause)

552.270–19 Progressive Occupancy.

As prescribed in 570.603, insert the following clause:

PROGRESSIVE OCCUPANCY (SEP 1999)

The Government shall have the right to elect to occupy the space in partial increments prior to the substantial completion of the entire leased premises, and the Lessor agrees to schedule its work so as to deliver the space incrementally as elected by the Government. The Government shall pay rent commencing with the first business day following substantial completion of the entire leased premise unless the Government has elected to occupy the leased premises incrementally. In case of incremental occupancy, the Government shall pay rent pro rata upon

the first business day following substantial completion of each incremental unit. Rental payments shall become due on the first workday of the month following the month in which an increment of space is substantially complete, except that should an increment of space be substantially completed after the fifteenth day of the month, the payment due date will be the first workday of the second month following the month in which it was substantially complete. The commencement date of the firm lease term will be a complete determined from all rent commencement dates.

(End of clause)

552.270–20 Payment.

As prescribed in 570.603, insert the following clause:

PAYMENT (SEP 1999)

(a) When space is offered and accepted, usable square footage delivered will be confirmed by either:

(1) The Government's measurement of plans submitted by the successful offeror as approved by the Government, and an inspection of the space to verify that the delivered space conforms with such plans.

(2) A mutual on-site measurement of the space if the Contracting Officer determines it necessary.

(b) The Government will not pay for space in excess of the amount of usable square footage stated in the lease.

(c) If the amount of usable square footage delivered is less than the amount agreed to in the lease, the lease will be modified to reflect the amount of usable space delivered and the annual rental will be adjusted as follows:

Usable square feet (USF) not delivered multiplied by one plus the common area factor (CAF), multiplied by the rate per rentable square foot (RSF). That is:

USF × (1+CAF) × Rate per RSF = Reduction in Annual Rent.

(End of clause)

552.270–21 Effect of Acceptance and Occupancy.

As prescribed in 570.603, insert the following clause:

EFFECT OF ACCEPTANCE AND OCCUPANCY (SEP 1999)

Neither the Government's acceptance of the premises for occupancy, nor the Government's occupancy thereof, shall be construed as a waiver of any requirement of or right of the Government under this Lease, or as otherwise prejudicing the Government with respect to any such requirement or right.

(End of clause)

552.270–22 Default by Lessor During the Term.

As prescribed in 570.603, insert the following clause:

DEFAULT BY LESSOR DURING THE TERM (SEP 1999)

(a) Each of the following shall constitute a default by Lessor under this lease:

(1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative.

(2) Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute a default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause.

(b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery-Time Extensions clause.

(End of clause)

552.270–23 Subordination, Nondisturbance and Attornment.

As prescribed in 570.603, insert the following clause:

SUBORDINATION, NONDISTURBANCE AND ATTORNMENT (SEP 1999)

(a) Lessor warrants that it holds such title to or other interest in the premises and other property as is necessary to the Government's access to the premises and full use and enjoyment thereof in accordance with the provisions of this lease. Government agrees, in consideration of the warranties and conditions set forth in this clause, that this lease is subject and subordinate to any and all recorded mortgages, deeds of trust and other liens now or hereafter existing or imposed upon the premises, and to any renewal, modification or extension thereof. It is the intention of the parties that this provision shall be self-operative and that no further instrument shall be required to effect the present or subsequent subordination of this lease. Government agrees, however, within twenty (20) business days next following the Contracting Officer's receipt of a written demand, to execute such instruments as Lessor may reasonably request to evidence further the subordination of this

lease to any existing or future mortgage, deed of trust or other security interest pertaining to the premises, and to any water, sewer or access easement necessary or desirable to serve the premises or adjoining property owned in whole or in part by Lessor if such easement does not interfere with the full enjoyment of any right granted the Government under this lease.

(b) No such subordination, to either existing or future mortgages, deeds of trust or other lien or security instrument shall operate to affect adversely any right of the Government under this lease so long as the Government is not in default under this lease. Lessor will include in any future mortgage, deed of trust or other security instrument to which this lease becomes subordinate, or in a separate nondisturbance agreement, a provision to the foregoing effect. Lessor warrants that the holders of all notes or other obligations secured by existing mortgages, deeds of trust or other security instruments have consented to the provisions of this clause, and agrees to provide true copies of all such consents to the Contracting Officer promptly upon demand.

(c) In the event of any sale of the premises or any portion thereof by foreclosure of the lien of any such mortgage, deed of trust or other security instrument, or the giving of a deed in lieu of foreclosure, the Government will be deemed to have attorned to any purchaser, purchasers, transferee or transferees of the premises or any portion thereof and its or their successors and assigns, and any such purchasers and transferees will be deemed to have assumed all obligations of the Lessor under this lease, so as to establish direct privity of estate and contract between Government and such purchasers or transferees, with the same force, effect and relative priority in time and right as if the lease had initially been entered into between such purchasers or transferees and the Government; provided, further, that the Contracting Officer and such purchasers or transferees shall, with reasonable promptness following any such sale or deed delivery in lieu of foreclosure, execute all such revisions to this lease, or other writings, as shall be necessary to document the foregoing relationship.

(d) None of the foregoing provisions may be deemed or construed to imply a waiver of the Government's rights as a sovereign.

(End of clause)

552.270–24 Statement of Lease.

As prescribed in 570.603, insert the following clause:

STATEMENT OF LEASE (SEP 1999)

(a) The Contracting Officer will, within thirty (30) days next following the Contracting Officer's receipt of a joint written request from Lessor and a prospective lender or purchaser of the building, execute and deliver to Lessor a letter stating that the same is issued subject to the conditions stated in this clause and, if such is the case, that (1) the lease is in full force and effect; and (2) the date to which the rent and other charges have been paid in advance, if any; and (3) whether any notice of default has been issued.

(b) Letters issued pursuant to this clause are subject to the following conditions:

(1) That they are based solely upon a reasonably diligent review of the Contracting Officer's lease file as of the date of issuance;

(2) That the Government shall not be held liable because of any defect in or condition of the premises or building;

(3) That the Contracting Officer does not warrant or represent that the premises or building comply with applicable Federal, State and local law; and

(4) That the Lessor, and each prospective lender and purchaser are deemed to have constructive notice of such facts as would be ascertainable by reasonable prepurchase and precommitment inspection of the Premises and Building and by inquiry to appropriate Federal, State and local Government officials.

(End of clause)

552.270–25 Substitution of Tenant Agency.

As prescribed in 570.603, insert the following clause:

SUBSTITUTION OF TENANT AGENCY (SEP 1999)

The Government may, at any time and from time to time, substitute any Government agency or agencies for the Government agency or agencies, if any, named in the lease.

(End of clause)

552.270–26 No Waiver.

As prescribed in 570.603, insert the following clause:

NO WAIVER (SEP 1999)

No failure by either party to insist upon the strict performance of any provision of this lease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent or other performance by either party during the continuance of any such breach shall constitute a waiver of any such breach of such provision.

(End of clause)

552.270–27 Integrated Agreement.

As prescribed in 570.603, insert the following clause:

INTEGRATED AGREEMENT (SEP 1999)

This Lease, upon execution, contains the entire agreement of the parties and no prior written or oral agreement, express or implied, shall be admissible to contradict the provisions of the Lease.

(End of clause)

552.270–28 Mutuality of Obligation.

As prescribed in 570.603, insert the following clause:

MUTUALITY OF OBLIGATION (SEP 1999)

The obligations and covenants of the Lessor, and the Government's obligation to pay rent and other Government obligations and covenants, arising under or related to this Lease, are interdependent. The Government may, upon issuance of and delivery to Lessor of a final decision asserting a claim against Lessor, set off such claim, in whole or in part, as against any payment or payments then or thereafter due the Lessor under this lease. No setoff pursuant to this clause shall constitute a breach by the Government of this lease.

(End of clause)

552.270–29 Acceptance of Space.

As prescribed in 570.603, insert the following clause:

ACCEPTANCE OF SPACE (SEP 1999)

(a) When the Lessor has completed all alterations, improvements, and repairs necessary to meet the requirements of the lease, the Lessor shall notify the Contracting Officer. The Contracting Officer or designated representative shall promptly inspect the space.

(b) The Government will accept the space and the lease term will begin after determining that the space is substantially complete and contains the required usable square footage as indicated in Paragraph 1.1, Amount and Type of Space, of this solicitation.

(End of clause)

PART 553—FORMS

Subpart 553.2—Illustrations of Forms

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37265, July 9, 1999, unless otherwise noted.

553.300 Scope of subpart.

Standard and GSA forms prescribed or referenced in the text of this chapter are illustrated in and made a part of the General Services Administration Acquisition Manual. The forms are not illustrated in Title 48, Chapter 5, of the Code of Federal Regulations. Copies may be obtained from the Director of the Office of GSA Acquisition Policy (MVP), 1800 F Street, NW, Washington, DC 20405.

SUBCHAPTER I—SPECIAL CONTRACTING PROGRAMS

PART 570—ACQUIRING LEASEHOLD INTERESTS IN REAL PROPERTY

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570.701 Standard forms.
570.702 GSA forms.

AUTHORITY: 40 U.S.C. 486(c).

SOURCE: 64 FR 37265, July 9, 1999, unless otherwise noted.

Subpart 570.1—General

570.101 Applicability.

(a) This part applies to acquisitions of leasehold interests in real property except:

(1) Leasehold interests acquired by the power of eminent domain or by donation.

(2) Acquisition of leasehold interests in bare or unimproved land.

(b) In addition, the GSAR rules in the following table apply. Other provisions of 48 CFR Chapter 5 (GSAR) do not apply to leases of real property unless specifically cross-referenced in this part 570.

GSAR RULES APPLICABLE TO ACQUISITIONS OF LEASEHOLD INTERESTS IN REAL PROPERTY

501	514.201–7(b)	517.207	533
502	514.407	519.7	536.271

GSAR RULES APPLICABLE TO ACQUISITIONS OF LEASEHOLD INTERESTS IN REAL PROPERTY—Continued

503	515.204–1	519.12	537.2
504.5	515.209–70	522.8	552
505	515.305	532.1	553
509.4	517.202	532.908	

570.102 Definitions.

Acquisition means the acquiring by lease of an interest in improved real property for use by the Federal Government, whether the space already exists or must be constructed.

Contract means lease.

Contractor means lessor.

Landlord or *lessor* means any individual, firm, partnership, trust, association, State or local government, or other legal entity that leases real property to the Government.

Lease or *leasehold interest in real property* means a conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord. It may include operational services provided by the landlord.

Lessee or *tenant* means the United States of America.

Operational services means services that support use of a leased property, such as heating, ventilation, air condition, utilities, and custodial services.

Rent and related services means that consideration paid for the use of leased property plus the costs of operational services whether furnished by the lessor, the Government, or both.

Simplified lease acquisition procedures mean the procedures for awarding leases at or below the simplified lease acquisition threshold.

Simplified lease acquisition threshold Means $100,000 average annual rent for the term of the lease, including option periods and excluding the cost of operational services.

Small business means a concern including affiliates, which is organized for profit, is independently-owned and operated, is not dominant in the field of leasing commercial real estate, and has annual average gross receipts of $15 million or less for the preceding three fiscal years.

Solicitation for Offers (SFO) means invitation for bids in sealed bidding or request for proposals in negotiations.

Space in buildings means the premises leased, or to be leased, including improvements. Its quantity is normally expressed in square feet. It does not include space acquired by the power of eminent domain, donation, or condemnation, nor acquisitions of bare or unimproved land.

Substantially as follows or *substantially the same as,* when used in prescribing a provision or clause, means that you may prepare and use a variation of that provision or clause to accommodate requirements peculiar to an individual acquisition. The variation must include the salient features of the FAR or GSAR provision or clause. It must also be consistent with the intent, principle, and substance of the FAR or GSAR provision or clause and related coverage on the subject matter.

570.103 Authority to lease.

(a) The Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(h)(1)), as amended, and Section 1 of the Reorganization Plan No. 18 of 1950 (40 U.S.C. 490 Note) authorize the Administrator of General Services to acquire leasehold interests in real property for use by Federal agencies. The authority is limited to leases for buildings and improvement that bind the Government for periods not exceeding 20 years.

(b) You have exclusive authority to enter into and administer leases on the Government's behalf to the extent provided in your certificate of appointment as a contracting officer.

570.104 Competition.

Unless you use the simplified procedures in subpart 570.2, the competition requirements of FAR part 6 apply to acquisition of leasehold interests in real property.

570.105 Methods of contracting.

570.105–1 Contracting by negotiation.

Contracting by negotiation is usually appropriate for acquiring space in a building through a lease contract. You will usually need to conduct discussions with offerors about their proposals and consider factors other than price in making the award.

570.105–2 Two-phase design-build selection procedures.

Unless you use another acquisition procedure authorized by law, you must use the two-phase design-build selection procedures in section 303M of the Federal Property and Administrative Services Act of 1949, as amended, for lease construction projects. This includes lease construction projects with options to purchase the real property leased. Use the procedures in section 303M when you meet the conditions in paragraphs (a) and (b) of this section:

(a) You anticipate the lease will involve the design and construction of a public building, facility, or work for lease to the Government.

(b) You determine the procedures are appropriate for entering into a lease construction contract based on the following:

(1) You expect to receive three or more offers.

(2) Offerors will need to perform design work before developing a price.

(3) Offerors will incur a substantial amount of expense in preparing offers.

(4) You consider criteria such as the following:

(i) The extent to which the project requirements have been adequately defined.

(ii) The time constraints for delivery of the project.

(iii) The capability and experience of potential contractors.

(iv) The suitability of the project for use of the two-phase selection procedures.

(v) The capability of the agency to manage the two-phase selection process.

(vi) Other criteria established by the HCA.

570.105–3 Sealed bidding.

For sealed bidding, use the procedures in FAR part 14. In most cases you should not use sealed bidding to acquire space in buildings unless you meet all the following conditions:

(a) You have a preselected site.

(b) A building will be constructed on the site using Government furnished plans and specifications.

(c) The Government will lease the building.

570.106 Publicizing/Advertising.

(a) Subparts 505.101, 505.202, and 505.203 define requirements for publicizing lease actions.

(b) Instead of issuing separate advertisements for multiple, known leasing actions, you may include the actions in one consolidated advertisement.

570.107 Oral presentations.

You may use oral presentations for acquisitions of leasehold interests in real property. Follow the procedures in FAR 15.102.

570.108 Responsibility determination.

(a) Determine that the prospective awardee is responsible with respect to the lease under consideration. The standards in FAR 9.104 apply. As part of the determination that a prospective contractor is otherwise qualified and eligible for award, review the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

(b) Your signature on the contract is deemed an affirmative determination.

(c) If you find an offeror nonresponsible, sign and place in the contract file a determination of nonresponsibility. State the basis for the determination.

(d) If you find a small business concern nonresponsible, the procedures at FAR 19.6 apply. Place all documents and reports supporting a determination of responsibility or nonresponsibility in the lease file.

570.109 Certifications.

Before awarding a lease, review applicable certifications for compliance with statute and regulations.

570.110 Cost or pricing data and information other than cost or pricing data.

(a) The policies and procedures of FAR 15.403 apply to lease contract actions.

(b) FAR 15.403–1 defines exceptions to and waivers for submitting cost or pricing data. Most leasing actions will have adequate price competition. For price analysis, you may use a market survey or an appraisal conducted using accepted real property appraisal procedures to establish a market price for comparison.

(c) In exceptional cases, the requirement for submission of certified cost or pricing data may be waived under FAR 15.403–1(c)(4).

(d) If cost or pricing data are required, follow the procedures in FAR 15.403–4 and 15.406–2.

570.111 Inspection and acceptance.

Before you accept space, obtain an inspection to ensure that the space complies with the Government's requirements and specifications. Document the inspection and acceptance in the contract file.

570.112 Awards to Federal employees.

If you receive an offer from an officer or employee of the Government, follow the procedures in FAR 3.6.

570.113 Disclosure of mistakes after award.

If you discover a mistake in a lessor's offer after award, follow the procedures in FAR 14.407–4 and subpart 514.407–4.

570.114 Protests.

FAR 33.1 and 533.1 apply to protests of lease acquisitions.

Subpart 570.2—Simplified Lease Acquisition Procedures

570.201 Purpose.

This subpart prescribes simplified procedures for small leases. These procedures reduce administrative costs, while improving efficiency and economy, when acquiring small leasehold interests in real property.

570.202 Policy.

Use simplified lease acquisition procedures to the maximum extent practicable for actions at or below the simplified lease acquisition threshold.

570.203 Procedures.

570.203–1 Market survey.

Conduct a market survey to identify potential sources. Use information available in GSA or from other sources to identify locations that will meet the Government's requirements.

570.203–2 Competition.

(a) Solicit at least three sources to promote competition to the maximum extent practicable. If you have repeated requirements for space in the same market, and if practicable, invite two sources not included in the most recent solicitation to submit offers.

(b) If you solicit only one source, document the file to explain the lack of competition.

570.203–3 Soliciting offers.

(a) Solicit offers by providing each prospective offeror a proposed short form lease or SFO. The short form lease or SFO must provide all the following information:

(1) A description of the Government's requirements.

(2) All award factors, including price or cost, and any significant subfactors you will consider in awarding the lease.

(3) A statement of the relative importance of the evaluation factors and subfactors.

(4) A statement of whether all evaluation factors other than cost or price, when combined, are either:

(i) Significantly more important than cost or price.

(ii) Approximately equal in importance to cost or price.

(iii) Significantly less important than cost or price.

(5) Either in full text or by reference, applicable FAR provisions and contract clauses required by 570.6.

(b) As necessary, review with prospective offerors the Government's requirements, pricing matters, evaluation procedures and submissions of offers.

570.203–4 Negotiations, evaluation, and award.

(a) If you need to conduct negotiations, use the procedures in 570.307.

(b) Evaluate offers in accordance with the solicitation. Evaluate prices and document the lease file to demonstrate whether the proposed contract prices are fair and reasonable.

(c) If the total price, including options, exceeds $500,000, consider whether you need cost and pricing data to determine that the price is fair and reasonable. In most cases the exceptions at FAR 15.403–1 will apply.

(d) If the total contract value of the lease, including options, will exceed $500,000, the proposed awardee must provide an acceptable small business subcontracting plan. This requirement does not apply if the proposed awardee is a small business concern.

(e) Make award to the responsible offeror whose proposal is most advantageous to the Government considering price and other factors included in the solicitation.

Subpart 570.3—Contracting Procedures for Leasehold Interests in Real Property

570.301 Market survey.

Conduct a market survey to identify potential sources. Use information available in GSA or from other sources to identify locations capable of meeting the Government's requirements.

570.302 Description of requirements.

(a) The description of requirements depends on the nature of the space the agency needs and the market available to satisfy that need.

(b) The description of requirements must include all the following:

(1) A statement of the purpose of the lease.

(2) Functional, performance, or physical requirements.

(3) Any special requirements.

(4) The delivery schedule.

(c) The description must promote full and open competition. Include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs or as authorized by law.

570.303 Solicitation for offers.

570.303–1 Preparing the SFO.

The SFO forms the basis for the lease negotiation process and becomes part of the lease. Document each SFO in writing or electronically. Include the information necessary to enable prospective offerors to prepare proposals. Each SFO, at a minimum, must provide all the following:

(a) Describe the Government's requirements.

(b) State the method the Government will use to measure space.

(c) Explain how to structure offers.

(d) Specify a date, time, and place for submission of offers.

(e) Explain how the Government will evaluate offers.

(f) Describe the source selection procedures the Government will use.

(g) Include a statement outlining the information the Government may disclose in debriefings.

(h) Include appropriate forms prescribed in 570.7.

570.303–2 Issuing the SFO.

Release the SFO to all prospective offerors at the same time.

570.303–3 Late offers, modifications of offers, and withdrawals of offers.

Follow the procedures in FAR 15.208.

570.303–4 Changes to SFOs.

(a) If the Government's requirements change, either before or after receipt of proposals, issue an amendment. Document the amendment using the same method as for the SFO, written or electronic.

(b) If time is critical, you may provide information on SFO amendments orally.

(1) Make a record of the information provided.

(2) Provide, or attempt to provide, the notice to all offerors or prospective offerors on the same day.

(3) Promptly confirm the information provided orally in a written amendment.

(c) Distribute an amendment as follows:

(1) If before the proposal due date, send the amendment to all prospective offerors who were sent a copy of the SFO.

(2) If after proposal receipt, send the amendment to each offeror who submitted a proposal.

(d) If an amendment is so substantial that it requires a complete revision of the SFO, cancel the SFO and issue a new one.

570.304 General source selection procedures.

(a) These procedures apply to acquisitions of leasehold interests except if you use either:

(1) Simplified lease acquisition procedures authorized by 570.2.

(2) Two-phase design-build selection procedures authorized by 570.105–2.

(b) The contracting officer is designated as the source selection official unless the HCA appoints another individual for a particular leasing action or group of leasing actions.

(c) You must include price or cost to the Government and past performance as evaluation factors in every case.

(d) The SFO must comply with FAR 15.304 and either:

(1) FAR 15.101–1 if you will use the tradeoff process.

(2) FAR 15.101–2 if you will use the lowest price technically acceptable source selection process.

570.305 Two-phase design-build selection procedures.

(a) These procedures apply to acquisitions of leasehold interests if you use the two-phase design-build selection procedures authorized by 570.105–2.

(b) The SFO must include all the following information:

(1) The scope of work.

(2) The evaluation factors and subfactors to be used in evaluating phase-one proposals and their relative importance.

(3) The maximum number of offerors to be selected to submit competitive proposals in phase-two.

(4) The evaluation factors, including cost or price, and subfactors to be used in evaluating phase-two proposals and selecting the successful offeror, and their relative importance.

(c) The following procedures apply to phase-one evaluation factors:

(1) Phase one factors include:

(i) Specialized experience and technical competence.

(ii) Capability to perform.

(iii) Past performance of the offeror's team (including architect-engineer and construction members of the team).

(iv) Other appropriate factors, such as site or location.

(2) Do not require offerors to submit detailed design information or cost or price information in phase one. Do not use cost related or price related evaluation factors.

(d) Set the maximum number of offerors to be selected for phase-two to not exceed five (5) unless you determine that a number greater than five is both:

(1) In the government's interest.

(2) Consistent with the purpose and objectives of the two-phase selection process.

(e) In phase-two, require detailed technical and price proposals. Evaluate the proposals using the procedures in 570.306.

570.306 Evaluating offers.

(a) You must evaluate offers solely in accordance with the factors and subfactors stated in the SFO.

(b) Evaluate prices and document the lease file to demonstrate that the proposed contract price is fair and reasonable.

(c) Evaluate past performance in accordance with FAR 15.305(a)(2).

(d) Document the evaluation of award factors other than price listed in the solicitation. The file must include the basis for evaluation, an analysis of each offer, and a summary of findings.

570.307 Negotiations.

(a) Follow the procedures in FAR 15.306 and 15.307 for exchanges (including clarifications, communications, negotiations, discussions, and revisions).

(b) Place a written record of all exchanges in the lease file.

(c) Provide prompt written notice to any offeror excluded from the competitive range or otherwise eliminated from the competition in accordance with FAR 15.503(a).

570.308 Award.

(a) Make award to the responsible offeror whose proposal represents the best value after evaluation in accordance with the factors and subfactors in the SFO.

(b) Make award in writing and in the timeframe specified in the SFO.

(1) If you cannot make an award in that time, request in writing from each offeror an extension of the acceptance period through a specific date.

(2) If time is critical, you may request the extensions orally. You must make a record of the requested and confirm it promptly in writing.

(c) Notify unsuccessful offerors in writing or electronically in accordance with FAR 15.501 and 15.503(b).

(d) The source selection authority may reject all proposals received in response to an SFO, if doing so is in the best interest of the Government.

570.309 Debriefings.

The procedures of FAR 15.505 and 15.506 apply to leasing actions.

Subpart 570.4—Special Aspects of Contracting for Continued Space Requirements

570.401 Renewal options.

(a) *Exercise of options*. Before exercising an option to renew, follow the procedures in 517.202 and 517.207. The contract must first provide the right to renew the lease.

(b) *Market survey*. Before exercising an option to renew a lease, review current market information to ensure the rental rate in the option is fair and reasonable.

570.402 Succeeding leases.

570.402–1 General.

(a) If a succeeding lease for the continued occupancy of space in a building does not exceed the simplified lease acquisition threshold, you may use the simplified procedures in 570.2. Explain the absence of competition in the contract file.

(b) If a succeeding lease will exceed the simplified lease acquisition threshold, you may enter into the lease under either of the following conditions:

(1) You do not identify any potential acceptable locations.

(2) You identify potential acceptable locations, but a cost-benefit analysis indicates that award to an offeror other than the present lessor will result in substantial relocation costs or duplication of costs to the Government, and the Government cannot expect to recover such costs through competition.

570.402–2 Publicizing/Advertising.

Publish a notice if required by 505.101(c). The notice should:

(a) Indicate the Government's lease is expiring.

(b) Describe the requirement in terms of type and quantity of space.

(c) Indicate the Government is interested in considering alternative space if economically advantageous.

(d) Advise prospective offerors that the Government will consider the cost of moving, alterations, etc., when deciding whether it should relocate.

(e) Provide a contact person for those interested in providing space to the Government.

570.402–3 Market survey.

Conduct a market survey following 570.301.

570.402–4 No potential acceptable locations.

If you do not identify any potential acceptable locations through the advertisement or the market survey, you may prepare a justification to negotiate directly with the present lessor. Fully document the efforts to locate alternative sources. Prepare the justification and obtain approval following FAR 6.3 and 506.3.

570.402–5 Potential acceptable locations.

If you identify potential acceptable locations through the advertisement or market survey, conduct a cost-benefit analysis following the procedures in 570.402–6. Based on the results of the cost-benefit analysis, take appropriate action as follows:

(a) If the cost-benefit analysis indicates that the Government will recover relocation costs and duplication of costs through competition, develop an SFO and negotiate with all interested parties following 570.3.

(b) If the cost-benefit analysis indicates that the Government cannot expect to recover relocation costs and duplication of costs through competition, prepare a justification for approval in accordance with FAR 6.3 and 506.3. Explain both:

(1) How you performed the cost-benefit analysis.

(2) That the cost-benefit analysis indicates that award to any other offeror will likely result in substantial costs to the Government that the Government cannot expect to recover through competition.

570.402–6 Cost-benefit analysis.

(a) The cost-benefit analysis must consider all the following:

(1) The prices of other potentially available properties.

(2) Relocation costs, including estimated costs for moving, telecommunications, and alterations, amortized over the firm term of the lease.

(3) Duplication of costs to the Government.

(4) Other appropriate considerations.

(b) Establish the prices for other potentially available properties by requesting each prospective offeror to provide an informational quotation for standard space for comparison purposes.

(1) Adjust the prices quoted for standard space for any special requirements.

(2) You do not need a formal SFO to obtain the informational quotation. However, you must provide a general description of the Government's needs.

(3) If you obtain oral quotations, document the following information, as a minimum:

(i) Name and address of the firm solicited.

(ii) Name of the firm's representative providing the quote.

(iii) Price(s) quoted.

(iv) Description of the space and services for which the quote is provided.

(v) Name of the Government employee soliciting the quotation.

(vi) Date of the conversation.

(4) Compare the informational quotations to the present lessor's price, adjusted to reflect the anticipated price for a succeeding lease.

570.403 Expansion requests.

(a) If the expansion space is in the general scope of the lease, you may acquire the space through a modification without further justification under FAR 6.3.

(b) If the expansion space needed is outside the general scope of the lease, determine whether it is more prudent to provide the expansion space by supplemental agreement to the existing lease or to satisfy the requirement by competitive means.

(1) Conduct a market survey to determine the availability of suitable alternative locations.

(2) If you identify alternate locations that can satisfy the total requirement, perform a cost-benefit analysis to determine whether it is in the Government's best interest to relocate. Consider, as appropriate.

(i) The cost of the alternate space compared to the cost of expanding at the existing location.

(ii) The cost of moving.

(iii) The cost of duplicating existing improvements.

(iv) The cost of the unexpired portion of the firm lease term. If a termination is possible, use the actual cost of such an action.

(v) the cost of disruption to the agency's operation.

(c) If you determine not to use competitive procedures and the expansion space is outside the general scope of the lease:

(1) If the estimated value of the acquisition does not exceed the simplified lease acquisition threshold, document the file as required by 570.203–2(b).

(2) If the estimated value of the acquisition exceeds the simplified lease acquisition threshold, prepare a justification for approval under FAR 6.3 and 506.3.

570.404 Superseding leases.

(a) Consider executing a superseding lease to replace an existing lease when the Government need numerous or detailed modifications to the space that would cause complications or substantially change the present lease.

(b) If the value of the superseding lease exceeds the simplified lease acquisition threshold, the justification and approval requirements in FAR 6.3 and 506.3 apply. If the cost does not exceed the simplified lease acquisition threshold, you may use the simplified procedures in 570.2 and explain the absence of competition in the file.

570.405 Lease extensions.

(a) This section applies to extension of the term of a lease to provide for continued occupancy on a short-term basis.

(b) If the value of a lease extension will exceed the simplified lease acquisition threshold, the justification and approval requirements in FAR 6.3 and 506.3 apply. For extensions that will

not exceed the simplified lease acquisition threshold, you may use the simplified procedures in 570.2 and explain the absence of competition in the file.

(c) FAR 6.302–1 permits contracting without providing for full and open competition when the property or services needed by the agency are available from only one responsible source and no other type of property or services will satisfy the needs of the agency. This authority may apply to lease extensions in situations such as the following:

(1) The agency occupying the leased space is scheduled to move into other Federally controlled space, but encounters unexpected delays in preparing the new space for occupancy.

(2) The Government encounters unexpected delays outside of its control in acquiring replacement space.

(3) The Government is consolidating various agencies occupying the leased space and you need to extend the terms of some leases to establish a common expiration date.

Subpart 570.5—Special Aspects of Contracting for Lease Alterations

570.501 General.

(a) Acquire alterations through a modification to an existing lease if you meet all the following conditions:

(1) The alterations fall in the general scope of the lease. Consider whether the work can be regarded as fairly and reasonably an inseparable part of the lease requirement originally contracted for.

(2) The lessor is willing to perform the proposed alterations at a fair and reasonable price.

(3) It is in the Government's interest to acquire the alterations from the lessor.

(b) If proposed alterations are outside the general scope of the existing lease, decide whether to acquire the alterations through either:

(1) A supplemental lease agreement, justified and approved under 570.502–1.

(2) Government performance or a separate contract. The lease must first provide the Government the right to perform alterations to the leased space.

570.502 Alterations by the lessor.

These procedures apply to alterations you acquire directly from a lessor by modification or supplement lease agreement.

570.502–1 Justification and approval requirements.

If the proposed alterations are outside the general scope of the lease and you plan to acquire them from the lessor without competition, the following justification and approval requirements apply:

(a) If the alteration project will exceed the simplified lease acquisition threshold, the justification and approval requirements in FAR 6.3 and 506.3 apply.

(b) If the alteration project will exceed $2,500, but not the simplified lease acquisition threshold, you may use simplified acquisition procedures and explain the absence of competition in the file.

(c) If the alternation project will not exceed $2,500, no justification and approval is required.

570.502–2 Procedures.

(a) *Scope of work.* Prepare a scope of work for each alteration project.

(b) *Independent Government estimate.* Obtain an independent Government estimate for each alteration project, including changes to existing alteration agreements with the lessor.

(c) *Request for proposal.* (1) Provide the scope of work to the lessor, including any plans and specifications, and request a proposal. Indicate in the request for proposal if the Government will make progress payments and provide for retainage, when appropriate.

(2) Request sufficient cost or price information to permit a price analysis.

(d) *Audits.* If you require cost or pricing data and the alteration project will exceed $500,000, request an audit.

(e) *Proposal evaluation.* (1) Determine if the proposal meets the Government's requirements.

(2) Analyze price or cost. At a minimum, compare the proposed cost to the independent estimate and, if applicable, any audit received.

(3) Analyze profit following FAR 15.404–4.

(4) Document your analysis under this paragraph and the resulting negotiation objectives.

(f) *Price negotiations*. (1) Exercise sound judgment. You may make reasonable compromises as necessary.

(2) The negotiated price should provide the lessor with the greatest incentive for efficient and economical performance.

(3) Document negotiations in the contract file.

(g) *Award*. Use GSA Form 276, Supplemental Lease Agreement. If the modification does not exceed the simplified acquisition threshold, you may use GSA Form 300, Order for Supplies or Services. Reference the lease on the form.

(h) *Inspection and payment*. Do not make final payment for alterations until the work is:

(1) Inspected by a qualified Government employee or independent Government contractor.

(2) Confirmed as completed in a satisfactory manner.

[64 FR 37265, July 9, 1999; 64 FR 49844, Sept. 14, 1999]

570.503 Alterations by the Government or through a separate contract.

(a) If the Government chooses to exercise its right to make the alterations rather than contracting directly with the lessor, the Government may either:

(1) Have Federal employees perform the work.

(2) Contract out the work using standard contracting procedures that apply to a construction contract performed on Federal property.

(b) If the Government decides to contract for the work, invite the lessor, as well as all other prospective contractors, to submit an offer for the project.

Subpart 570.6—Solicitation Provisions and Contract Clauses

570.601 FAR provisions and clauses.

Include provisions or clauses substantially the same as the following FAR provisions and clauses.

If . . .	Then include . . .
(a) the estimated value of the acquisition exceeds $2,500.	52.204–3 Taxpayer Identification. 52.219–1 Small Business Program Representations. 52.222–36 Affirmative Action for Workers with Disabilities. 52.232–23 Assignment of Claims. 52.233–1 Disputes.
(b) the estimated value of the acquisition exceeds $10,000.	52.222–21 Prohibition of Segregated Facilities. 52.222–22 Previous Contracts and Compliance Reports. 52.222–25 Affirmative Action Compliance. 52.222–26 Equal Opportunity. 52.222–35 Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era. 52.222–37 Employment Reports on Disabled Veterans and Veterans of the Vietnam Era.
(c) the estimated value of the acquisition exceeds $25,000.	52.209–6 Protecting the Government's Interest when Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment.
(d) the estimated value of the acquisition exceeds $100,000.	52.203–11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions.
(e) the estimated value of the acquisition exceeds the simplified lease acquisition threshold.	52.203–2 Certificate of Independent Price Determination. 52.203–7 Anti-Kickback Procedures. 52.209–5 Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters. 52.215–2 Audit and Records—Negotiation. 52.219–8 Utilization of Small Business Concerns. 52.223–6 Drug-Free Workplace. 52.233–2 Service of Protest.
(f) the estimated value of the acquisition exceeds $500,000.	52.219–9 Small Business Subcontracting Plan. 52.219–16 Liquidated Damages—Subcontracting Plan.
(g) the estimated value of the acquisition exceeds $500,000 and the acquisition includes an evaluation factor that considers the extent of participation of small disadvantaged business concerns in accordance with FAR 19.12.	52.219–24 Small Disadvantaged Business Participation Program—Targets. 52.219–25 Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting.

If . . .	Then include . . .
(h) the estimated value of the acquisition exceeds $10 million.	52.222–24 Preaward On-Site Equal Opportunity Compliance Review.
(i) you require cost or pricing data for work or services exceeding $500,000.	52.215–10 Price Reduction for Defective Cost or Pricing Data. 52.215–12 Subcontractor Cost or Pricing Data.
(j) you authorize submission of facsimile proposals.	52.215–5 Facsimile Proposals.
(k) a negotiated acquisition provides monetary incentives based on actual achievement of small disadvantaged business subcontracting targets under FAR 19.1203 and 519.1203.	52.219–26 Small Disadvantaged Business Participation Program—Incentive Subcontracting.

570.602 GSAR solicitation provisions.

Each SFO must include provisions substantially the same as the following, unless you determine that the provision is not appropriate:

552.270–1 Instructions to Offerors—Acquisition of Leasehold Interests in Real Property. Use Alternate I if you decide that it is advantageous to the Government to allow offers to be submitted up to the exact time specified for award. Use Alternate II if the Government intends to award without discussions. These two alternates are not exclusive.
552.270–2 Historic Preference.
552.270–3 Parties to Execute Lease.

570.603 GSAR contract clauses.

Insert clauses substantially the same as the following in solicitations and contracts for leasehold interests in real property that exceed the simplified lease acquisition threshold, unless you determine that a clause is not appropriate. You do not require a deviation under 570.604 to determine that a clause in this section is not appropriate. Use the clauses at your discretion in actions at or below the simplified lease acquisition threshold.

552.270–4 Definitions. You must use this clause if you use 570.270–28.
552.270–5 Subletting and Assignment.
552.270–6 Maintenance of Building and Premises—Right of Entry.
552.270–7 Fire and Casualty Damage.
552.270–8 Compliance with Applicable Law.
552.270–9 Inspection—right of Entry.
552.270–10 Failure in Performance.
552.270–11 Successors Bound.
552.270–12 Alterations.
552.270–13 Proposals for Adjustment.
552.270–14 Changes.
552.270–15 Liquidated Damages. Insert this clause in solicitations and contracts if you have a critical requirement to meet the delivery date and you cannot establish an actual cost for the loss to the Government resulting from late delivery.
552.270–16 Adjustment for Vacant Premises.
552.270–17 Delivery and Condition.
552.270–18 Default in Delivery—Time Extensions.
552.270–19 Progressive Occupancy.
552.270–20 Payment.
552.270–21 Effect of Acceptance and Occupancy.
552.270–22 Default by Lessor During the Term.
552.270–23 Subordination, Nondisturbance and Attornment
552.270–24 Statement of Lease.
552.270–25 Substitution of Tenant Agency.
552.270–26 No Waiver.
552.270–27 Integrated Agreement.
552.270–28 Mutuality of Obligation.
552.270–29 Acceptance of Space.

570.604 Deviations to provisions and clauses.

(a) You need a deviation approved under 501.4 to omit any required provision or clause.

(b) You also need an approved deviation to modify the language of a provision or clause mandated by statute (e.g., GSAR 552.203–5, Covenant Against Contingent Fees, FAR 52.215–2, Audit and Records—Negotiation). The authorizing statue must allow for a waiver.

(c) Certain clauses required by non-GSA regulations require approval of the issuing agency before you can delete or modify them. For example, 52.222–26, Equal Opportunity; 52.222–35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era; and 52.222–36, Affirmative Action for Workers with Disabilities, require the approval of the Department of Labor's Office of Federal Contract Compliance Programs before they can be deleted from or modified in the SFO or lease.

Subpart 570.7—Forms

570.701 Standard forms.

Use Standard Form 2, U.S. Government Lease for Real Property, to award leases unless you use GSA Form 3626 (see 570.702). Delete the reference to the Standard Form 2–A in paragraph 7.

570.702 GSA forms.

(a) You may use GSA Form 3626, U.S. Government Lease for Real Property (Short Form), to award leases if you use the simplified leasing procedures in 570.2 or if you determine it advantageous to use.

(b) You may use GSA Form 276, Supplemental Lease Agreement, for actions requiring the agreement of both parties. This includes actions such as amending an existing lease to acquire additional space, obtaining partial release of space, revising the terms of a lease, settling restoration claims, and acquiring alterations.

(c) You may use GSA Form 1364, Proposal To Lease Space, to obtain offers from prospective offerors.

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SUBCHAPTER A—GENERAL

PART 601—DEPARTMENT OF STATE ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26159, July 11, 1988, unless otherwise noted.

601.000 Scope of part.

This part describes the Department of State Acquisition Regulation (DOSAR) in terms of establishment, relationship to the Federal Acquisition Regulation (FAR), arrangement, applicability, and deviation procedures.

[53 FR 26159, July 11, 1988, as amended at 59 FR 66750, Dec. 28, 1994]

Subpart 601.1—Purpose, Authority, Issuance

601.101 Purpose.

The DOSAR is issued to provide Department guidance in accordance with the policy cited in FAR 1.301(a)(2). The portions of this regulation that affects the relationship between a Department of State organization and a contractor or potential contractor are published in this chapter 6 of title 48 of the Code of Federal Regulations, in accordance with FAR 1.301(b).

[59 FR 66750, Dec. 28, 1994]

601.105 Issuance.

601.105–3 Copies.

The DOSAR is available through the Department's Intranet system at *http://aope.a.state.gov*, or through the Internet from A/OPE's Acquisition Web site. The Internet address is: *http://www.statebuy.state.gov/*.

[69 FR 19329, Apr. 13, 2004]

601.106 OMB approval under the Paperwork Reduction Act.

The Paperwork Reduction Act of 1980 (44 U.S.C. 3501–3520) requires that Federal agencies obtain approval from the Office of Management and Budget before collecting information from ten (10) or more members of the public. Individuals are not required to respond to information collection unless the OMB number and burden estimate information is provided. Accordingly, the information and recordkeeping requirements contained in this regulation have been approved by OMB under OMB Control Number 1405–0050. The burden estimate is 225,503 hours. The information and recordkeeping requirements for Form DS–4053, *Department of State Mentor-Protégé Program Application*, have been approved by OMB under

OMB Control Number 1405–0161; the burden estimate is 294 hours.

[64 FR 43620, Aug. 11, 1999, as amended at 69 FR 19329, Apr. 13, 2004; 71 FR 34839, June 16, 2006]

Subpart 601.2—Administration

601.201 Maintenance of the FAR.

601.201–1 The two councils.

The Office of the Procurement Executive (A/OPE) represents the Department of State (DOS) on the Civilian Agency Acquisition Council. The Procurement Executive shall appoint a representative for this purpose. A/OPE is responsible for coordinating with all interested DOS elements proposed FAR revisions and for advocating FAR revisions sought by the Department.

[53 FR 26159, July 11, 1988, as amended at 59 FR 66750, Dec. 28, 1994]

Subpart 601.3—Agency Acquisition Regulations

601.301 Policy.

(a) The Assistant Secretary of State for Administration is the agency head for the purposes of FAR 1.301 (see Delegation of Authority No. 120 (34 FR 18095, October 30, 1969), as amended by Delegation of Authority No. 120–4 (59 FR 38022, July 26, 1994)). Under Delegation of Authority No. 120–5 (59 FR 62771, December 6, 1994), the Assistant Secretary of State for Administration redelegated to the Procurement Executive the authority to prescribe, promulgate, and amend DOS acquisition policies, rules, and regulations.

(b) The Department of State Acquisition Regulation (DOSAR) is prescribed under the authority of 22 U.S.C. 2658 and 40 U.S.C. 486(c).

(c) The DOSAR implements and supplements the FAR.

[59 FR 66751, Dec. 28, 1994, as amended at 64 FR 43620, Aug. 11, 1999]

601.302 Limitations.

(a) The FAR and the DOSAR apply to all DOS acquisitions of personal property and services, including construction, both within and outside the United States, unless expressly excluded by this subpart, or exempt from the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 474(7)), or undertaken pursuant to section 208 of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 4308), or the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 292 *et seq.*).

(b) At posts where Joint Administrative Offices have been formed, the FAR and the DOSAR apply to all Agency for International Development (AID) administrative and technical support acquisitions, except in those areas which have been exempted by the cognizant administrative office.

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994; 64 FR 43620, Aug. 11, 1999]

601.303 Publication and codification.

(a) The DOSAR is issued as Chapter 6 of Title 48, Code of Federal Regulations. The DOSAR is established as Chapter 6 of the Federal Acquisition Regulations System. The DOSAR is divided into the same parts, subparts, sections, subsections, and paragraphs as is the FAR. However, when the FAR coverage is adequate by itself there will be no corresponding DOSAR coverage. Where the DOSAR implements a specific part, subpart, section, or subsection of the FAR, the DOSAR coverage is numbered and titled to correspond to the appropriate FAR number and title, except that the DOSAR number will include a 6 or 60 such that there will always be three numbers to the left of the decimal. For example, the DOSAR implementation of FAR 14.1 is shown as 614.1 and the DOSAR implementation of FAR 1.301 is shown as 601.301. Materials that supplement the FAR are assigned the numbers 70 and up. For example, DOSAR requires additional definitions than those used in FAR; this supplementary material is provided in 602.101–70.

(b) The DOSAR and its revisions are published in the FEDERAL REGISTER and in the Code of Federal Regulations, both of which may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

(c) The DOSAR shall be referenced in the same manner as described at FAR 1.105–2(c).

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994; 64 FR 43620, Aug. 11, 1999]

Subpart 601.4—Deviations from the FAR

601.403 Individual deviations.

The Procurement Executive is the agency head's designee for the purposes of FAR 1.403.

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994]

601.404 Class deviations.

The Procurement Executive is the agency head's designee for the purposes of FAR 1.404(a).

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994]

601.405 Deviations pertaining to treaties and executive agreements.

The Procurement Executive shall determine whether a deviation pertaining to treaties and executive agreements is authorized under FAR 1.405 or that a request for deviation is required under FAR 1.405(e).

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994]

601.470 Deviations from the DOSAR

The authority to approve any deviations from the DOSAR is reserved to the Procurement Executive.

[53 FR 26159, July 11, 1988, as amended at 59 FR 66751, Dec. 28, 1994]

Subpart 601.5—Agency and Public Participation

601.570 Rulemaking.

(a) The DOSAR is promulgated and may be revised, as necessary, in accordance with FAR part 1.

(b) The Procurement Executive shall issue all DOS acquisition regulations.

[59 FR 66751, Dec. 28, 1994]

Subpart 601.6—Career Development, Contracting Authority, and Responsibilities

601.601 General.

The Procurement Executive is the agency head for the purposes of FAR 1.601.

601.602 Contracting officers.

601.602–1 Authority.

(a) DOS contracts are awarded pursuant to the foreign affairs management responsibilities conferred on the Secretary of State (22 U.S.C. 2656), and the various laws, regulations, and Executive Orders relating thereto.

(b) Except as otherwise provided by law, DOS regulations, and this DOSAR, the Procurement Executive has the authority to execute, award, and administer contracts, purchase orders, other contractual arrangements, and other agreements, including FAR-covered interagency acquisition agreements, for the expenditure of funds involved in the acquisition of personal property, services, and for the sale of personal property. The Procurement Executive may further delegate this authority to those DOS employees appointed or designated to the contracting activities enumerated in 601.603–70.

(c) The contracting officer shall not award, modify, or terminate a contract unless all reviews, clearances, and approvals prescribed in the FAR or the DOSAR have been obtained, and all applicable requirements of law, the FAR, the DOSAR, and other regulations have been met.

[53 FR 26159, July 11, 1988, as amended at 55 FR 5774, Feb. 16, 1990; 59 FR 66751, Dec. 28, 1994; 72 FR 45695, Aug. 15, 2007]

601.603 Selection, appointment, and termination of appointment.

601.603–1 General.

Details of the Department's acquisition career management program are described in 14 FAH–3, Acquisition Career Management Program Handbook, which is available on the Internet at *http://foia.state.gov/REGS/search.asp.*

[72 FR 45695, Aug. 15, 2007]

601.603–3 Appointment.

(a) *General*. There is no contracting officer authority conferred upon any DOS employee by virtue of position. The Procurement Executive appoints all DOS contracting officers, in conformance with FAR 1.603–3, with the one exception as noted in paragraph (b) of this section. The contracting officer shall retain the original copy of the Standard Form 1402, Certificate of Appointment, signed by the Procurement Executive. Only qualified employees shall be appointed as contracting officers. A/OPE is responsible for providing guidance and oversight in managing such appointments.

(b) *Temporary warrants*. The Chief of Mission is delegated the authority by the Procurement Executive to issue temporary contracting officer warrants for periods up to 90 calendar days in order to cover emergency, post-specific operational requirements (e.g., staffing gaps, medical evacuations, extended leave, etc.). These temporary appointments shall be executed on the Standard Form 1402, and a copy shall be furnished to A/OPE. The warrant shall contain both a dollar limitation of no more than $100,000 and a specific time period (not to exceed 90 days) during which the warrant is effective.

(c) *Non-Federal employees*. Only United States Government direct-hire employees who are U.S. citizens shall be appointed as contracting officers. Personal services contractors, Foreign Service Nationals, and Third Country Nationals are not eligible for appointment as DOS contracting officers.

(d) *Personal services agreements*. Individuals who may sign personal services agreements (PSAs) are limited to the following:

(1) The Human Resources Officer;

(2) The Human Resources/Financial Management Officer; or,

(3) The Management Officer or an American Foreign Service Officer designated to perform human resource functions.

[59 FR 66752, Dec. 28, 1994, as amended at 64 FR 43620, Aug. 11, 1999; 69 FR 19330, Apr. 13, 2004]

601.603–70 Delegations of authority.

(a) *Delegations*. As stated in 601.603–3(a), there is no contracting officer authority conferred by virtue of position. Pursuant to 601.602–1(b), the Procurement Executive has designated the following as contracting activities as defined in FAR 2.101. These authorities are not redelegable. In addition, specific individuals are designated as heads of contracting activities (HCAs) (*see* FAR 2.101):

(1) *Overseas posts*. Each overseas post shall be regarded as a contracting activity to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies, equipment, publications, and services. The Principal Officer, the Management Officer, or the Supervisory General Services Officer are designated as HCAs; *provided*, that he/she has a contracting officer's warrant issued by the Procurement Executive. The Procurement Executive (or authorized A/OPE staff) may delegate to a contracting officer, on a case-by-case basis, the authority to award a contract or modification which exceeds the contracting officer's warrant level.

(i) No authority is delegated to enter into cost-reimbursement, fixed-price incentive, or fixed-price redeterminable contracts. Design/build solicitations and contracts may only be entered into with the written approval of A/OPE and OBO. Proposed construction contracts exceeding $500,000 and any related architect-engineer contracts must have prior A/OPE approval.

(ii) When expressly authorized by a U.S. Government agency which does not have a contracting officer at the post, the officers named in paragraph (a)(1) introductory text of this section may enter into contracts for that agency. Use of this authority is subject to the statutory authority of that agency and any special contract terms or other requirements necessary for compliance with any conditions or limitations applicable to the funds of that agency. The agency's authorization shall cite the statute(s) and state any special contract terms or other requirements with which the acquisition so authorized must comply. In view of the contracting officer's responsibility

for the legal, technical, and administrative sufficiency of contracts, questions regarding the propriety of contracting actions that the post is required to take pursuant to this authority may be referred to the Department for resolution with the headquarters of the agency concerned.

(2) *Office of Logistics Management; Office of Acquisition Management (A/LM/AQM)*. The authority to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies and services, including construction, is delegated to the Director or designee as the HCA.

(3) *Foreign Service Institute*. The authority to enter into and administer contracts pursuant to Chapter 7, Title I, of the Foreign Service Act of 1980, as amended (22 U.S.C. 4021 *et seq.*), is delegated to the Director of the Foreign Service Institute, the Executive Director, the Deputy Executive Director, and the Supervisory Contracting Officer as the HCA.

(4) *Office of Foreign Missions*. The authority to enter into and administer contracts pursuant to Title II of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 4301 *et seq.*), is delegated to the Director, Office of Foreign Missions, and the Administrative Officer as the HCA.

(5) *U.S. Mission to the United Nations*. The authority to enter into and administer contracts pursuant to the United Nations Participation Act of 1945, as amended (22 U.S.C. 287), is delegated to the Counselor for Administration as the HCA.

(6) *Regional Procurement Support Offices*. The authority to enter into and administer contracts for the expenditure of funds involved in the acquisition of supplies, equipment, publications, and services on behalf of overseas posts is delegated to each Director, Regional Procurement Support Office (RPSO) as the HCA at the following locations:

(i) RPSO Frankfurt in conjunction with Consulate General Frankfurt; and

(ii) RPSO Florida in conjunction with the Florida Regional Center.

(b) *Other delegations*. Several DOS offices have been delegated limited procurement authority, although they have not been designated as HCAs. Matters requiring HCA resolution are referred to the A/LM/AQM. These delegations are provided only to warranted contracting officers in the respective offices. They are as follows:

(1) *Office of Language Services*. The authority to enter into and administer simplified acquisition transactions under FAR Part 13 and orders against existing contracts up to the maximum ordering threshold or limitation for interpreting, translating, conference reporting, and related language support and escort services.

(2) *Office of Overseas Schools*. The authority to enter into and administer simplified acquisition transactions under FAR Part 13 and orders against existing contracts up to the maximum ordering threshold or limitation pursuant to section 29 of the State Department Basic Authorities Act of 1956, as amended.

(3) *Library*. The authority to enter into and administer simplified acquisition transactions under FAR Part 13 and orders against existing contracts up to the maximum ordering threshold or limitation pursuant to the provisions of the Public Printing and Documents Act of 1968, as amended, and for the acquisition of newspapers, books, maps, and periodicals.

(4) *Office of International Conferences*. The authority to enter into and administer simplified acquisition transactions under FAR Part 13 and orders against existing contracts up to the maximum ordering threshold or limitation pursuant to section 5, Title I, of the Department of State Basic Authorities Act of 1956, as amended.

(5) *Bureau of International Narcotics and Law Enforcement Affairs*. The authority to enter into and administer simplified acquisition transactions under FAR Part 13, orders against existing contracts up to the maximum ordering threshold or limitation and personal services contracts pursuant to the Foreign Assistance Act of 1961, as amended; and, 48 CFR Chapter 7, Agency for International Development Acquisition Regulation, including any amendments thereto. These authorities extend to any acquisition performed by any Department of State contracting activity on behalf of INL.

(6) *Office of Small and Disadvantaged Business Utilization*. The authority to enter into and administer 8(a) purchase orders and contracts as a third party pursuant to the Memorandum of Understanding signed with the Small Business Administration.

(7) *Bureau of Administration, Office of Operations*. The authority to enter into and administer simplified acquisition transactions for emergency or contingency operations necessary to protect life or federal property. This authority is limited to cases when a contracting officer in the Office of Acquisitions Management is unavailable.

[59 FR 66752, Dec. 28, 1994, as amended at 60 FR 39662, Aug. 3, 1995; 64 FR 43620, Aug. 11, 1999; 69 FR 19330, Apr. 13, 2004; 71 FR 34839, June 16, 2006; 72 FR 45695, Aug. 15, 2007]

PART 602—DEFINITIONS OF WORDS AND TERMS

Subpart 602.1—Definitions

Sec.
602.101 Definitions.
602.101–70 DOSAR definitions.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26162, July 11, 1988, unless otherwise noted.

Subpart 602.1—Definitions

602.101 Definitions.

602.101–70 DOSAR definitions.

For the purposes of the DOSAR, unless otherwise indicated, the following terms have the meanings set forth in this subpart.

Chief of Mission means the principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 (Public Law 96–465) to be temporarily in charge of such a mission or office.

Consolidated Receiving Point or *CRP*; means the contractor under contract to a Despatch Agency to receive and prepare items for shipment to a post. The CRP receives, records, consolidates, and packs items for shipment overseas under the direction of the Despatch Agency.

Department or *DOS* means the Department of State, including all of its activities wherever located.

Despatch Agency means the office responsible for the transportation of supplies between the U.S. and posts within its specific geographic area as assigned by the Office of Logistics Operations. There are six Despatch Agencies, one each in Iselin, New Jersey; Baltimore, Maryland; Miami, Florida; Seattle, Washington; Brownsville, Texas; and the European Logistical Support Office in Antwerp, Belgium.

Government means the Government of the United States of America unless specifically stated otherwise.

Major system has the same definition as described in FAR 2.101; however, the Department of State's dollar threshold as defined in paragraph (2) is $30 million. The Under Secretary for Management is the head of the agency for the purposes of paragraph (3).

Overseas post means a ''post'' located outside the United States of America.

Post means a diplomatic or consular mission of the United States of America, administered or managed by the DOS.

[53 FR 26163, July 11, 1988, as amended at 59 FR 66753, Dec. 28, 1994; 60 FR 39662, Aug. 3, 1995; 64 FR 43620, Aug. 11, 1999; 69 FR 19330, Apr. 13, 2004; 72 FR 45695, Aug. 15, 2007]

PART 603—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 603.1—Safeguards

Sec.
603.104 Procurement integrity.
603.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.
603.104–7 Violations or possible violations.

Subpart 603.2—Contractor Gratuities to Government Personnel

603.204 Treatment of violations.

Subpart 603.4—Contingent Fees

603.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 603.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

603.601 Policy.
603.602 Exceptions.

Subpart 603.7—Voiding and Rescinding Contracts

603.704 Policy.
603.705 Procedures.

Subpart 603.8—Limitations on the Payment of Funds To Influence Federal Transactions

603.804 Policy

Subpart 603.9—Whistleblower Protections for Contractor Employees

603.905 Procedures for investigating complaints.
603.906 Remedies.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26163, July 11, 1988, unless otherwise noted.

Subpart 603.1—Safeguards

SOURCE: 64 FR 43620, Aug. 11, 1999, unless otherwise noted.

603.104 Procurement integrity.

603.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(a) The following classes of persons may be authorized to receive contractor bid or proposal information or source selection information by the contracting officer or head of the contracting activity, who is the agency head's designee, when such access is necessary to the conduct of an acquisition:

(1) Individuals involved in the selection process, such as the Contracting Officer's Representative, technical evaluators, advisors, consultants, and the Source Selection Official;

(2) Clerical personnel directly involved in the acquisition;

(3) Supervisors in the contracting officer's chain of command;

(4) Contracting personnel involved in reviewing or approving the solicitation, contract, or contract modification;

(5) Individuals from offices who may be required to perform pre-award audits, such as DCAA; and,

(6) Personnel in the following offices: Office of Small and Disadvantaged Business Utilization (A/SDBU), Office of the Legal Adviser, Office of Legislative Affairs, Office of the Inspector General, Office of the Procurement Executive, the Small Business Administration, and the Office of Federal Contract Compliance Programs (Department of Labor).

(c) All information which is considered proprietary or source selection information shall be marked to prevent its unauthorized disclosure before award. This may be performed by marking each page of proprietary or source selection material with the statement ''Source Selection Information—See FAR 3.104'' or ''Proprietary Information—See FAR 3.104'', as applicable. Alternatively, this requirement may be met by attaching Forms DS–1926, Proprietary Information (Cover Page), and DS–1927, Source Selection Information (Cover Page), to any proprietary and source selection information. Individuals responsible for preparing derivative documents which reference, cite, or paraphrase proprietary or source selection information, are responsible for marking such documents as indicated in this paragraph. The required marking or cover page shall be included when technical proposals are submitted for evaluation and when an audit is requested. After award, the procedures governing the Freedom of Information Act and related laws/regulations shall be followed regarding release of proprietary or source selection information.

[64 FR 43620, Aug. 11, 1999. Redesignated at 69 FR 19330, Apr. 13, 2004]

603.104–7 Violations or possible violations.

(a)(1) The contracting officer shall report any violation or possible violation to the head of the contracting activity after he or she has reviewed the documentation and has concluded that there is no impact on the acquisition.

(d)(2)(ii)(B) The Procurement Executive is the agency head's designee for the purposes of FAR 3.104–7(d)(2)(ii)(B).

[64 FR 43620, Aug. 11, 1999. Redesignated and amended at 69 FR 19330, Apr. 13, 2004]

Subpart 603.2—Contractor Gratuities to Government Personnel

603.204 Treatment of violations.

(a) The Procurement Executive is the agency head's designee for the purposes of FAR 3.204.

(b) Upon completion of the investigation and/or prosecution or with the consent of the U.S. Department of Justice, the Assistant Inspector General for Investigations shall provide to the Procurement Executive a report, together with all pertinent documentation, concerning the suspected violation. The Office of the Procurement Executive shall provide to the contractor a written notice by certified mail, return receipt requested, presenting the findings, and shall establish a schedule, including location, for an investigative hearing for the purposes described in FAR 3.204(b).

[64 FR 43620, Aug. 11, 1999, as amended at 69 FR 19330, Apr. 13, 2004]

Subpart 603.4—Contingent Fees

603.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) The contracting officer may request the Office of the Inspector General to develop further information if the facts available are deemed insufficient to determine whether an actual violation has occurred. The contracting officer may also obtain the advice of the Office of the Legal Adviser as to the legality and general propriety of any information disclosed.

[64 FR 43621, Aug. 11, 1999]

Subpart 603.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

603.601 Policy.

(a) It is Department policy not to award contracts to Federal employees, or businesses substantially owned or controlled by Federal employees. This policy also applies to individuals hired under personal services agreements and personal services contracts.

[59 FR 66754, Dec. 28, 1994, as amended at 69 FR 19331, Apr. 13, 2004]

603.602 Exceptions.

The Procurement Executive is the agency head's designee for the purposes of FAR 3.602.

Subpart 603.7—Voiding and Rescinding Contracts

603.704 Policy.

The Procurement Executive is the agency head's designee for the purposes of FAR 3.704.

[59 FR 66754, Dec. 28, 1994]

603.705 Procedures.

The Procurement Executive is the agency head's designee for the purposes of FAR 3.705.

[59 FR 66754, Dec. 28, 1994]

Subpart 603.8—Limitations on the Payment of Funds To Influence Federal Transactions

603.804 Policy

(b) The contracting officer shall forward a copy of all contractor disclosures furnished pursuant to the clause at FAR 52.203–12 to the Office of the Legal Adviser, Employment Law, Senior Ethics Counsel (L/EMP/Ethics).

[69 FR 19331, Apr. 13, 2004]

Subpart 603.9—Whistleblower Protections for Contractor Employees

SOURCE: 64 FR 43621, Aug. 11, 1999, unless otherwise noted.

603.905 Procedures for investigating complaints.

The Procurement Executive is the agency head's designee for the purposes of FAR 3.905.

603.906 Remedies.

The Procurement Executive is the agency head's designee for the purposes of FAR 3.906.

PART 604—ADMINISTRATIVE MATTERS

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

Subpart 604.5—Electronic Commerce in Contracting

604.502 Policy.

(b) The Assistant Secretary of State for Administration is the head of the agency for the purpose of FAR 4.502(b).

(1)(i) *Materials not in automated format.* For solicitations containing drawings or other materials that are not in an automated format, the contracting officer shall:

(A) Post as much of the solicitation as possible on the Internet; and,

(B) Make hard copies available for those parts of the solicitation that are not in an automated format.

(ii) *Posting solicitations for overseas contracting activities.* Contracting officers at overseas contracting activities shall post competitive local guard solicitations on the Internet using the Government-wide point of entry if U.S. firms may be competing. Posting of other solicitations is optional.

[69 FR 19331, Apr. 13, 2004, as amended at 72 FR 45695, Aug. 15, 2007]

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 605—PUBLICIZING CONTRACT ACTIONS

Subpart 605.2—Synopsis of Proposed Contract Actions

Sec.
605.202 Exceptions.
605.202–70 Foreign acquisitions.
605.207–70 Acquisitions available from only one responsible source.

Subpart 605.3—Synopses of Contract Awards

605.303 Announcement of contract awards.

Subpart 605.4—Release of Information

605.403 Requests from members of Congress.
605.404 Release of long-range acquisition estimates.
605.404–1 Release procedures.

Subpart 605.5—Paid Advertisements

605.502 Authority.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26164, July 11, 1988, unless otherwise noted.

Subpart 605.2—Synopsis of Proposed Contract Actions

605.202 Exceptions.

605.202–70 Foreign acquisitions.

(a) *Policy*. In accordance with a Determination and Findings issued by the Assistant Secretary of State for Administration, the requirement for advance notices in the Governmentwide point of entry (GPE) for the Department's foreign acquisitions awarded by overseas contracting activities is waived. GPE notices may be published for any acquisition where the contracting officer decides that publication would be in the Department's best interests.

(b) *Procedures*. Contracting officers at overseas contracting activities are not required to prepare an individual determination and findings to document their decision to waive the GPE notice requirements.

(c) *Competition requirements*. Nothing in this section waives the requirement to obtain competition as required by FAR part 6 and DOSAR (48 CFR) part 606. Competition, including the use of written solicitation, shall be obtained in all cases to the extent feasible. If there are known U.S. firms or firms with U.S. affiliations in local residence capable of supplying the required supplies or services, the contracting activity shall ensure that those firms are included in the source list for the acquisition.

(d) *Policy exclusions*. GPE waiver authority does not apply to local guard service contracts exceeding $250,000, or any contracts exceeding $5 million. Local guard service contracts that exceed $250,000 and other contracts that exceed $5 million shall be published in the GPE. Option year prices shall be included when computing the applicability of this threshold.

[60 FR 39662, Aug. 3, 1995, as amended at 64 FR 43621, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004]

605.207–70 Acquisitions available from only one responsible source.

In addition to the information required at FAR 5.207, each notice of a proposed acquisition from only one responsible source shall include descriptions of the specific qualifications or capabilities required to perform the work and the information a potential source must submit.

[53 FR 26164, July 11, 1988, as amended at 69 FR 19331, Apr. 13, 2004]

Subpart 605.3—Synopses of Contract Awards

605.303 Announcement of contract awards.

(a) Contracting officers shall make information available on awards over $10 million to the Bureau of Legislative Affairs, upon request, in sufficient time for an announcement by 5:00 p.m. Washington, DC time on the day of the award. This requirement applies only

to awards made by domestic contracting activities where performance will take place within the United States or its possessions.

[59 FR 66755, Dec. 28, 1994, as amended at 64 FR 43621, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004]

Subpart 605.4—Release of Information

605.403 Requests from members of Congress.

The Procurement Executive is the agency head for the purposes of FAR 5.403.

[59 FR 66755, Dec. 28, 1994, as amended at 72 FR 45695, Aug. 15, 2007]

605.404 Release of long-range acquisition estimates.

605.404–1 Release procedures.

The Procurement Executive is the agency head's designee for the purposes of FAR 5.404–1(a) and the agency head for the purposes of FAR 5.404–1(b).

[55 FR 5774, Feb. 16, 1990]

Subpart 605.5—Paid Advertisements

605.502 Authority.

(a) For paid advertisements in newspapers within the United States, the head of the contracting activity is the agency head's designee for the purposes of FAR 5.502(a). For acquisitions by overseas posts necessitating paid advertisements in newspapers outside the United States, the head of the contracting activity is the agency's head's designee for the purposes of FAR 5.502(a). When the head of the contracting activity is the contracting officer for the acquisition, no further approvals are necessary.

[59 FR 66755, Dec. 28, 1994]

PART 606—COMPETITION REQUIREMENTS

Subpart 606.2—Full and Open Competition After Exclusion of Sources

Sec.
606.202 Establishing or maintaining alternate sources.

Subpart 606.3—Other Than Full and Open Competition

606.302 Circumstances permitting other than full and open competition.
606.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
606.302–4 International agreement.
606.302–6 National security.
606.302–7 Public interest.
606.303–1 Requirements.
606.304 Approval of the justification.
606.304–70 Acquisitions by overseas posts.
606.370 Department of State standardization program.

Subpart 606.5—Competition Advocates

606.501 Requirement.
606.501–70 Overseas posts.
606.570 Solicitation provision.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26165, July 11, 1988, unless otherwise noted.

Subpart 606.2—Full and Open Competition After Exclusion of Sources

606.202 Establishing or maintaining alternate sources.

The Procurement Executive is the agency head for the purposes of FAR 6.202.

Subpart 606.3—Other Than Full and Open Competition

606.302 Circumstances permitting other than full and open competition.

606.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(b)(4) The Procurement Executive is the agency head for the purposes of FAR 6.302–1(b)(4).

[59 FR 66755, Dec. 28, 1994]

606.302–4 International agreement.

(b)(2) In accordance with FAR 6.302–4, guard services shall be acquired from the host government only when it is the sole available source.

[59 FR 66755, Dec. 28, 1994]

606.302–6 National security.

(b) This subsection applies to all acquisitions involving national security information, regardless of dollar amount. In no case shall information be classified in order to restrict competition. Information may be classified only when its authorized disclosure could be expected to cause damage to national security.

(c)(1) The Chief, Controls Division, Office of Intelligence Liaison, Directorate for Coordination, Bureau of Intelligence and Research, is responsible for reviewing and certifying on any proposed acquisitions derived from or funded or administered by intelligence community agencies that involve sensitive compartmented information and ensuring that the provisions of Executive Order 12958 and FAR 6.302–6 have been met. The Office Director, Office of Information Security, Office of Security Infrastructure, Bureau of Diplomatic Security (DS/SI/IS) is responsible for reviewing and certifying on all other proposed acquisitions funded by the Department of State that involve national security information and ensuring that the provisions of Executive Order 12958 and FAR 6.302–6 have been met. When disclosure of the Department's needs through full and open competition would compromise national security, the Justification for Other than Full and Open Competition shall include the following specific information:

(i) How national security would be compromised if the Department of State's (or other agencies') needs were disclosed in the GPE;

(ii) Why the GPE notice cannot be worded in such a manner that national security would not be compromised;

(iii) Necessity for access to classified information to prepare technical and/or cost proposal and level of security clearance required;

(iv) Necessity for access to classified information to perform the proposed contract and level of security clearance required;

(v) Number and value of contracts that the justification covers; and

(vi) A statement as follows: ''I hereby certify that the national security concerns of the referenced acquisition(s) meet the criteria set forth in Executive Order 12958 and FAR 6.302–6''.

(2) Any acquisition involving national security information shall be publicized in the GPE unless disclosure of the agency's needs would compromise national security.

(3) The contracting officer is responsible for soliciting offers from as many potential sources as is practicable under the circumstances. However, given the sensitivity required for acquisitions involving national security information, it is expected that requirements offices will work closely with the contracting officer in maximizing competition.

[59 FR 66755, Dec. 28, 1994, as amended at 64 FR 43621, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004; 72 FR 45695, Aug. 15, 2007]

606.302–7 Public interest.

The authority to approve the determination prescribed in FAR 6.302–7(c) is reserved to the Secretary of State.

606.303–1 Requirements.

Justifications for contract actions prescribed in FAR 6.303–1(d) shall be forwarded by the contracting officer to A/OPE for transmittal to the Office of the United States Trade Representative.

[53 FR 26165, July 11, 1988, as amended at 59 FR 66755, Dec. 28, 1994]

606.304 Approval of the justification.

(a)(2) The approval authority for a proposed contract over $550,000 but not exceeding $11.5 million for domestic contracting activities that do not have a competition advocate is the Department Competition Advocate.

(d) The estimated dollar value of all options shall be included in determining the approval level of a justification.

[59 FR 66755, Dec. 28, 1994, as amended at 64 FR 43621, Aug. 11, 1999; 72 FR 45695, Aug. 15, 2007]

606.304–70 Acquisitions by overseas posts.

The Departmental Competition Advocate is the approval authority for the purposes of FAR 6.304(a)(3). This authority is not redelegable. Any such justification must be transmitted

through the Principal Officer at the overseas post.

[59 FR 66756, Dec. 28, 1994]

606.370 Department of State standardization program.

(a) It is the Department's policy to promote full and open competition in all procurement actions. The authority at 41 U.S.C. 253(c)(1) shall be used with respect to standardization when only specified makes and models of equipment will satisfy the Department's needs and only one source is available. This policy applies to all acquisitions involving standardization, regardless of dollar amount.

(b) Contracts awarded under the authority at 41 U.S.C. 253(c)(1) shall be supported by the written justification described in FAR 6.303. The contracting officer, requirements office, procuring activity competition advocate, and the Procurement Executive shall approve all Justifications for Other than Full and Open Competition that cite standardization of technical equipment as justification to restrict competition. The Management Officer at each post is the procuring activity competition advocate for that post and the requirements office at post is the embassy functional office responsible for identifying the need to contract.

(c) Procurement of specified makes and models of technical equipment and systems, for which there is only one source of supply, is considered other than full and open competition. Such procurements shall be supported by an approved Justification for Other than Full and Open Competition. The justification shall include the content requirements of FAR 6.303–2. The justification shall also address potential cost savings in areas such as inventory, operations, training, maintenance, repairs, and administrative and management support. Areas of consideration for potential cost savings shall be supported by detailed estimates as attachments to the justification. Justifications shall specify an effective period, which shall bear a reasonable relationship to the life of the technical equipment. The effective period shall not exceed six years with a review at the end of the first three years. Periodic reviews shall be made during the standardization period to determine whether the standardization should be continued, revised or canceled.

[59 FR 66756, Dec. 28, 1994, as amended at 69 FR 19331, Apr. 13, 2004]

Subpart 606.5—Competition Advocates

606.501 Requirement.

(a) The Procurement Executive is the head of the agency for the purposes of FAR 6.501 and designates the Department Competition Advocate.

(b) A contracting activity competition advocate has been designated for A/LM/AQM. A/LM/AQM's competition advocate is also designated the contracting activity competition advocate for the Regional Procurement Support Offices. The Department Competition Advocate is the activity competition advocate for all other domestic contracting activities.

[59 FR 66756, Dec. 28, 1994, as amended at 64 FR 43622, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004]

606.501–70 Overseas posts.

The Management Officer at each overseas post is the competition advocate for that post.

[53 FR 26165, July 11, 1988, as amended at 69 FR 19331, Apr. 13, 2004]

606.570 Solicitation provision.

The contracting officer shall insert the provision at 652.206–70, Competition Advocate/Ombudsman, in all solicitations exceeding the simplified acquisition threshold.

[64 FR 43622, Aug. 11, 1999]

PART 607—ACQUISITION PLANNING

AUTHORITY: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR subpart 1.3.

Subpart 607.1—Acquisition Plans

607.103 Agency-head responsibilities.

The Procurement Executive is the agency head's designee for the purposes of FAR 7.103.

[55 FR 5774, Feb. 16, 1990]

PART 609—CONTRACTOR QUALIFICATIONS

Subpart 609.2—Qualifications Requirements

Sec.
609.202 Policy.
609.206 Acquisitions subject to qualification requirements.
609.206–1 General.

Subpart 609.4—Debarment, Suspension, and Ineligibility

609.403 Definitions.
609.403–70 DOSAR definitions.
609.404 Excluded parties list system.
609.404–70 Specially Designated Nationals List.
609.405 Effect of listing.
609.405–1 Continuation of current contracts.
609.405–2 Restrictions on subcontracting.
609.405–70 Termination action decision.
609.406 Debarment.
609.406–1 General.
609.406–3 Procedures.
609.407 Suspension.
609.407–1 General.
609.407–3 Procedures.

Subpart 609.5—Organizational and Consultant Conflicts of Interests

609.503 Waiver.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26165, July 11, 1988, unless otherwise noted.

Subpart 609.2—Qualifications Requirements

609.202 Policy.

The authority prescribed in FAR 9.202(a)(1) is delegated, without power of redelegation, to the head of the contracting activity.

[53 FR 26165, July 11, 1988, as amended at 59 FR 66756, Dec. 28, 1994]

609.206 Acquisitions subject to qualification requirements.

609.206–1 General.

(b) The authority prescribed in FAR 9.206–1(b) is delegated, without power of redelegation, to the head of the contracting activity.

[64 FR 43622, Aug. 11, 1999]

Subpart 609.4—Debarment, Suspension, and Ineligibility

609.403 Definitions.

Debarring official means the Procurement Executive.

Suspending official means the Procurement Executive.

609.403–70 DOSAR definitions.

Fact-finding official means the chairperson of a three member fact-finding panel. The panel comprises one representative each from the Office of the Legal Adviser, the contracting activity, and the requirements office. The representative from the Office of the Legal Adviser is the panel chairperson.

Notice means a written communication sent by certified mail (return receipt requested) to the last known address of the party, its identified counsel, or its agent. In the case of a business, such notice may be sent to any partner, principal officer, director, owner or co-owner, or joint venturer. If no return receipt is received within 10 calendar days of mailing, receipt shall then be presumed. This definition applies to the notice requirements in FAR 9.406–3 and FAR 9.407–3.

609.404 Excluded parties list system.

A/OPE shall accomplish the agency responsibilities prescribed in FAR 9.404(c)(1) through (c)(3). The authority to establish procedures prescribed in FAR 9.404(c)(7) is delegated, without power of redelegation, to the head of the contracting activity.

[53 FR 26165, July 11, 1988; 53 FR 36461, Sept. 20, 1988, as amended at 55 FR 5774, Feb. 16, 1990; 59 FR 66756, Dec. 28, 1994; 72 FR 45695, Aug. 15, 2007]

609.404–70 Specially Designated Nationals List.

Contracting officers shall not award to any of the entities listed on the Specially Designated Nationals (SDN) List, available on the Department of Treasury's Office of Foreign Assets Control Web site at *http://www.treas.gov/ofac/*. Contracting officers shall consult this list prior to award for any dollar amount. This list

may also be accessed through the EPLS Web site at *http://www.epls.gov*.

[69 FR 19331, Apr. 13, 2004, as amended at 72 FR 45695, Aug. 15, 2007]

609.405 Effect of listing.

(a) The Procurement Executive is the agency head's designee for the purposes of FAR 9.405(a).

(d)(3) The Procurement Executive is the agency head's designee for the purposes of FAR 9.405(d)(3).

[59 FR 66756, Dec. 28, 1994, as amended at 60 FR 39662, Aug. 3, 1995; 64 FR 43622, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004]

609.405–1 Continuation of current contracts.

The Procurement Executive is the agency head's designee for the purposes of FAR 9.405–1. The decision whether to terminate a current contract shall be made in consideration of the circumstances listed in 609.405–70.

609.405–2 Restrictions on subcontracting.

The Procurement Executive is the agency head's designee for the purposes of FAR 9.405–2.

609.405–70 Termination action decision.

(a) Prior to making a decision to terminate, based on the consideration listed below, the contracting officer shall have the proposed action reviewed and approved by:

(1) The Office of the Legal Adviser;

(2) An individual one level above the contracting officer; and

(3) For overseas posts, A/OPE.

(b) *Termination for default.* Termination for default under a contract's default clause is appropriate when the circumstances giving rise to the debarment or suspension also constitute a default in the contractor's performance of that contract. Debarment or suspension of the contractor for reasons unrelated to the performance of that contract may not support a termination for default.

(c) *Termination for convenience or cancellation.* Termination for convenience or cancellation under appropriate contract clauses should be considered when the contractor presents a significant risk to the Government in completing a current contract and when such termination for convenience or cancellation is determined to be in the Government's best interests. In making this determination, the contracting officer should consider such factors as the—

(1) Seriousness of the cause for debarment or suspension;

(2) Extent of contract performance;

(3) Potential costs to the Government;

(4) Urgency of the requirement and the impact of the delay; and/or

(5) Availability of other safeguards to protect the Government's interests.

[53 FR 26165, July 11, 1988, as amended at 59 FR 66756, Dec. 28, 1994]

609.406 Debarment.

609.406–1 General.

The Procurement Executive is the agency head's designee for the purposes of FAR 9.406–1(c).

609.406–3 Procedures.

(a) *Investigation and referral.* (1) DOS employees aware of any cause that may serve as the basis for debarment shall immediately refer those cases through the contracting officer to the debarring official. The debarring official shall immediately refer to the Office of the Inspector General all reported cases that involve possible criminal or fraudulent activities for investigation by that office. The Office of the Inspector General shall investigate the matter, as appropriate, and provide a copy of its investigation report to the Procurement Executive for consideration of debarment action, if and when appropriate. The contracting officer shall provide to the Procurement Executive and the Office of the Inspector General a copy of his or her intended actions in response to the Office of the Inspector General report.

(2) Referrals for consideration of debarment shall include—

(i) The cause for debarment (see FAR 9.406–2);

(ii) A statement of facts;

(iii) Copies of supporting documentary evidence and a list of all necessary or probable witnesses, including addresses and telephone numbers, together with a statement concerning

their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of all contractors involved, either as principals or as affiliates, including current or last known home and business addresses and ZIP codes;

(v) A statement of the acquisition history with such contractors;

(vi) A statement concerning any known pertinent active or potential criminal investigation, criminal or civil court proceedings, or administrative claim before Boards of Contract Appeals; and

(vii) A statement from each DOS organizational element affected by the debarment action as to the impact of a debarment on DOS programs.

(b) *Decisionmaking process*. (1) If the contractor does not respond to a debarment notice within 30 calendar days after receipt of the notice, the debarring official may put the debarment into effect.

(2) In response to the debarment notice, if the contractor or its representative notifies the debarring official within 30 days after receipt of the notice that it wants to present information and arguments in person to the debarring official, that official shall chair such a meeting within 20 calendar days of receipt of the request, unless the contractor requests a longer period of time. The oral presentation shall be conducted informally and a transcript need not be made. However, the contractor may supplement its oral presentation with written information and arguments for inclusion in the administrative record.

(3) Pursuant to FAR 9.406–3(b)(2), the contractor may request and shall be entitled to a hearing before the fact-finding panel. The fact-finding panel shall conduct the hearing within 20 calendar days of receipt of the request, unless the contractor requests a longer period of time.

(4) The debarring official shall convene the fact-finding panel for this purpose and shall provide the panel with a copy of all documentary evidence on the matter. Upon receipt of such material, the fact-finding official shall notify the contractor and schedule a hearing date.

(5) In addition to the purposes provided in FAR 9.406–3(b)(2), the hearing is intended to provide the debarring official with findings of fact based on a preponderance of evidence submitted to the fact-finding panel and to provide the debarring official with a determination as to whether a cause for debarment exists, based on the facts as found.

(6) The fact-finding panel shall conduct its hearing in accordance with rules promulgated by the fact-finding official. The rules shall be as informal as is practicable, consistent with FAR 9.406–3(b) The fact-finding official is responsible for making the transcribed record of the hearing, unless the contractor and the fact-finding panel agree to waive the requirement for a transcript.

(7) The fact-finding official shall deliver written findings and the transcribed record, if made, to the debarring official within 30 calendar days after the hearing. The findings shall resolve any facts in dispute based on a preponderance of the evidence presented and recommend whether a cause for debarment exists.

(c) *Notice of proposal to debar*. (1) Upon receipt of a complete referral and after consulting with the Office of the Legal Adviser, the debarring official shall decide whether to initiate debarment action.

(2) When a determination is made to initiate action, the debarring official shall provide to the contractor and any specifically named affiliates written notice in accordance with FAR 9.406–3(c). A copy of the notice shall be provided to the DOS officer who made the referral and to each DOS organizational elements affected by the determination.

(3) When a determination is made not to initiate action, the debarring official shall so advise the DOS officer who made the referral.

(d) *Debarring official's decision*. In addition to complying with FAR 9.406–3(d) and FAR 9.406–3(e), the debarring official shall provide single copies of the decision to each DOS organizational element affected by the decision

and to the General Services Administration in accordance with 609.404.

[53 FR 26165, July 11, 1988; 53 FR 36461, Sept. 20, 1988, as amended at 64 FR 43622, Aug. 11, 1999; 69 FR 19331, Apr. 13, 2004]

609.407 Suspension.

609.407–1 General.

The Procurement Executive is the agency head's designee for the purposes of FAR 9.407–1(d).

609.407–3 Procedures.

(a) *Investigation and referral.* Investigation and referral shall be accomplished as provided in 609.406–3(a), except that referrals made to the suspending official shall cite causes pertinent to a suspension action (see FAR 9.407–2).

(b) *Decisionmaking process.* (1) If the contractor does not respond to a notice of suspension within 30 calendar days after receipt of the notice, the suspending official may proceed with completion of investigation.

(2) The DOS decisionmaking process for a suspension action pursuant to FAR 9.407–3(b) follow those established for a debarment action (see 609.406(b)), except that the contractor may request and shall be entitled to a hearing before the fact-finding panel only if permitted under FAR 9.407–3(b)(2).

(c) *Notice of suspension.* Notice of suspension shall be accomplished as provided in 609.406–3(a), except that the suspending official shall process the notice in accordance with FAR 9.407–3(c).

(d) *Suspending official's decision.* In addition to complying with FAR 9.407–3(d), the suspending official shall provide single copies of the decision to each DOS organizational element affected by the decision and to the General Services Administration in accordance with 609.404.

Subpart 609.5—Organizational and Consultant Conflicts of Interests

609.503 Waiver.

The Procurement Executive is the agency head's designee for the purposes of FAR 9.503.

PART 611—DESCRIBING AGENCY NEEDS

Sec.
611.002 Policy.
611.002–70 Metric system implementation.

Subpart 611.1—Selecting and Developing Requirements Documents

611.103 Market acceptance.

Subpart 611.5—Liquidated Damages

611.501 Policy.

Subpart 611.6—Priorities and Allocations

611.600 Scope of subpart.
611.602 General.
611.603 Procedures.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 64 FR 43622, Aug. 11, 1999, unless otherwise noted.

611.002 Policy.

611.002–70 Metric system implementation.

(a) *Policy.* The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205a, *et seq.*), requires Federal agencies to establish implementing guidelines pursuant to metric policy to adopt the metric system as the preferred system of weights and measurements for United States trade and commerce. This section establishes the Department of State's metric conversion guidelines.

(b) *Applicability.* This section applies to all DOS acquisitions, except to the extent that such use is impractical or is likely to cause significant inefficiencies or loss of markets to U.S. firms.

(c) *Definitions.*

Dual system means the use of both traditional and metric systems. For example, an item is designated, produced and described in inch-pound values with soft metric values also shown for information or comparison.

Hard metric means the use of only standard metric (SI) measurements in specifications, standards, supplies and services.

Hybrid system means the use of both traditional and hard metric values in specifications, standards, supplies and services.

Measurement sensitive means any item having an application or meaning depending substantially on some measured quantity. For example, measurement sensitive items include product or performance criteria and standards binding on others, such as emission levels, size and weight limitations, etc.

Metric system means the International System of Units (Le System International d'Unites (SI)) of the International Bureau of Weights and Measures.

Metrication means any act that increases metric system use, including metric training and initiation or conversion of measurement sensitive processes and systems to the metric system.

Soft metric means the result of mathematical conversion of inch-pound measurements to metric equivalents. The physical dimensions, however, are not changed.

Traditional system of weights and measurements means the predominant weight and measurement system currently used in the United States, also referred to as the ''inch-pound system.'' The traditional system includes such commonly used units as inch, foot, yard, mile, pint, quart, gallon, bushel, ounce (fluid and avoirdupois), pound, degree Fahrenheit, ampere, candela, and second.

(d) *Procedures.* (1) DOS contracting activities shall implement the metric system in a manner consistent with 15 U.S.C. 205a, *et seq.*

(2) All DOS contracting activities shall use the metric system in acquisition consistent with security, operations, economic, technical, logistical, training and safety requirements.

(3) The Department shall encourage industry to adopt the metric system by acquiring commercially available metric products and services that meet the Department's needs whenever practical. Toward this end, solicitations for DOS acquisitions shall:

(i) State all measurement sensitive requirements in metric terms whenever possible. Alternatives to hard metric are soft, dual and hybrid metric terms. The Metric Handbook for Federal Officials regarding the selection of proper metric units and symbols is available from the National Technical Information Service; and

(ii) For contracts expected to exceed $500,000 contracting officers shall return to the requirements office all specifications and statements of work that are not expressed in some form of metric terms unless the requirements office has prepared a justification, for the approval of the contracting officer, for the use of non-metric specifications or statements of work. The justification shall be in a format as prescribed by the head of the contracting activity. Option year prices shall be considered when computing the $500,000 threshold.

(4) Waivers are not required when ordering from Federal Supply Schedules.

(5) Valid justifications for non-metric specifications or statements of work include, but are not limited to:

(i) Existing specifications or standards are in inch-pound units, unless conversion of the existing specifications or standards is necessary or advantageous to the Government. Unnecessary retrofit of existing systems with new metric components should be avoided if the total cost of the retrofit, including redesign costs, exceeds $50,000;

(ii) Metric is not the accepted industry system with respect to a business-related activity; however, soft, hybrid, or dual systems may be used during the transition to hard metric;

(iii) The use of metric is impractical or is likely to cause significant inefficiencies or loss of markets to U.S. firms.

(6) The contracting officer shall review and, if acceptable, approve the waiver prior to the release of the solicitation. The waiver shall be placed in the contract file. If the waiver is not approved, the contracting officer shall return it to the requirements office with an explanation for the disapproval.

(7) The in-house operating metric costs shall be identified. Identification includes, but is not limited to, the cost of metric aids, tools, equipment, training and increased cost to develop metric specifications. All contracting activities and requirements offices shall maintain a record of any costs and/or savings brought about by metric conversion.

(8) Bulk (loose, unpacked) materials shall be specified and purchased in metric or dual units.

(9) Measuring devices, shop and laboratory equipment shall be purchased in metric or dual units.

(10) Shipping allowances, bills of lading and other shipping documents shall be expressed in metric or dual units.

Subpart 611.1—Selecting and Developing Requirements Documents

611.103 Market acceptance.

(a) The head of the contracting activity is the agency head for the purpose of FAR 11.103(a).

Subpart 611.5—Liquidated Damages

611.501 Policy.

(d) The head of the contracting activity is the agency head for the purpose of FAR 11.501(d).

[64 FR 43622, Aug. 11, 1999. Redesignated and amended at 71 FR 34839, June 16, 2006]

Subpart 611.6—Priorities and Allocations

SOURCE: 69 FR 19332, Apr. 13, 2004, unless otherwise noted.

611.600 Scope of subpart.

On September 18, 2001, the Department of Commerce (DOC) authorized the Department of State to use the Defense Priorities and Allocations System (DPAS). This authority expires on October 1, 2006. The Department of Defense has approved the Department's Embassy Security Protection Program (DOSESPP) as a national defense program eligible for the priorities support under the DPAS.

611.602 General.

(c)(1) Authority to use the DPAS is limited to the following circumstances:

(i) The contract or order must be placed with a U.S. firm; and,

(ii) The contract or order must be in support of the DOSESPP, which consists of work involving the security of overseas posts. The DOSESPP includes a wide range of elements of both physical and technical security, such as:

(A) New Embassy/Consulate Compound (NEC/NCC) Program. This program involves the construction of new secure Embassies, Consulates, and related facilities, as well as renovations of newly acquired buildings when used as alternatives to the construction of new secure buildings.

(B) Physical security upgrade. This includes installation of forced entry/ballistic resistant (FE/BR) windows and doors, walls/fences, active anti-ram barriers, bollards (concrete and steel barriers), and related items.

(C) Forced entry/ballistic resistant (FE/BR) components. This includes doors, windows, and related facilities and items that can provide the necessary time to protect Government personnel from attack.

(D) Armored vehicles. This includes passenger vehicles with appropriate armoring.

(E) Entry control and building surveillance equipment. This includes walk-through metal detectors, X-ray equipment, surveillance cameras, explosive detection equipment, and other features to enhance the protection of Government personnel and facilities.

(2) DOC has assigned the following priority rating to DOSESPP contracts or orders: DO-H8.

611.603 Procedures.

(f) Department of State contracting officers are authorized to sign DO-H8 rated contracts or orders. It is the responsibility of the requirements office to determine which contracts or orders should be rated. All contracts with U.S. firms under the DOSESPP will not necessarily need to be assigned a priority rating.

(g) The contracting officer should place a DO-H8 rating on any contract or order if there is any doubt as to whether a contractor doing work for Embassy security protection will be able to deliver on time. If an unrated contract or order is not completed on time, the contracting officer may modify the contract or order to add the rating; however, the rating shall only be effective for the newly established delivery date, not the original delivery date.

(1) DOC can provide special assistance to implement the DPAS program in specific cases. For example, the Department may request a higher priority rating, or request that DOC issue a written directive to a contractor that is not complying with the DPAS regulations. In addition, although the DPAS program normally applies only to U.S. firms, if the Department has a prime contract with a foreign firm that will be awarding subcontracts with U.S. firms, the Department may request from DOC authorization to place a rating on the prime contract.

(2) Contracting officers or requirements offices who wish to request special assistance from DOC must complete DOC Form BXA–999, *Request for Special Priorities Assistance*, and submit it to A/OPE, which will arrange for submission of the request to DOC.

PART 612—ACQUISITION OF COMMERCIAL ITEMS

Subpart 612.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

612.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) The head of the contracting activity shall approve any request for a waiver to tailor a clause or otherwise include any additional terms or conditions in a solicitation or contract in a manner that is inconsistent with customary commercial practice.

[69 FR 19332, Apr. 13, 2004]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 613—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 613.2—Actions At or Below the Micro-Purchase Threshold

613.201 General.

Subpart 613.3—Simplified Acquisition Methods

Sec.
613.303 Blanket purchase agreements (BPAs).
613.303–5 Purchases under BPAs.
613.305 Imprest funds and third party drafts.
613.305–3 Conditions for use.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 64 FR 43623, Aug. 11, 1999, unless otherwise noted.

Subpart 613.2—Actions At or Below the Micro-Purchase Threshold

613.201 General.

(g)(1) The procurement Executive is the agency head's designee for the purpose of FAR 13.201(g)(1).

[72 FR 45695, Aug. 15, 2007]

Subpart 613.3—Simplified Acquisition Methods

613.303 Blanket purchase agreements (BPAs).

613.303–5 Purchases under BPAs.

(b) Individual purchases under BPAs for commercial items may exceed the simplified acquisition threshold; however, the higher threshold must be consistent with the requirements of FAR 13.303–5(b)(1) and (2).

(c) In accordance with FAR 13.303–5(c), BPAs shall be awarded to small businesses to the maximum extent practicable.

[64 FR 43623, Aug. 11, 1999, as amended at 69 FR 19332, Apr. 13, 2004]

613.305 Imprest funds and third party drafts.

613.305–3 Conditions for use.

The Procurement Executive is the agency head's designee for the purposes of FAR 13.305–3(a).

PART 614—SEALED BIDDING

Subpart 614.2—Solicitation of Bids

Sec.
614.201 Preparation of Invitation for Bids (IFB).
614.201–70 Use of English language.

Subpart 614.4—Opening of Bids and Award of Contract

614.402 Opening of bids.
614.402–1 Unclassified bids.
614.402–70 Waiver of public opening of bids.
614.404 Rejection of bids.
614.404–1 Cancellation of invitations after opening.
614.407 Mistakes in bids.
614.407–3 Other mistakes disclosed before award.
614.407–4 Mistakes after award.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26168, July 11, 1988, unless otherwise noted.

Subpart 614.2—Solicitation of Bids

SOURCE: 64 FR 43623, Aug. 11, 1999, unless otherwise noted.

614.201 Preparation of Invitation for Bids (IFB).

614.201–70 Use of English language.

Use of English language solicitations and contracts is mandatory unless a deviation has been approved by the Procurement Executive in accordance with 601.470. If any part of a contract is not written in the English language, the contracting officer shall attach an accurate English language translation of such part to the original and each copy of the contract, unless the contracting officer determines such action is infeasible.

Subpart 614.4—Opening of Bids and Award of Contract

614.402 Opening of bids.

614.402–1 Unclassified bids.

After the unclassified bids have been opened pursuant to FAR 14.402–1, the bid opening officer shall announce that the opening of bids has been completed and that all bidders will be notified as soon as possible regarding the award.

614.402–70 Waiver of public opening of bids.

Overseas posts may request waiver of the public opening of bids if that activity is inconsistent with local law or legal practice, or with post security. For that purpose, the Procurement Executive must approve a deviation in accordance with 601.470.

614.404 Rejection of bids.

614.404–1 Cancellation of invitations after opening.

The authority to make the determination prescribed in FAR 14.404–1(c) is delegated, without power of redelegation, to the head of the contracting activity. The head of the contracting activity shall obtain the concurrence of the Office of the Legal Adviser before making a determination pursuant to this subsection.

(f) The head of the contracting activity is the agency head for the purpose of FAR 14.404–1(f). This authority is not redelegable.

[53 FR 26168, July 11, 1988, as amended at 59 FR 66758, Dec. 28, 1994; 64 FR 43623, Aug. 11, 1999]

614.407 Mistakes in bids.

614.407–3 Other mistakes disclosed before award.

The authority to make the determinations prescribed in FAR 14.407 is delegated, without power of redelegation, to the head of the contracting activity. In conformance with FAR 14.407–3(f), the head of the contracting activity shall obtain the concurrence of the Office of the Legal Adviser before making any determinations pursuant to this subsection.

[53 FR 26168, July 11, 1988. Redesignated and amended at 64 FR 43623, Aug. 11, 1999]

614.407–4 Mistakes after award.

The authority to make all determinations prescribed in FAR 14.407–4 is delegated, without power of redelegation, to the head of the contracting activity. In conformance with FAR 14.407–4(d), the head of the contracting activity shall consult with the Office of the Legal Adviser before making any determinations pursuant to this subsection.

[53 FR 26168, July 11, 1988. Redesignated and amended at 64 FR 43623, Aug. 11, 1999]

PART 615—CONTRACTING BY NEGOTIATION

Subpart 615.2—Solicitation and Receipt of Proposals and Information

Sec.
615.204 Contract format.
615.205 Issuing solicitations.
615.205–70 Use of English language.

Subpart 615.3—Source Selection

615.303 Responsibilities.

Subpart 615.6—Unsolicited Proposals

615.604 Agency points of contact.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 64 FR 43623, Aug. 11, 1999, unless otherwise noted.

Subpart 615.2—Solicitation and Receipt of Proposals and Information

615.204 Contract format.

(e) The Procurement Executive is the agency head's designee for the purposes of FAR 15.204(e).

615.205 Issuing solicitations.

(a) Contracting officers shall release copies of solicitation mailing lists in accordance with FAR 14.205–5(a). However, the list of those firms which actually submit proposals is not releasable. Requests for information other than

solicitation mailing lists shall be handled under the Freedom of Information Act.

615.205–70 Use of English language.

The requirements of DOSAR 614.201–70 also apply when contracting by negotiation.

Subpart 615.3—Source Selection

615.303 Responsibilities.

(a) The Procurement Executive is the agency head for the purposes of FAR 15.303(a).

Subpart 615.6—Unsolicited Proposals

615.604 Agency points of contact.

(a)(4) The contact points for unsolicited proposals are the heads of the contracting activities.

PART 616—TYPES OF CONTRACTS

Sec.
616.000 Scope of part.

Subpart 616.2—Fixed-Price Contracts

616.203 Fixed-Price contracts with economic price adjustment.
616.203–4 Contract clauses.
616.207 Firm-fixed-price, level-of-effort term contracts.
616.207–3 Limitations.

Subpart 616.5—Indefinite-Delivery Contracts

616.505 Ordering.
616.506 Solicitation provisions and contract clauses.
616.506–70 DOSAR contract clause.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26169, July 11, 1988, unless otherwise noted.

616.000 Scope of part.

The contracting officer may use any of the contract types described in FAR part 16 for acquisitions made under simplified acquisition procedures. The contracting officer shall document his/her decision to use a contract type in accordance with the requirements of FAR part 16.

[60 FR 39963, Aug. 3, 1995]

Subpart 616.2—Fixed-Price Contracts

616.203 Fixed-Price contracts with economic price adjustment.

616.203–4 Contract clauses.

Contracting officers at domestic contracting activities may use an economic price adjustment clause based on cost indexes of labor or material in accordance with the circumstances listed in FAR 16.203–4(d) and after obtaining the approval of the head of the contracting activity. Overseas posts may use the clause at 652.216–71, Price Adjustment, when procuring continuing services (e.g., guard, janitorial, building maintenance, and gardening). Posts shall obtain A/OPE approval for any price adjustment clause that differs from the clause at 652.216–71.

[53 FR 26169, July 11, 1988, as amended at 59 FR 66759, Dec. 28, 1994]

616.207 Firm-fixed-price, level-of-effort term contracts.

616.207–3 Limitations.

The head of the contracting activity is the chief of the contracting office for the purposes of FAR 16.207–3.

Subpart 616.5—Indefinite-Delivery Contracts

616.505 Ordering.

(b)(5) The Departmental Competition Advocate is designated the task and delivery order contract ombudsman.

[64 FR 43624, Aug. 11, 1999, as amended at 69 FR 19332, Apr. 13, 2004]

616.506 Solicitation provisions and contract clauses.

616.506–70 DOSAR contract clause.

The contracting officer shall insert the clause at 652.216–70, Ordering—Indefinite-Delivery Contract, whenever the clause at FAR 52.216–20, Definite Quantity, or the clause at FAR 52.216–21, Requirements, or the clause at FAR 52.216–22, Indefinite Quantity, is used.

[53 FR 26169, July 11, 1988. Redesignated at 64 FR 43624, Aug. 11, 1999]

PART 617—SPECIAL CONTRACTING METHODS

Subpart 617.1—Multiyear Contracting

Sec.
617.104 General.
617.105 Policy.
617.105–1 Uses.
617.108 Congressional notification.

Subpart 617.2—Options

617.201 Definitions.
617.201–70 DOSAR Definitions.
617.204 Contracts.

Subpart 617.5—Interagency Acquisitions Under the Economy Act

617.503 Determination and findings requirements.
617.504–70 Ordering procedures.

Subpart 617.6—Management and Operating Contracts

617.602 Policy.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26169, July 11, 1988, unless otherwise noted.

Subpart 617.1—Multiyear Contracting

SOURCE: 64 FR 43624, Aug. 11, 1999, unless otherwise noted.

617.104 General.

(b) The Procurement Executive is the agency head for the purpose of FAR 17.104(b).

617.105 Policy.

617.105–1 Uses.

(d) Every multiyear contract shall comply with FAR 17.104(c), unless an exception is approved through the budget process in coordination with the cognizant financial management office/comptroller.

617.108 Congressional notification.

(a) The Procurement Executive is the agency head for the purposes of FAR 17.108(a).

Subpart 617.2—Options

617.201 Definitions.

617.201–70 DOSAR Definitions.

Evaluated option means an option that is evaluated for award purposes by adding the total price for the option(s) to the total price for the basic requirement.

Price option means an option where the amount for the option is specified in or is reasonably determinable from the terms of the basic contract, as described in FAR 17.207(f) (1) through (5).

Unevaluated option means an option that is not included in the evaluation for award purposes.

Unpriced option means an option where the prices for the option quantities or performance periods are not specified in the contract at the time of award and the option prices are negotiated at the time the option is exercised.

[53 FR 26169, July 11, 1988, as amended at 59 FR 66759, Dec. 28, 1994]

617.204 Contracts.

(e) The Procurement Executive shall approve any solicitations or contracts which exceed the five (5) year maximum length for supplies or services. The Procurement Executive may delegate this approval authority to individuals within the Office of the Procurement Executive.

[59 FR 66759, Dec. 28, 1994, as amended at 69 FR 19332, Apr. 13, 2004]

Subpart 617.5—Interagency Acquisitions Under the Economy Act

617.503 Determination and findings requirements.

The authority to make the determination prescribed in FAR 17.503 is delegated to the head of the contracting activity.

[64 FR 43624, Aug. 11, 1999]

617.504–70 Ordering procedures.

(a) Department deputy assistant secretaries and Bureau Executive Directors or their equivalents are authorized

to execute Economy Act IAAs. Department contracting officers also are authorized to execute Economy Act IAAs, as prescribed in FAR 17.504(a).

(b) Department of State form DS–1921, Award/Modification of Interagency Acquisition Agreement, shall be used for all Economy Act IAAs where the Department is the requesting agency. It shall also be used for Economy Act IAAs where the Department is the servicing agency if the requesting agency does not have a similar form that provides the same information.

[59 FR 66759, Dec. 28, 1994, as amended at 64 FR 43624, Aug. 11, 1999; 69 FR 19332, Apr. 13, 2004]

Subpart 617.6—Management and Operating Contracts

617.602 Policy.

The Assistant Secretary for Administration is the agency head for the purposes of FAR 17.602.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 619—SMALL BUSINESS PROGRAMS

Sec.
619.000 Scope of part.

Subpart 619.2—Policies

619.201 General policy.
619.202 Specific policies.
619.202–70 The Department of State Mentor-Protégé Program.

Subpart 619.4—Cooperation with the Small Business Administration

619.402 Small Business Administration procurement center representatives.
619.402–70 DOS designee.

Subpart 619.5—Set-Asides for Small Business

619.501 General.
619.505 Rejecting Small Business Administration recommendations.
619.506 Withdrawing or modifying set asides.

Subpart 619.6—Certificates of Competency and Determinations of Eligibility

619.602 Procedures.
619.602–1 Referral.

Subpart 619.7—The Small Business Subcontracting Program

619.705 Responsibilities of the contracting officer under the subcontracting assistance program.
619.705–1 General support of the program.
619.705–3 Preparing the solicitation.
619.705–4 Reviewing the subcontracting plan.
619.705–6 Postaward responsibilities of the contracting officer.
619.705–6–70 Reporting responsibilities.
619.708–70 Solicitation provisions and contract clauses.

Subpart 619.8—Contracting with the Small Business Administration (The 8(a) Program)

619.800 General.
619.803 Selecting acquisitions for the 8(a) program.
619.803–70 Responsibilities of the Office of Small and Disadvantaged Business Utilization (A/SDBU).
619.803–71 Simplified procedures for 8(a) acquisitions under MOUs.
619.804 Evaluation, offering, and acceptance.
619.804–2 Agency offering.
619.804–3 SBA acceptance.
619.804–3–70 SBA acceptance under MOUs for acquisitions exceeding $100,000.
619.805 Competitive 8(a).
619.805–2 Procedures.
619.806 Pricing the 8(a) contract.
619.808 Contract negotiation.
619.808–1 Sole source.
619.810 SBA appeals.
619.811 Preparing the contracts.
619.811–1 Sole source.
619.811–2 Competitive.
619.811–3 Contract clauses.
619.812 Contract administration.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26170, July 11, 1988, unless otherwise noted.

619.000 Scope of part.

(b) It is the Department's policy to provide maximum opportunities for U.S. small businesses to participate in the acquisition process. DOS contracts that are awarded domestically for performance overseas shall be subject to the Small Business Act as a matter of policy. Contracts that are both awarded and performed overseas should comply on a voluntary basis.

[71 FR 34839, June 16, 2006]

Subpart 619.2—Policies

619.201 General policy.

(a) The Operations Director, Office of Small and Disadvantaged Business Utilization (A/SDBU), is responsible for performing all functions and duties prescribed in FAR 19.201(c) and (d).

(b) In addition to the requirements of FAR 19.201(b), each head of the contracting activity, or designee, is responsible for establishing in coordination with the A/SDBU Operations Director annual goals for the DOS small business program.

(d) Pursuant to FAR 19.201(d), each Small and Disadvantaged Business Utilization Specialist (SDBUS) is responsible for—

(1) Maintaining a program to locate capable small business, small disadvantaged business, women-owned small

business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business sources to fulfill DOS acquisition requirements;

(2) Coordinating inquiries and requests for advice from small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns on DOS contracting and subcontracting opportunities and other acquisition matters;

(3) Advising contracting activities on new or revised small business policies, regulations, procedures, and other related information;

(4) Assuring that small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns are provided adequate specifications or drawings by initiating, in writing, with appropriate technical and contracting personnel to ensure that all necessary specifications or drawings for current and future acquisitions, as appropriate, are available;

(5) Reviewing all proposed acquisitions in excess of the simplified acquisition threshold, including commercial items using the simplified acquisition procedures of FAR Subpart 13.5, and task and delivery orders under multiple award contracts exceeding $2 million, to assure that small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns will be afforded an equitable opportunity to compete and, as appropriate, initiating recommendations for small business, 8(a), or HUBZone set-asides. This includes proposed contract modifications for new or additional requirements that do not fall within the original scope of the contract and which exceed the simplified acquisition limitation. This does not include the exercising of contract options;

(6) Assuring that contract financing available under existing regulations is offered when appropriate and that requests by small business concerns for such financing are not treated as a handicap in the award of contracts;

(7) Providing assistance to the contracting officer in making determinations concerning responsibility of prospective contractors whenever small business concerns are involved;

(8) Participating in the evaluation of a prime contractor's small, small disadvantaged, woman-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business subcontracting plans;

(9) Assuring that the participation of small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns is accurately reported;

(10) Attending, as appropriate, debriefings to unsuccessful small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns to assist those firms in understanding requirements for responsiveness and responsibility so that the firm may be able to qualify for future awards;

(11) Making available to SBA copies of solicitations when so requested;

(12) When a bid or offer from a small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business has been rejected for non-responsiveness or non-responsibility, upon request, aid, counsel, and assist that firm in understanding requirements for responsiveness and responsibility so that the firm may be able to qualify for future awards;

(13) Participating in Government-industry conferences to assist small business concerns, including Business Opportunity/Federal Acquisition Conferences, Minority Business Enterprise Acquisition Seminars and Business Opportunity Committee meetings;

(14) Maintaining a list of supplies and services that have been placed as repetitive small business set-asides;

(15) Participating in the development, implementation, and review of

automated source systems to assure that the interests of small business concerns are included;

(16) Advising potential sources how they can obtain information about competitive acquisitions;

(17) Providing small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business, and service-disabled veteran-owned small business concerns information regarding assistance available from Federal agencies such as the Small Business Administration, Minority Business Development Agency, Bureau of Indian Affairs, Economic Development Administration, National Science Foundation, Department of Labor and others, including State agencies and trade associations; and

(18) Participating in interagency programs relating to small business matters as authorized by the A/SDBU Operations Director.

(f)(1) The Procurement Executive is the agency designee for the purposes of FAR 19.201(f)(1). The written determination shall be forwarded to the Procurement Executive through the A/SDBU Operations Director.

[69 FR 19333, Apr. 13, 2004, as amended at 72 FR 45695, Aug. 15, 2007]

619.202 Specific policies.

619.202–70 The Department of State Mentor-Protégé Program.

(a) *Purpose*. The Mentor-Protégé Program is designed to motivate and encourage firms to assist small businesses with business development, including small disadvantaged businesses, women-owned small businesses, HUBZone small businesses, veteran-owned small businesses and service-disabled veteran-owned small businesses. The program is also designed to improve the performance of DOS contracts and subcontracts, foster the establishment of long-term business relationships between small businesses and prime contractors, and increase the overall number of small businesses that receive DOS contract and subcontract awards. The program is limited to non-commercial item acquisitions.

(b) *Definitions*. The definitions of small business (SB), HUBZone small business concern (HUBZone), small disadvantaged business (SDB), women-owned small business (WOSB), veteran-owned small business (VOSB), and service-disabled veteran-owned small business (SDVOSB) are the same as found in FAR 2.101.

Mentor means a prime contractor that elects to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the protégé.

Protégé means a small business, HUBZone small business, small disadvantaged business, women-owned small business, veteran-owned small business, or service-disabled veteran-owned small business that is the recipient of developmental assistance pursuant to a mentor-protégé program.

(c) *Non-affiliation*. For purposes of the Small Business Act, a protégé firm is not considered an affiliate of a mentor firm solely because the protégé firm is receiving developmental assistance from the mentor firm under the program.

(d) *General policy*. (1) Eligible business prime contractors not included on the ''List of Parties Excluded from Federal Procurement and Nonprocurement Programs'' that are approved as mentor firms may enter into agreements with eligible protégé.

(2) A firm's status as a protégé under a DOS contract shall not have an effect on the firm's ability to seek other prime contracts or subcontracts.

(e) *Incentives for prime contractor participation*. (1) Under the Small Business Act (15 U.S.C. 637(d)(4)(E)), DOS is authorized to provide appropriate incentives to encourage subcontracting opportunities for small businesses consistent with the efficient and economical performance of the contract. This authority is limited to negotiated acquisitions.

(2) Before awarding a contract that requires a subcontracting plan, the existence of a mentor-protégé arrangement, and performance, if any, under an existing arrangement, may be considered by the contracting officer in:

(i) Evaluating the quality of a proposed subcontracting plan under FAR 19.704–5; and,

(ii) Assessing the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in determining contractor responsibility under FAR 19.705–5(a)(1).

(3) A non-monetary award may be presented annually (or as often as appropriate) to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Operations Director, A/SDBU.

(f) *Measurement of program success.* The success of the DOS Mentor-Protégé Program will be measured by:

(1) The increase in the number and dollar value of contracts awarded to protégé firms under DOS contracts from the date the protégé enters the program;

(2) The increase in the number and dollar value of contracts and subcontracts awarded to the protégé under other Federal agencies and commercial contracts; and,

(3) The developmental assistance provided by the mentor firm and the resulting increase in the technical, managerial, financial or other capabilities of the protégé firm, as reported by the protégé.

(g) *Eligibility of mentor firms.* A mentor firm:

(1) May be either a large or small business;

(2) Must be eligible for award of U.S. Government contracts;

(3) Must be able to provide developmental assistance that will enhance the ability of protégé to perform as subcontractors; and,

(4) Will be encouraged to enter into arrangements with protégé and firms with whom they have established business relationships.

(h) *Eligibility of protégé firms.* (1) A protégé firm must be:

(i) A SB, HUBZone, SDB, WOSB, VOSB, or SDVOSB as those terms are defined in FAR 2.101;

(ii) Small in the NAICS code for the services or supplies to be provided by the protégé to the mentor; and,

(iii) Eligible for award of U.S. Government contracts.

(2) Except for SDB and HUBZone firms, a protégé firm may self-certify to a mentor firm that it meets the requirements set forth in paragraph (h)(1) of this subsection. Mentors may rely in good faith on written representations by potential protégé that they meet the specified eligibility requirements. SDB status eligibility and documentation requirements are determined by FAR 19.304. HUBZone status eligibility and documentation requirements are determined by FAR 19.1303.

(3) Protégé may have multiple mentors. protégé participating in mentor-protégé programs in addition to DOS's program should maintain a system for preparing separate reports of mentoring activity for each agency's program.

(i) *Selection of protégé firms.* (1) Mentor firms are solely responsible for selecting protégé firms. The mentor is encouraged to identify and select a broad base of protégé firms whose core competencies support DOS's mission.

(2) Mentors may have multiple protégé.

(3) The selection of protégé firms by mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a mentor shall be handled in accordance with FAR and SBA regulations.

(j) *Application and agreement process for mentor-protégé teams to participate in the program.* (1) Firms interested in becoming a mentor firm shall apply in writing to A/SDBU. The application (Form DS–4053, Department of State Mentor-Protégé Program Application), shall be evaluated by the nature and extent of technical and managerial support proposed as well as the extent of financial assistance in the form of equity investment, loans, joint-venture support, and traditional subcontracting support proposed.

(2) A proposed mentor shall submit the application form and associated information to A/SDBU.

(k) *A/SDBU review of application.* (1) A/SDBU shall review the information to ensure the mentor and protégé are eligible and the information provided is complete. A/SDBU shall consult with the contracting officer on the adequacy

of the proposed mentor-protégé arrangement, and its review shall be complete no later than 30 calendar days after receipt of the application by A/SDBU.

(2) Upon completion of the review, A/SDBU will advise the mentor if its application is acceptable. The mentor may then implement the developmental assistance program in accordance with the approved agreement.

(3) The agreement defines the relationship between the mentor and protégé firms only. The agreement itself does not create any privity of contract between the mentor or protégé and the DOS.

(l) *Developmental assistance.* The forms of developmental assistance a mentor can provide to a protégé include:

(1) Management guidance relating to:

(i) Financial management;

(ii) Organizational management;

(iii) Overall business management/planning;

(iv) Business development; and,

(v) Technical assistance.

(2) Loans;

(3) Rent-free use of facilities and/or equipment;

(4) Property;

(5) Temporary assignment of personnel to protégé for purpose of training; and,

(6) Any other types of permissible, mutually beneficial assistance.

(m) *Obligation.* (1) A mentor or protégé firm may voluntarily withdraw from the program. However, in no event shall such withdrawal impact the program mission and contractual requirements under the prime contract.

(2) Mentor and protégé firms shall submit to A/SDBU annual reports on program progress of the mentor-protégé agreements. Large business mentors may submit these reports as part of their SB, HUBZone, SDB, WOSB, VOSB, and SDVOSB plan submission in accordance with the due date on the SF–295. DOS shall consider the following in evaluating these reports:

(i) Specific actions taken by the contractor, during the evaluation period, to increase the participation of protégés as suppliers to the U.S. Government and to commercial entities;

(ii) Specific actions taken by the mentor, during the evaluation period, to develop the technical and corporate administrative expertise of a protégé as defined in the agreement;

(iii) To what extent the protégé has met the developmental objectives in the agreement; and,

(iv) To what extent the mentor firm's participation in the Mentor-Protégé Program resulted in the protégé receiving contract(s) and subcontract(s) from private firms and agencies other than the DOS.

(3) The DOS A/SDBU shall submit the annual reports to the cognizant contracting officer regarding participating prime contractor(s) performance in the program.

(4) Mentor and protégé firms shall submit an evaluation to the A/SDBU at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the program, whichever comes first.

(n) *Internal controls.* (1) A/SDBU shall oversee the program and shall work with the cognizant contracting officer to achieve program objectives.

(2) DOS may rescind approval of an existing Mentor-Protégé agreement if it determines that such an action is in the Department's best interest. The recission shall be in writing and sent to the mentor and protégé firms after approval by the A/SDBU Operations Director. Recission of an agreement does not change the terms of the subcontract between the mentor and the protégé or the prime contractor's obligations under its subcontracting plan.

(o) *Solicitation provision and contract clause.* (1) The contracting officer shall insert the provision at 652.219–72, Department of State Mentor-Protégé Program, in all unrestricted solicitations exceeding $500,000 ($1,000,000 for construction) that offer subcontracting opportunities.

(2) The contracting officer shall insert the clause at DOSAR 652.219–73, Mentor Requirements and Evaluation, in all contracts where the prime contractor has signed a Mentor-Protégé Agreement with the Department of State.

[69 FR 19333, Apr. 13, 2004]

Subpart 619.4—Cooperation with the Small Business Administration

619.402 Small Business Administration procurement center representatives.

619.402–70 DOS designee.

Where the FAR requires action by a Small Business Administration procurement center representative, but one has not been assigned to the DOS contracting activity, the A/SDBU Operations Director shall perform the action so required.

Subpart 619.5—Set-Asides for Small Business

619.501 General.

(c) Contracting officers shall use Department of State Form DS–1910, Small Business Review—Actions Above the Simplified Acquisition Threshold, to document set-aside decisions.

[59 FR 66759, Dec. 28, 1994, as amended at 60 FR 39663, Aug. 3, 1995; 64 FR 43624, Aug. 11, 1999]

619.505 Rejecting Small Business Administration recommendations.

The Procurement Executive is the agency head for the purposes of FAR 19.505.

619.506 Withdrawing or modifying set asides.

(b) The Procurement Executive shall resolve disagreements between the A/SDBU Operations Director and the contracting officer.

[59 FR 66759, Dec. 28, 1994]

Subpart 619.6—Certificates of Competency and Determinations of Eligibility

619.602 Procedures.

619.602–1 Referral.

The contracting officer shall transmit to the A/SDBU Operations Director concurrently with the submission to the appropriate SBA Regional Office, a copy of the documentation supporting the determination that a small business concern is not responsible, as required by FAR 19.602–1(a).

Subpart 619.7—The Small Business Subcontracting Program

619.705 Responsibilities of the contracting officer under the subcontracting assistance program.

619.705–1 General support of the program.

It is the Department's policy to incorporate its current fiscal year goals as negotiated with the SBA into all pertinent Department solicitations, in addition to the standard subcontract clauses. Incorporation of the goals does not require that large prime contractors must subcontract, but does require that to the extent they plan to subcontract, specific goals be established for doing business with small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business firms. Where funds are available, an incentive clause such as that found in FAR 52.219–10, Incentive Subcontracting Program, is encouraged.

[69 FR 19335, Apr. 13, 2004]

619.705–3 Preparing the solicitation.

To further promote the use of small, disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business firms by large prime contractors, contracting officers are encouraged to consider the adequacy of the subcontracting plans, and/or past performance in achieving negotiated subcontract goals, as part of the overall evaluation of the technical proposals.

[69 FR 19335, Apr. 13, 2004]

619.705–4 Reviewing the subcontracting plan.

A/SDBU shall review subcontracting plans to determine if small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business concerns are afforded the maximum practicable opportunity to participate as subcontractors. A/

SDBU shall recommend to the contracting officer changes needed to subcontracting plans found to be deficient.

[69 FR 19335, Apr. 13, 2004]

619.705–6 Postaward responsibilities of the contracting officer.

619.705–6–70 Reporting responsibilities.

(a) The contracting officer shall forward to the A/SDBU Operations Director a copy of each subcontracting plan that was incorporated into a contract or contract modification. Each contracting activity shall maintain a list of its active prime contracts that contain subcontracting plans.

(b) Contracting officers shall collect subcontracting data from contractors required to establish subcontracting plans in support of small, small disadvantaged, women-owned small, HUBZone small, veteran-owned small, and service-disabled veteran-owned small business concerns. This data shall be collected annually and semiannually, using Standard Form 295, Summary Subcontracting Report, for the annual submissions, and Standard Form 294, Subcontracting Report for Individual Contracts, for the semiannual submissions. The head of the contracting activity shall forward these reports to the A/SDBU Operations Director, not later than the 30th day of the month following the close of the reporting period.

[53 FR 26170, July 11, 1988, as amended at 59 FR 66760, Dec. 28, 1994; 69 FR 19335, Apr. 13, 2004]

619.708–70 Solicitation provisions and contract clauses.

The contracting officer shall insert a provision substantially the same as the provision at 652.219–70, Department of State Subcontracting Goals, in solicitations whenever the clause at FAR 52.219–9, Small Business Subcontracting Plan, is used.

[59 FR 66760, Dec. 28, 1994, as amended at 69 FR 19335, Apr. 13, 2004]

Subpart 619.8—Contracting with the Small Business Administration (The 8(a) Program)

SOURCE: 64 FR 43624, Aug. 11, 1999, unless otherwise noted.

619.800 General.

(d) Utilizing Memoranda of Understanding (MOUs), the SBA has delegated its authority to contract directly with program participants under Section 8(a) of the Small Business Act to the Senior Procurement Executives of various Federal contracting activities. The Department of State has signed an MOU with SBA, effective May 6, 1998. Under the MOU, a contract may be awarded directly to an 8(a) firm on either a sole source or competitive basis. The SBA reserves the right to withdraw any delegation issued as a result of an MOU; however, any such withdrawal shall have no effect on contracts currently awarded under the MOU.

619.803 Selecting acquisitions for the 8(a) program.

619.803–70 Responsibilities of the Office of Small and Disadvantaged Business Utilization (A/SDBU).

A/SDBU shall review the capabilities of 8(a) concerns and disseminate that information to DOS program and contracting personnel. As necessary, A/SDBU shall obtain from the SBA or 8(a) concerns supplemental information for DOS program and contracting personnel.

619.803–71 Simplified procedures for 8(a) acquisitions under MOUs.

Contracting activities may use the simplified acquisition procedures of FAR part 13 and DOSAR part 613 to issue purchase orders or contracts, not exceeding $100,000, to 8(a) participants. The $100,000 limitation for use of FAR part 13 simplified acquisition procedures applies to the acquisition of both commercial and non-commercial items. The following applies to such acquisitions:

(a) Neither offering letters to, nor acceptance letters from, the SBA are required.

(b) The contracting activity shall use the Central Contractor Registration database (*http://www.ccr.gov*) to establish that the selected 8(a) firm is a current program participant.

(c) Once an 8(a) contractor has been identified, the agency contracting officer shall establish the price with the selected 8(a) contractor.

(d) The contracting officer shall issue the purchase order or contract directly to the 8(a) firm in accordance with the provisions of FAR part 13 and DOSAR part 613. The contracting officer shall insert FAR clause 52.219–14, Limitations on Subcontracting, and DOSAR clause 652.219–71, Section 8(a) Direct Award, in all purchase orders and contracts awarded under this subsection. The contracting officer's title shall include the contracting activity, as follows: Contracting Officer for the Department of State [insert contracting activity]. In addition, in accordance with the MOU, A/SDBU staff who have been issued limited contracting officer warrants for this purpose, shall sign the purchase order or contract as a third party.

(e) The contracting officer shall forward to the SBA District Office serving the 8(a) firm a copy of the purchase order or contract within five days after the order is issued.

[64 FR 43624, Aug. 11, 1999, as amended at 71 FR 34839, June 16, 2006]

619.804 Evaluation, offering, and acceptance.

619.804–2 Agency offering.

(a) When applicable, this notification shall identify that the offering is in accordance with the MOU identified in 619.800.

619.804–3 SBA acceptance.

619.804–3–70 SBA acceptance under MOUs for acquisitions exceeding $100,000.

(a) The SBA's decision whether to accept the requirement shall be transmitted to the contracting agency in writing within five working days of receipt of the offer.

(b) The SBA may request, and the contracting agency may grant, an extension beyond the five-day limit.

(c) SBA's acceptance letter should be faxed or e-mailed to the offering contracting agency.

(d) If the offering contracting agency has not received an acceptance or rejection of the offering from SBA within five days of SBA's receipt of the offering letter, the contracting agency may assume that the requirement has been accepted and proceed with the acquisition.

(e) The contents of the acceptance letter shall be limited to the eligibility of the recommended 8(a) contractor.

619.805 Competitive 8(a).

619.805–2 Procedures.

(a) 8(a) acquisitions may also be conducted using simplified acquisition procedures (see FAR part 13). The award process is significantly streamlined where an MOU is in place.

(b) For requirements exceeding $100,000 processed under the MOU cited in 619.800, the contracting officer shall submit the name, address, and telephone number of the low offeror (in sealed bid acquisitions) or the apparent successful offeror (in negotiated acquisitions) to the SBA Business Opportunity Specialist at the field office servicing the identified 8(a) firm. The SBA shall determine the eligibility of the firm(s) and advise the contracting officer within two working days of the receipt of the request. If the firm is determined to be ineligible, the contracting officer shall submit information on the next low offeror or next apparent successful offeror, as applicable, to the cognizant SBA field office.

[64 FR 43624, Aug. 11, 1999, as amended at 69 FR 19335, Apr. 13, 2004; 72 FR 45695, Aug. 15, 2007]

619.806 Pricing the 8(a) contract.

(a) When required by FAR subpart 15.4, the contracting officer shall obtain certified cost or pricing data directly from the 8(a) contractor if the contract is being awarded under the MOU cited in 619.800.

619.808 Contract negotiation.

619.808–1 Sole source.

(a) If the acquisition is conducted under an MOU cited in 619.800, the 8(a)

contractor is responsible for negotiating with the agency within the time established by the agency. If the 8(a) contractor does not negotiate within the established time and the agency cannot allow additional time, the agency may, after notification and approval by SBA, proceed with the acquisition from other sources.

(b) If the acquisition is conducted under an MOU cited in 619.800, the agency is delegated the authority to negotiate directly with the 8(a) participant; however, if requested by the 8(a) participant, the SBA may participate in the negotiations.

619.810 SBA appeals.

(c) The Procurement Executive is the agency head for the purposes of FAR 19.810(c).

[64 FR 43624, Aug. 11, 1999, as amended at 72 FR 45696, Aug. 15, 2007]

619.811 Preparing the contracts.

619.811–1 Sole source.

(d) If the award is to be made under an MOU cited in 619.800, the contract to be awarded by the contracting activity to the 8(a) firm shall be prepared in accordance with the contracting activity's normal procedures, given contract type and dollar amount, that the contracting activity would use for a similar, non-8(a) acquisition, except for the following:

(1) The award form shall cite 41 U.S.C. 253(c)(5) or 10 U.S.C. 2304(c)(5), as appropriate, and 15 U.S.C. 637(a) as the authority for use of other than full and open competition.

(2) The contracting officer shall insert FAR 52.219–14, Limitations on Subcontracting, and DOSAR 652.219–71, Section 8(a) Direct Awards.

(3) For acquisitions exceeding $100,000, the contracting activity shall include SBA's requirement number on the award document.

(4) A single award document shall be used between the agency and the 8(a) contractor, *i.e.*, an SBA signature will not be required. The title of the agency contracting officer shall include the contracting activity, as follows: Contracting Officer for the Department of State [insert contracting activity]. In addition, in accordance with the MOU, A/SDBU staff who have been issued limited contracting officer warrants for this purpose shall sign the contract as a third party. The 8(a) contractor's signature shall be placed on the award document as the prime contractor. The 8(a) contractor's name and address shall be placed in the ''Awarded to'' or ''Contractor name'' block on the appropriate form.

619.811–2 Competitive.

(a) If the award is made under the delegation of 8(a) contracting authority, competitive contracts for 8(a) firms shall be prepared in accordance with the same standards as 8(a) sole source contracts. See 619.811–1.

(b) If the acquisition is conducted under the MOU cited in 619.800, the process for obtaining signatures shall be as specified in 619.811–1(d)(4).

619.811–3 Contract clauses.

(d) The contracting officer shall insert the clause at FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, (Deviation), in competitive solicitations and contracts exceeding $100,000 when the acquisition is processed under the MOU cited in 619.800.

(e) The contracting officer shall insert the clause at FAR 52.219–14, Limitations on Subcontracting, and DOSAR 652.219–71, Section 8(a) Direct Awards, in all solicitations and contracts that are processed under the MOU cited at 619.800. The clauses at FAR 52.219–11, Special 8(a) Contract Conditions; 52.219–12, Special 8(a) Subcontract Conditions; and, 52.219–17, Section 8(a) Award, shall not be used.

[64 FR 43624, Aug. 11, 1999, as amended at 71 FR 34839, June 16, 2006; 72 FR 45696, Aug. 15, 2007]

619.812 Contract administration.

(d) The head of the contracting activity is the agency head for the purposes of FAR 19.812(d). Awards under the MOU cited in 619.800 are subject to 15 U.S.C. 637(a)(21). These contracts contain the clause at DOSAR 652.219–71, Section 8(a) Direct Awards, that requires the 8(a) contractor to notify the SBA and the contracting officer when ownership of the firm is being transferred.

PART 622—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 622.3—Contract Work Hours and Safety Standards Act

Sec.
622.302 Liquidated damages and overtime pay.

Subpart 622.4—Labor Standards for Contracts Involving Construction

622.404 Davis-Bacon Act wage determinations.
622.404–3 Procedures for requesting wage determinations.
622.404–6 Modifications of wage determinations.
622.404–7 Correction of wage determinations containing clerical errors.
622.404–11 Wage determination appeals.
622.406 Administration and enforcement.
622.406–1 Policy.
622.406–8 Investigations.
622.406–9 Withholding from or suspension of contract payments.
622.406–10 Disposition of disputes concerning construction contract labor standards enforcement.
622.406–11 Contract terminations.
622.406–12 Cooperation with the Department of Labor.

Subpart 622.6—Walsh-Healey Public Contracts Act

622.604 Exemptions.
622.604–2 Regulatory exemptions.

Subpart 622.8—Equal Employment Opportunity

622.803 Responsibilities.
622.807 Exemptions.

Subpart 622.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

622.1305 Waivers.
622.1310 Solicitation provision and contract clauses.

Subpart 622.14—Employment of Workers with Disabilities

622.1403 Waivers.
622.1408 Contract clause.

Subpart 622.15—Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

622.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26172, July 11, 1988, unless otherwise noted.

Subpart 622.3—Contract Work Hours and Safety Standards Act

622.302 Liquidated damages and overtime pay.

The authority to make the determination prescribed in FAR 22.302(c) is delegated, without power of redelegation, to the head of the contracting activity.

[55 FR 5774, Feb. 16, 1990]

Subpart 622.4—Labor Standards for Contracts Involving Construction

SOURCE: 55 FR 5774, Feb. 16, 1990, unless otherwise noted.

622.404 Davis-Bacon Act wage determinations.

622.404–3 Procedures for requesting wage determinations.

The cognizant contracting activity (see 601.603–70) is the contracting agency for the purposes of 22.404–3(b) and (d).

[53 FR 26172, July 11, 1988, as amended at 72 FR 45696, Aug. 15, 2007]

622.404–6 Modifications of wage determinations.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404–6.

(b)(6) The head of the contracting activity is the agency head's designee for the purposes of FAR 22.404–6(b)(6).

[55 FR 5774, Feb. 16, 1990, as amended at 59 FR 66760, Dec. 28, 1994]

622.404–7 Correction of wage determinations containing clerical errors.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404–7.

622.404–11 Wage determination appeals.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.404–11.

622.406 Administration and enforcement.

622.406–1 Policy.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406–1(a).

622.406–8 Investigations.

(a) The chief of the contracting activity is responsible for conducting labor standards investigations as prescribed in FAR 22.406–8(a).

(d) The Procurement Executive is the agency head's designee for the purposes of FAR 22.406–8(d).

622.406–9 Withholding from or suspension of contract payments.

The authority to suspend contract payments pursuant to FAR 22.406–9(b) is delegated, without power of redelegation, to the head of the contracting activity.

622.406–10 Disposition of disputes concerning construction contract labor standards enforcement.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406–10(b).

622.406–11 Contract terminations.

The cognizant contracting activity is the contracting agency for the purposes of FAR 22.406–11.

622.406–12 Cooperation with the Department of Labor.

Any information furnished to the Department of Labor pursuant to FAR 22.406–12(a) shall be submitted through the head of the contracting activity.

Subpart 622.6—Walsh-Healey Public Contracts Act

622.604 Exemptions

622.604–2 Regulatory exemptions.

The Procurement Executive is the agency head for the purposes of FAR 22.604–2(b)(1).

[55 FR 5774, Feb. 16, 1990, as amended at 71 FR 34839, June 16, 2006]

Subpart 622.8—Equal Employment Opportunity

622.803 Responsibilities.

(c) The Procurement Executive is the agency head for the purpose of FAR 22.803(c).

[64 FR 43626, Aug. 11, 1999]

622.807 Exemptions.

The Procurement Executive is the agency head for the purposes of FAR 22.807(a)(1).

Subpart 622.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

622.1305 Waivers.

The Procurement Executive is the agency head for the purposes of FAR 22.1305.

[53 FR 26172, July 11, 1988. Redesignated and amended at 69 FR 19335, Apr. 13, 2004]

622.1310 Solicitation provision and contract clauses.

The Procurement Executive is the agency head for the purposes of FAR 22.1310 (a)(1)(ii) and (a)(2).

[55 FR 5775, Feb. 16, 1990. Redesignated and amended at 69 FR 19336, Apr. 13, 2004; 72 FR 45696, Aug. 15, 2007]

Subpart 622.14—Employment of Workers with Disabilities

622.1403 Waivers.

The Procurement Executive is the agency head for the purposes of FAR 22.1403.

622.1408 Contract clause.

The Procurement Executive is the agency head for the purposes of FAR 22.1408.

[55 FR 5775, Feb. 16, 1990]

Subpart 622.15—Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor

622.1503 Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor.

(e) The contracting officer shall refer to the DOS Inspector General for Investigation any instances where the contracting officer has reason to believe that forced or indentured child labor was used to mine, produce, or manufacture an end product furnished pursuant to a contract awarded subject to the certification required in FAR 22.1503(c).

[69 FR 19336, Apr. 13, 2004]

PART 623—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 623.3—Hazardous Material Identification and Material Safety Data

Sec.
623.302–70 Policy.

Subpart 623.4—Use of Recovered Materials

623.400 Scope of subpart.

Subpart 623.5—Drug-Free Workplace

623.506 Suspension of payments, termination of contract, and debarment and suspension actions.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26172, July 11, 1988, unless otherwise noted.

Subpart 623.3—Hazardous Material Identification and Material Safety Data

623.302–70 Policy.

Any work which affects the safety and/or health of post personnel, including the handling of hazardous materials, shall comply with the applicable requirements of the Department of State Safety/Health and Environmental Management Resource Guide (6 FAM 606.7). Requirements offices shall ensure that any contractor operations and activities, whether sponsored by the post or other Department organization, are closely coordinated with the Post Occupational Safety and Health Officer during both planning and implementation phases.

[59 FR 66760, Dec. 28, 1994]

Subpart 623.4—Use of Recovered Materials

SOURCE: 64 FR 43626, Aug. 11, 1999, unless otherwise noted.

623.400 Scope of subpart.

The affirmative procurement program is applicable to all domestic acquisitions of items currently designated by an EPA guideline or by future guidelines promulgated by EPA. The requirements of this section are not applicable to acquisitions awarded outside the United States or its possessions.

[64 FR 43626, Aug. 11, 1999, as amended at 69 FR 19336, Apr. 13, 2004]

Subpart 623.5—Drug-Free Workplace

623.506 Suspension of payments, termination of contract, and debarment and suspension actions.

The authority to approve the determination prescribed in FAR 23.506(e) is reserved to the Secretary of State.

[55 FR 5775, Feb. 16, 1990]

PART 624—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

AUTHORITY: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR Subpart 1.3.

Subpart 624.2—Freedom of Information Act

624.202 Policy.

DOS regulations implementing the Freedom of Information Act (5 U.S.C. 552), as amended, are codified in Chapter 1, Department of State, Subchapter R, Access to Information, Part 171, Availability of information and records to the public, of Title 22 of the Code of Federal Regulations (22 CFR Part 171).

[53 FR 26172, July 11, 1988]

PART 625—FOREIGN ACQUISITION

Subpart 625.1—Buy American Act—Supplies

Sec.

625.103 Exceptions.
625.105 Determining reasonableness of cost.

Subpart 625.2—Buy American Act—Construction Materials

625.202 Exceptions.
625.204 Evaluating offers of foreign construction material.

Subpart 625.70—Arab League Boycott and Related Provisions

625.7001 Policy.
625.7002 Solicitation provision and contract clause.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26172, July 11, 1988, unless otherwise noted.

Subpart 625.1—Buy American Act—Supplies

625.103 Exceptions.

(a) The authority to make the determination prescribed in FAR 25.103(a) is delegated, without power of redelegation, to the head of the contracting activity.

[69 FR 19336, Apr. 13, 2004]

625.105 Determining reasonableness of cost.

(a)(1) The authority to make the determinations prescribed in FAR 25.105(a)(1) is delegated, without power of redelegation, to the head of the contracting activity.

[69 FR 19336, Apr. 13, 2004]

Subpart 625.2—Buy American Act—Construction Materials

625.202 Exceptions.

(a)(1) The authority to make the determination prescribed in FAR 25.202(a)(1) is delegated, without power of redelegation, to the head of the contracting activity.

[69 FR 19336, Apr. 13, 2004]

625.204 Evaluating offers of foreign construction material.

(b) The head of the contracting activity is the agency head for the purposes of FAR 25.204(b).

[69 FR 19336, Apr. 13, 2004]

Subpart 625.70—Arab League Boycott and Related Provisions

SOURCE: 64 FR 43626, Aug. 11, 1999, unless otherwise noted.

625.7001 Policy.

(a) Section 565 of the Fiscal Year 94/95 Foreign Relations Authorizations Act (Public Law 103–236) prohibits the Department of State from entering into any contract that expends funds appropriated to the Department of State:

(1) With a foreign person that complies with the Arab League Boycott of Israel; or,

(2) With any foreign or United States person that discriminates in the award of subcontracts on the basis of religion.

(b) This authority has continuing effect. Section 565 requires specific language to be included in all Invitations for Bids and Requests for Proposals with respect to a contract subject to Section 565's prohibitions.

(c) Section 565 may be waived on a country-by-country basis if such a waiver is in the national interest and

necessary to carry on diplomatic functions and is approved by the Secretary of State or his/her designee.

625.7002 Solicitation provision and contract clause.

Contracting officers shall include the following provision and clause in all solicitations and contracts exceeding the simplified acquisition threshold, unless a waiver has been granted in accordance with DOSAR 625.7001(c):

(a) 652.225–70, Arab League Boycott of Israel; and.

(b) 652.225–71, Section 8(a) of the Export Administration Act, as amended.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 627—PATENTS, DATA, AND COPYRIGHTS

Subpart 627.2—Patents

Sec.
627.203 Patent indemnification of Government by contractor.
627.203–6 Clause for Government waiver of indemnity.

Subpart 627.3—Patent Rights Under Government Contracts

627.303 Contract clauses.
627.304 Procedures.
627.304–1 General.
627.304–5 Appeals.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 59 FR 66763, Dec. 28, 1994, unless otherwise noted.

Subpart 627.2—Patents

627.203 Patent indemnification of Government by contractor.

627.203–6 Clause for Government waiver of indemnity.

The Procurement Executive is the agency head's designee for the purposes of FAR 27.203–6.

Subpart 627.3—Patent Rights Under Government Contracts

627.303 Contract clauses.

The Procurement Executive is the agency head's designee for the purposes of FAR 27.303. Determinations issued by the Procurement Executive shall be reviewed by the Office of the Legal Adviser.

627.304 Procedures.

627.304–1 General.

The Procurement Executive is the agency head's designee for the purposes of FAR 27.304–1. Questions regarding fact-finding procedures as specified in FAR 27.304–1(a)(4) shall be referred to A/OPE. Determinations issued by the Procurement Executive shall be reviewed by the Office of the Legal Adviser.

627.304–5 Appeals.

The Procurement Executive is the agency head's designee for the purposes of FAR 27.304–5. Questions regarding the appeals procedure as specified in FAR 27.304–5(b) shall be referred to A/OPE.

PART 628—BONDS AND INSURANCE

Subpart 628.1—Bonds

Sec.
628.101 Bid guarantees.
628.101–1 Policy on use.
628.106–6 Furnishing information.

Subpart 628.2—Sureties and Other Securities for Bonds

628.203 Acceptability of individual surety.
628.203–7 Exclusion of individual sureties.

Subpart 628.3—Insurance

628.305 Overseas workers' compensation and war-hazard insurance.
628.309 Contract clauses for workers' compensation insurance.
628.309–70 DOSAR provisions and clauses.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26173, July 11, 1988, unless otherwise noted.

Subpart 628.1—Bonds

SOURCE: 59 FR 66763, Dec. 28, 1994, unless otherwise noted.

628.101 Bid guarantees.

628.101–1 Policy on use.

(c) The Procurement Executive is the agency head's designee for the purposes of FAR 28.101–1(c).

628.106–6 Furnishing information.

(c) The head of the contracting activity is the agency head's designee for the purposes of FAR 28.106–6(c).

Subpart 628.2—Sureties and Other Securities for Bonds

628.203 Acceptability of individual surety.

(g) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the Assistant Inspector General for Investigations.

[59 FR 66763, Dec. 28, 1994, as amended at 69 FR 19336, Apr. 13, 2004]

628.203–7 Exclusion of individual sureties.

The Procurement Executive is the agency head's designee for the purposes of FAR 28.203–7.

[59 FR 66763, Dec. 28, 1994]

Subpart 628.3—Insurance

SOURCE: 71 FR 34840, June 16, 2006, unless otherwise noted.

628.305 Overseas workers' compensation and war-hazard insurance.

(b)(1) Acquisitions for services, including construction but excluding personal services contracts, requiring contractor personnel to perform work outside of the United States, shall include the contractual obligation for coverage under the Defense Base Act (42 U.S.C. Sections 1651–1654, as amended), for covered contractor employees. For the purposes of this section, ''covered contractor employees'' includes the following individuals:

(i) United States citizens or residents;

(ii) Individuals hired in the United States or its possessions, regardless of citizenship; and,

(iii) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(2) Individuals who are self-employed (*i.e.*, they have not incorporated) do not meet the definition of an employee. No Defense Base Act insurance is required when contracting with these individuals.

(3) Exceptions are discussed in paragraphs (e)(1) and (f) of this section.

(c) The Department of State has entered into a contract with an insurance broker and carrier to provide Defense Base Act insurance (at a fixed rate for services and construction) to cover DOS contracts that require performance overseas by covered contractor employees. Upon award of a contract that requires Defense Base Act insurance, the contracting officer shall provide the contractor with the name of the insurance broker from which the contractor must acquire the Defense Base Act insurance.

(d) The authority to recommend a waiver from the Defense Base Act, as set forth in FAR 28.305(d), is reserved to the Secretary of State.

(e)(1) The Secretary of Labor has waived the applicability of the Defense Base Act to all DOS service contracts, including construction, for contractor employees who are local nationals or third country nationals. This waiver is conditioned on the requirement for the contractor to provide workers' compensation benefits against the risk of work injury or death and assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention as prescribed by the local workers' compensation laws.

(2) In cases where a contract is performed in a country where there are no local workers' compensation laws, local and third country national contractor employees are considered to be ''covered contractor employees'', and the contractor shall acquire Defense Base Act insurance for those employees pursuant to the contract between the Department of State and the Defense Base Act insurance broker.

(f)(1) Section 16 of the State Department Basic Authorities Act (22 U.S.C. 2680a), as amended, provides that the Defense Base Act shall not apply with respect to such contracts as the Secretary of State determines are contracts with persons employed to perform work for the Department of State on an intermittent basis for not more than 90 days in a calendar year. The Department of State has established that ''persons'' includes employees hired by companies under contract with the Department. The Procurement Executive has the authority to

issue the waivers for employees who work on an intermittent or short-term basis. Waivers may be issued only for employees who are U.S. citizens and residents, and only where the contractor provides evidence of alternative workers' compensation coverage for those employees. Waivers may not be issued for local or third country nationals.

(2) The contractor shall submit waiver requests to the contracting officer. The request shall contain the following information:

(i) Contract number;

(ii) Name of contractor;

(iii) Brief description of the services to be provided under the contract and country of performance;

(iv) Name and position title of individual(s);

(v) Nationality of individual(s) (must be U.S. citizen or resident);

(vi) Dates (or timeframe) of performance at the overseas location; and

(vii) Evidence of alternative workers' compensation coverage for these employees (e.g., evidence that the State workers' compensation program covers workers on short-term foreign assignments).

(3) The contracting officer shall review the request for completeness and accuracy. If the request is complete and accurate, the contracting officer shall forward the request to the Procurement Executive. If the contractor does not provide complete and accurate information, the contracting officer shall return the request to the contractor with an explanation as to what additional information is required.

(4) The Procurement Executive shall review requests for waiver forwarded by the contracting officer and either approve or disapprove the request. The Procurement Executive shall return the request indicating his/her approval or disapproval to the contracting officer. Any request that is not approved shall describe the reason(s) why the request was not approved. The contracting officer shall provide the contractor with the original of the approved or disapproved document and maintain a copy in the contract file.

628.309 Contract clauses for workers' compensation insurance.

628.309–70 DOSAR provisions and clauses.

(a) The contracting officer shall insert the provision at 652.228–70, Defense Base Act—Covered Contractor Employees, in all solicitations for services and construction to be performed outside of the United States.

(b) The contracting officer shall insert the clause at 652.228–71, Workers' Compensation Insurance (Defense Base Act)—Services, in solicitations and contracts for services to be performed outside of the United States when there is a reasonable expectation that offers will include covered contractor employees, as defined in 628.305(b). If the contracting officer is unsure as to whether offers will include covered contractor employees, the contracting officer shall insert the clause. If the contract is for construction, the contracting officer shall insert the clause with its Alternate I.

(c) The contracting officer shall insert the provision at 652.228–74, Defense Base Act Insurance Rates—Limitation, in solicitations for services or construction to be performed outside of the United States when there is a reasonable expectation that offers will include covered contractor employees, as defined in 628.305(b). If the contracting officer is unsure as to whether offers will include covered contractor employees, the contracting officer shall insert the provision.

PART 629—TAXES

Subpart 629.1—General

Sec.
629.101 Resolving tax problems.

Subpart 629.2—Federal Excise Taxes

629.202 General exemptions.
629.202–70 Exemption from other Federal taxes.

Subpart 629.3—State and Local Taxes

629.302 Application of State and local taxes to the Government.
629.303 Application of State and local taxes to Government contractors and subcontractors.

Subpart 629.4—Contract Clauses

629.401 Domestic contracts.
629.401–70 DOSAR contract clause.
629.402 Foreign contracts.
629.402–1 Foreign fixed-price contracts.
629.402–1–70 DOSAR contract clause.

AUTHORITY: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR Subpart 1.3.

SOURCE: 53 FR 26173, July 11, 1988, unless otherwise noted.

Subpart 629.1—General

629.101 Resolving tax problems.

In certain instances, acquisitions by posts are exempt from various taxes in foreign countries. Contracting officers shall ascertain such exemptions and take maximum advantage of them.

Subpart 629.2—Federal Excise Taxes

629.202 General exemptions.

629.202–70 Exemptions from other Federal taxes.

Taxable articles purchased for presentation abroad as gifts to foreign dignitaries and taxable articles purchased for presentation as gifts to foreign dignitaries visiting in the United States but which are to be taken out of the United States may be exempt from retail taxes or manufacturers excise taxes, in accordance with the letter of October 18, 1963, from the Chief, Excise Tax Branch, Internal Revenue Service.

Subpart 629.3—State and Local Taxes

629.302 Application of State and local taxes to the Government.

The Office of the Legal Adviser is the agency-designated counsel for the purposes of FAR 29.302(a).

629.303 Application of State and local taxes to Government contractors and subcontractors.

The authority to make the determination prescribed in FAR 29.303(a) is delegated, without power of redelegation, to the head of the contracting activity (see 601.603–70). The Office of the Legal Adviser is the agency-designated counsel for the purposes of FAR 29.303(c).

Subpart 629.4—Contract Clauses

629.401 Domestic contracts.

629.401–70 DOSAR contract clause.

The contracting officer shall insert the clause at 652.229–71, Excise Tax Exemption Statement for Contractors Within the United States, in solicitations and contracts if the prospective contractor is located inside the United States and the acquisition involves export of supplies to an overseas post.

629.402 Foreign contracts.

629.402–1 Foreign fixed-price contracts.

629.402–1–70 DOSAR contract clause.

The contracting officer shall insert the clause at 652.229–71, Personal Property Disposition at Posts Abroad, in all solicitations and contracts performed overseas.

[64 FR 43627, Aug. 11, 1999]

PART 630—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 630.2—CAS Program Requirements

630.201 Contract requirements.

630.201–5 Waiver.

(a) The Procurement Executive is the head of the agency for the purposes of FAR 30.201–5(a) and (b).

[69 FR 19336, Apr. 13, 2004]

PART 631—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 631.1—Applicability

Sec.
631.101 Objectives.

Subpart 631.2—Contracts with Commercial Organizations

631.205 Selected costs.
631.205–6 Compensation for personal services.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 59 FR 66764, Dec. 28, 1994, unless otherwise noted.

Subpart 631.1—Applicability

631.101 Objectives.

The Procurement Executive is the agency head's designee for the purposes of FAR 31.101.

Subpart 631.2—Contracts with Commercial Organizations

631.205 Selected costs.

631.205–6 Compensation for personal services.

(g)(3) The head of the contracting activity is the agency head's designee for the purpose of FAR 31.205–6(g)(6).

[64 FR 43627, Aug. 11, 1999, as amended at 72 FR 45696, Aug. 15, 2007]

PART 632—CONTRACT FINANCING

Sec.
632.006 Reduction or suspension of contract payments upon finding of fraud.
632.006–1 General.
632.006–2 Definitions.
632.006–4 Procedures.

Subpart 632.1—Non-Commercial Item Purchase Financing

632.114 Unusual contract financing.

Subpart 632.2—Commercial Item Purchase Financing

632.201 Statutory authority.

Subpart 632.4—Advance Payments for Non-Commercial Items

632.402 General.
632.404 Exclusions.
632.407 Interest.

Subpart 632.7—Contract Funding

632.702 Policy.
632.702–70 DOS policy.
632.703 Contract funding requirements.
632.703–3 Contracts crossing fiscal years.
632.705 Contract clauses.
632.705–70 DOSAR contract clause.

Subpart 632.8—Assignment of Claims

632.803 Policies.

Subpart 632.9—Prompt Payment

632.906 Making payments.
632.908 Contract clauses.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26173, July 11, 1988, unless otherwise noted.

632.006 Reduction or suspension of contract payments upon finding of fraud.

632.006–1 General.

The Procurement Executive is the agency head for the purpose of FAR 32.006–1.

[64 FR 43627, Aug. 11, 1999]

632.006–2 Definitions.

Remedy coordination official means the Procurement Executive.

[64 FR 43627, Aug. 11, 1999, as amended at 69 FR 19336, Apr. 13, 2004]

632.006–4 Procedures.

The Procurement Executive is the agency head for the purposes of FAR 32.006–4.

[64 FR 43627, Aug. 11, 1999]

Subpart 632.1—Non-Commercial Item Purchase Financing

632.114 Unusual contract financing.

The Procurement Executive is the agency head for the purpose of FAR 32.114.

[64 FR 43627, Aug. 11, 1999]

Subpart 632.2—Commercial Item Purchase Financing

632.201 Statutory authority.

The head of the contracting activity is the agency head for the purpose of FAR 32.201.

[64 FR 43627, Aug. 11, 1999]

Subpart 632.4—Advance Payments for Non-Commercial Items

632.402 General.

(b) Advance payments shall be authorized sparingly. Contracting officers

should consider the use of partial payments, fast payments, or more frequent payments as alternatives to advance payments.

(c)(1)(iii) The authority to make the determination prescribed in FAR 32.402(c)(1)(iii) is delegated, without power of redelegation, to the head of the contracting activity (see 601.603–70). For acquisitions by overseas posts, the head of the contracting activity shall obtain the concurrence of the Procurement Executive before making a determination pursuant to this section.

[53 FR 26173, July 11, 1988, as amended at 59 FR 66764, Dec. 28, 1994]

632.404 Exclusions.

(a) Total advance payments may be authorized for the items listed in FAR 32.404(a), notwithstanding their designation as a commercial item and acquisition under FAR part 12 procedures.

[64 FR 43627, Aug. 11, 1999]

632.407 Interest.

(d) The Procurement Executive is the agency head's designee for the purposes of FAR 32.407(d).

[59 FR 66764, Dec. 28, 1994]

Subpart 632.7—Contract Funding

SOURCE: 64 FR 43628, Aug. 11, 1999, unless otherwise noted.

632.702 Policy.

632.702–70 DOS policy.

The Department's policy is to provide full funding for all contracts, to the maximum extent practicable. FAR 32.704 and 32.705–2 provide for incremental funding of cost-reimbursement contracts. Fixed-price, labor-hour, and time-and-materials contracts for severable services may also be incrementally funded if full funding is not available at the time of contract award and the contracting officer executes a determination and findings, approved by the requirements office, justifying the need for incremental funding due to the unavailability of funds.

632.703 Contract funding requirements.

632.703–3 Contracts crossing fiscal years.

(b) The head of the contracting activity is the agency head for the purpose of FAR 32.703–3(b).

632.705 Contract clauses.

632.705–70 DOSAR contract clause.

The contracting officer shall insert the clause at 652.232–72, Limitation of Funds, in incrementally funded fixed-price, labor-hour, and time-and-materials solicitations and contracts for severable services.

Subpart 632.8—Assignment of Claims

632.803 Policies.

(b) The assignment of claims shall be prohibited for all personal services contracts. The assignment of claims shall also be prohibited for all contracts awarded and performed overseas, unless approval is received from the Procurement Executive. The Directors, Regional Procurement Support Offices may approve the assignment of claims for contracts under their administration after obtaining legal consultation.

[59 FR 66764, Dec. 28, 1994, as amended at 64 FR 43628, Aug. 11, 1999]

Subpart 632.9—Prompt Payment

632.906 Making payments.

(a) *General.* The authority to make the determination prescribed in FAR 32.906(a) is delegated, without power of redelegation, to the head of the contracting activity. Before making this determination, the head of the contracting activity shall consult with the appropriate financial office.

[69 FR 19336, Apr. 13, 2004]

632.908 Contract clauses.

(a) The contracting officer may insert a clause substantially the same as the clause at 652.232–70, Payment Schedule and Invoice Submission (Fixed-Price), in fixed-price type solicitations and contracts.

(b) The contracting officer may insert a clause substantially the same as the clause at 652.232–71, Voucher Submission (cost-Reimbursement), in cost-reimbursement type solicitations and contracts.

[59 FR 66764, Dec. 28, 1994]

PART 633—PROTESTS, DISPUTES, AND APPEALS

Subpart 633.1—Protests

Sec.
633.102 General.
633.103 Protests to the agency.
633.104 Protests to GAO.

Subpart 633.2—Disputes and Appeals

633.203 Applicability.
633.214–70 Alternative dispute resolution.
633.270 Disputes and appeals under DOS contracts subject to the Contract Disputes Act of 1978.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26173, July 11, 1988, unless otherwise noted.

Subpart 633.1—Protests

633.102 General.

All communications relative to protests filed with the Government Accountability Office (GAO) shall be coordinated with the Office of the Legal Adviser.

[53 FR 26173, July 11, 1988, as amended at 64 FR 43628, Aug. 11, 1999; 72 FR 45696, Aug. 15, 2007]

633.103 Protests to the agency.

(d)(4) The independent review as described in FAR 33.103(d)(4) shall be performed by the Departmental Competition Advocate.

[64 FR 43628, Aug. 11, 1999]

633.104 Protests to GAO.

(a) General procedures. The Office of the Assistant Legal Adviser for Buildings and Acquisitions (L/BA) coordinates the response of the Department of State to protests filed at the GAO. Contracting activities shall consult L/BA for guidance before taking any actions in response to a protest to GAO.

[64 FR 43628, Aug. 11, 1999]

Subpart 633.2—Disputes and Appeals

633.203 Applicability.

The Procurement Executive is the agency head for the purposes of FAR 33.203(b).

633.214–70 Alternative dispute resolution.

(a) *Policy*. The Department's goal is to resolve contract disputes before the issuance of a contracting officer's final decision under the Contract Disputes Act. Contracting officers shall consider all possible means of reaching a negotiated settlement, consistent with the Government's best interests, before issuing a final decision on a contractor claim under the process outlined in FAR 33.206 through 33.211.

(b) *When to use ADR*—(1) *Factors favoring ADR*. Contracting officers should consider using ADR in those cases where:

(i) Only facts are in dispute;

(ii) The facts are clearly not favorable to the Government;

(iii) The anticipated costs (in time and money) are less than the anticipated costs of litigation;

(iv) Settlement attempts have reached an impasse;

(v) ADR techniques have been used successfully in similar situations;

(vi) There is a need for independent expert analysis; or,

(vii) The claim has merit but its value is overstated.

(2) *Factors disfavoring ADR*. The following circumstances do not favor use of ADR:

(i) Cases involving disputes controlled by clear legal precedent, making compromise difficult;

(ii) The resolution will have a significant impact on other pending cases or on the future conduct of Department business;

(iii) The dispute is primarily over issues of law;

(iv) A decision of precedential value is needed;

(v) A significant policy question is involved;

(vi) A full public record of the proceeding is important;

(vii) The outcome could significantly involve persons who are not parties to the contract;

(viii) The costs of pursuing an ADR procedure (in time and money) exceed the cost of litigation;

(ix) The nature of the case may cause ADR to be used merely for delay or discovery; or,

(x) The case involves criminal violations.

(3) *Initial action.* Immediately upon receipt of a claim, the contracting officer shall send a letter acknowledging receipt of the claim and soliciting the contractor's views on submitting this claim for ADR. In every dispute, the first step toward resolution shall be unassisted negotiations, in which the parties try to work out the disagreement among themselves. If this fails, before issuing a final decision, the contracting officer shall consult first with the head of the contracting activity, and contact the Office of the Legal Adviser and A/OPE to determine whether the disagreement appears susceptible to resolution by ADR. Consideration shall be given to pursuing additional fact-finding or designating a neutral expert in the disputed issue to provide an advisory opinion.

(c) *Methods of ADR.* If the initial action to resolve the dispute fails, and the contracting officer issues a final decision which is appealed, ADR may still be feasible. The GSBCA issues a notice regarding ADR to all contractors who file appeals under the Contract Disputes Act. This notice describes the following ADR techniques, which contracting officers are urged to discuss with contractors at any time:

(1) *Settlement judge.* A settlement judge is either an administrative judge or hearing examiner who is appointed by the parties in dispute for the purpose of facilitating settlement. The agenda is flexible and based on the specifics of the individual dispute. By holding a frank, in-depth discussion of the strengths and weaknesses of each party's position, the settlement judge may be able to foster a settlement of the dispute. The settlement judge may meet with the parties jointly or individually, and the settlement judge's recommendations are not binding. Typically, the settlement judge's opinions, based on his or her experience in handling prior disputes, will help the parties realize whether their arguments have merit or not.

(2) *Minitrial.* A minitrial is not an actual trial but rather a flexible, expedited, but structured procedure in which each party presents an abbreviated version of its position both to a neutral advisor (who may be appointed by the GSBCA) and to principals of the parties who have full contractual authority to conclude a settlement. The parties mutually decide on the form of presentation without regard to traditional judicial proceedings or rules of evidence. An advance agreement by the parties specifies the procedure to be followed in making presentations, as well as the role of the neutral advisor. Upon conclusion of the presentations, settlement negotiations are conducted. The neutral advisor may assist the parties in negotiating settlement, including making non-binding recommendations.

(3) *Summary trial with binding decision.* A summary trial with binding decision is a procedure in which the scheduling of an appeal is expedited and the parties try their appeal informally before an administrative judge or panel of judges. The length of the trial and the time for presentation and decision are tailored to the needs of the particular case. Trial procedures and rules applicable to appeals are modified or eliminated to expedite resolution of the appeal. The parties must agree, however, that all decisions, rulings, and orders by the judge(s) are final, conclusive, and not appealable, and may not be set aside, except for fraud. A summary ''bench'' decision is issued at the conclusion of the trial or a summary written decision will be issued within ten (10) days of either the trial's conclusion or receipt of a trial transcript.

(4) *Mediation.* Mediation is a process in which a neutral and impartial third party assists the Government and the contractor in conflict to negotiate an acceptable settlement of contested issues. The mediator is jointly selected and is asked by the disputing parties to assist them to reach a voluntary agreement. The mediator has no decision-making authority and cannot impose a decision. Mediation assistance involves

working with the parties to improve their communications, clarify or interpret data, identify key issues to be discussed, design an effective negotiation process, generate settlement options, or help to identify or formulate areas of agreement. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(5) *Arbitration*. Non-binding arbitration is a process in which a dispute is jointly submitted by the Government and a contractor to an impartial and neutral person or panel who provides a written, non-binding opinion used as a guide for negotiations toward a settlement. Although the Administrative Dispute Resolution Act of 1990 (Pub. L. 101–552) allows agencies to use binding arbitration, the law provides that the agency head may vacate any arbitration award within 30 days after it is served on all parties. For this reason, non-binding arbitration is preferable. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(6) *Partnering*. Partnering involves an agreement in principle to share the risks involved in completing a project, and to establish and promote a partnership environment. Partnering itself is not a contractual agreement and it does not create any legally enforceable rights, but instead partnering seeks to create a new cooperative attitude in completing Government contracts. The three basic steps in partnering are:

(i) Establish the new relationship through personal contact among the principals for the Government and the contractor before the work begins;

(ii) Prepare a joint statement of goals establishing common objectives in specific detail for reaching the goals; and,

(iii) Identify specific dispute prevention processes designed to head off problems, evaluate performance, and promote cooperation. Additional information on alternative dispute resolution and mediation resources is available at the following address on the Internet: *http://www.adrr.com*

(d) *ADR procedures*. The ADR method shall be selected voluntarily by both the Government and the contractor. Both parties shall agree on the procedures to be followed, including the agenda and amount of time allowed for each party to present its case. The parties may choose not to have a written transcript or hearing on the record, as this might inhibit settlement. Also, the decision rendered, if any, should not be considered to establish any precedent for future litigation unless the parties agree otherwise. In cases where the parties agree to pay jointly for a third-party neutral advisor, it is recommended that the parties and the advisor agree on a fair and reasonable price. The Government would then issue a simplified acquisition (if the dollar amount does not exceed the simplified acquisition limitation) for 50% of the agreed price, and the advisor would submit separate invoices (each for 50% of the price) to the Government and the contractor.

[59 FR 66764, Dec. 28, 1994, as amended at 64 FR 43628, Aug. 11, 1999]

633.270 Disputes and appeals under DOS contracts subject to the Contract Disputes Act of 1978.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 634—MAJOR SYSTEM ACQUISITION

Sec.
634.003 Responsibilities.
634.005 General requirements.
634.005–6 Full production.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26175, July 11, 1988, unless otherwise noted.

634.003 Responsibilities.

(a) The Procurement Executive is the agency head's designee for the purposes of FAR 34.003(a).

(b) The Under Secretary for Management is the agency head for the purposes of FAR 34.003(c) and the acquisition executive for the purposes of A–109.

[53 FR 26175, July 11, 1988, as amended at 59 FR 66766, Dec. 28, 1994; 64 FR 43628, Aug. 11, 1999]

634.005 General requirements.

634.005–6 Full production.

The Deputy Secretary is the agency head for the purposes of FAR 34.005–6 with power of redelegation to the Under Secretary for Management.

[59 FR 66766, Dec. 28, 1994, as amended at 64 FR 43628, Aug. 11, 1999]

PART 636—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 636.1—General

Sec.
636.101 Applicability.
636.101–70 Exception.
636.104 Policy
636.104–70 Foreign Service Buildings Act of 1926, as amended.
636.104–71 Omnibus Diplomatic Security and Antiterrorism Act.

Subpart 636.2—Special Aspects of Contracting for Construction

636.202 Specifications.
636.209 Construction contracts with architect-engineer firms.

Subpart 636.5—Contract Clauses

636.513 Accident prevention.
636.570 Additional DOSAR provisions.

Subpart 636.6—Architect-Engineer Services

636.602 Selection of firms for architect-engineer contracts.
636.602–1 Selection criteria.
636.602–5 Short selection processes for contracts not to exceed the simplified acquisition threshold.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26175, July 11, 1988, unless otherwise noted.

Subpart 636.1—General

636.101 Applicability.

636.101–70 Exception.

Contracts for overseas construction, including capital improvements, alterations, and major repairs, may be excepted where necessary from the provisions of the FAR (48 CFR Chapter 1) under the authority of section 3 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 294). The Director/Chief Operating Officer of the Bureau of Overseas Buildings Operations is authorized to approve such exceptions.

[69 FR 19337, Apr. 13, 2004]

636.104 Policy.

636.104–70 Foreign Service Buildings Act of 1926, as amended.

(a) *Policy*. Section 11 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 302) limits competition for the construction, alteration, or repair of buildings or grounds abroad exceeding $5 million to:

(1) American-owned firms; or

(2) Firms from countries which permit or agree to permit substantially equal access to American firms for comparable diplomatic and consular building projects.

(b) *Limitation*. This participation may be permitted by or limited to:

(1) Host-country firms where required by international agreement; or

(2) By the laws of the host country; or

(3) Where determined by the Secretary of State to be necessary in the interest of bilateral relations or necessary to carry out the construction project.

(c) *Evaluation preference*. For purposes of determining competitive status, American-owned firms shall receive a ten (10) percent price preference reduction, provided that two prospective responsible bidders/offerors submit a bid/offer.

[69 FR 19337, Apr. 13, 2004]

636.104–71 Omnibus Diplomatic Security and Antiterrorism Act.

(a) *Preference for United States contractors*. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 (Public Law 99–399; 22 U.S.C. 4852) limits certain construction projects abroad to United States persons or qualified United States joint venture persons. The Omnibus Diplomatic Security and Antiterrorism Act of 1986 applies to the following, as determined by the Assistant Secretary for Diplomatic Security:

(1) Diplomatic construction or design projects abroad exceeding $10 million; or,

(2) Diplomatic construction projects abroad at any dollar amount that involve technical security, unless the project involves low-level technology.

(b) *Exception*. This preference shall not apply with respect to any diplomatic construction or design project in a foreign country whose statutes prohibit the use of United States contractors on such projects.

(c) *Subcontracting limitation*. With respect to a diplomatic construction project, a prime contractor may not subcontract more than 50 percent of the total value of the contract for that project.

[69 FR 19337, Apr. 13, 2004]

Subpart 636.2—Special Aspects of Contracting for Construction

636.202 Specifications.

(d) The Director/Chief Operating Officer of the Bureau of Overseas Building Operations is the head of the agency for the purposes of FAR 36.202(d)(3) and (4).

[69 FR 19337, Apr. 13, 2004]

636.209 Construction contracts with architect-engineer firms.

The Procurement Executive is the head of the agency for the purposes of FAR 36.209.

Subpart 636.5—Contract Clauses

636.513 Accident prevention.

(a) In accordance with a class deviation approved by the Procurement Executive, contracting officers at overseas contracting activities shall insert DOSAR 652.236–70, Accident Prevention, in lieu of FAR clause 52.236–13 when awarding construction contracts. The contracting officer shall confer with OBO/OM/SHEM if there are any questions on any factors listed in paragraph (4) of the clause, or if the contracting officer has any questions regarding construction safety issues.

[64 FR 43628, Aug. 11, 1999, as amended at 69 FR 19337, Apr. 13, 2004]

636.570 Additional DOSAR provisions.

(a) The contracting officer shall insert the provision at 652.236–71, Foreign Service Buildings Act, As Amended, in all contracts exceeding $5,000,000 for the construction, alteration, or repair of buildings and grounds overseas, unless:

(1) An international agreement with or laws of the host country government permits or limits the participation to host-country firms; or,

(2) The Secretary of State determines that it is necessary to the interest of bilateral relations or to carry out the project to either permit or limit the participation to host-country firms; or,

(3) The provision at DOSAR 652.236–72 applies.

(b) The contracting officer shall insert the provision at 652.236–72, Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act, in all diplomatic construction or design solicitations exceeding $10 million; or, diplomatic construction projects abroad at any dollar amount that involve technical security, unless

the project involves low-level technology, as determined by the Assistant Secretary of Diplomatic Security.

[69 FR 19337, Apr. 13, 2004]

Subpart 636.6—Architect-Engineer Services

636.602 Selection of firms for architect-engineer contracts.

636.602–1 Selection criteria.

(b) The head of the contracting activity is the agency head's designee for the purpose of FAR 36.602–1(b).

[64 FR 43628, Aug. 11, 1999]

636.602–5 Short selection processes for contracts not to exceed the simplified acquisition threshold.

The short selection process described in FAR 36.602–5 is authorized for use for contracts not expected to exceed the simplified acquisition threshold.

[59 FR 66766, Dec. 28, 1994, as amended at 60 FR 39663, Aug. 3, 1995]

PART 637—SERVICE CONTRACTING

Subpart 637.1—Service Contracts—General

Sec.
637.102 Policy.
637.102–70 Special requirements for the acquisition of local guard services overseas.
637.103 Contracting officer responsibility.
637.104 Personal services contracts.
637.104–70 Personal services contracts.
637.110 Solicitation provisions and contract clauses.

Subpart 637.2—Advisory and Assistance Services

637.204 Guidelines for determining availability of personnel.

Subpart 637.6—Performance-Based Contracting

637.601 General.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26176, July 11, 1988, unless otherwise noted.

Subpart 637.1—Service Contracts—General

637.102 Policy.

637.102–70 Special requirements for the acquisition of local guard services overseas.

(a) *Policy*. Section 136 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (22 U.S.C. 4864) encourages the participation of United States persons and qualified United States joint venture persons in local guard contracts overseas under diplomatic security programs.

(b) *Evaluation preference*. For purposes of determining competitive status, proposals of United States persons and qualified United States joint venture persons shall receive a ten (10) percent price preference reduction.

[69 FR 19337, Apr. 13, 2004]

637.103 Contracting officer responsibility.

The Office of the Legal Adviser is the DOS legal counsel for the purposes of FAR 37.103(a)(2).

637.104 Personal services contracts.

The Office of the Legal Adviser is the DOS legal counsel for the purposes of FAR 37.104(e).

637.104–70 Personal services contracts.

Pursuant to FAR 37.104(b), DOS statutory authorities for personal services contracts are—

(a) For the Department, section 2(c) of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 2669);

(b) For the Bureau of Population, Refugees, and Migration, section 5(a)(6) of the Migration and Refugee Assistance Act of 1962, as amended (22 U.S.C. 2605);

(c) For the Bureau for International Narcotics and Law Enforcement Affairs, section 636(a)(3) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2396);

(d) For the Foreign Service Institute, section 704(a)(4) of the Foreign Service Act of 1980, as amended (22 U.S.C. 4024);

(e) For the Office of Foreign Missions, section 208(d) of Title II—Authorities Relating to the Regulation of Foreign Missions, of the State Department Basic Authorities Act of 1956, as amended (22 U.S.C. 4308);

(f) For the Bureau of Overseas Buildings Operations, section 5 of the Foreign Service Buildings Act, 1926, as amended (22 U.S.C. 296);

(g) For the U.S. Mission to the United Nations, section 7 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287e);

(h) For the Bureau of International Organization Affairs, the separate State Department appropriations acts; and

(i) For the Bureau of Diplomatic Security, section 206 of Public Law 99–399, as amended by the Emergency Supplemental Appropriations Act of 1998.

[53 FR 26176, July 11, 1988, as amended at 59 FR 66766, Dec. 28, 1994; 60 FR 39663, Aug. 3, 1995; 64 FR 43629, Aug. 11, 1999; 69 FR 19337, Apr. 13, 2004]

637.110 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the clause at 652.237–70, Compensatory Time Off, in personal services contracts awarded in support of International Narcotics Control programs overseas, if the contracting officer determines its use appropriate.

(b) The contracting officer shall insert the clause at 652.237–71, Identification/Building Pass, in all solicitations and contracts where contractor personnel require frequent and continuing access to Department of State facilities.

(c) The contracting officer shall insert a clause substantially the same as the clause at 652.237–72, Observance of Legal Holidays and Administrative Leave, in all solicitations and contracts where contractor personnel will be working on-site in any Department of State facility. Overseas contracting activities may add local holidays to the list included in paragraph (a) of the clause.

(d) The contracting officer shall insert the provision at 652.237–73, Statement of Qualifications for Preference as a U.S. Person, in all overseas local guard solicitations.

[59 FR 66766, Dec. 28, 1994, as amended at 64 FR 43629, Aug. 11, 1999; 69 FR 19337, Apr. 13, 2004]

Subpart 637.2—Advisory and Assistance Services

637.204 Guidelines for determining availability of personnel.

The head of the contracting activity is the agency head for the purposes of FAR 37.204.

[64 FR 43629, Aug. 11, 1999]

Subpart 637.6—Performance-Based Contracting

637.601 General.

It is the Department's policy that all new service contracts be performance-based, with clearly defined deliverables and performance standards. Any deviations from this policy shall be fully justified in writing and approved by the Departmental Competition Advocate.

[69 FR 19337, Apr. 13, 2004]

PART 639—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 639.1—General

Sec.
639.107 Contract clause.
639.107–70 DOSAR solicitation provision and contract clause.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 72 FR 51569, Sept. 10, 2007, unless otherwise noted.

Subpart 639.1—General

639.107 Contract clause.

639.107–70 DOSAR solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 652.239–70, Information Technology Security Plan and Accreditation, in solicitations that include information technology resources or services in which the contractor will have physical or electronic access to Department information that

directly supports the mission of the Department.

(b) The contracting officer shall insert the clause at 652.239–71, Security Requirements for Unclassified Information Technology Resources, in solicitations and contracts containing the provision at 652.239–70. The provision and clause shall not be inserted in solicitations and contracts for personal services with individuals.

PART 641—ACQUISITION OF UTILITY SERVICES

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 64 FR 43629, Aug. 11, 1999, unless otherwise noted.

Subpart 641.2—Acquiring Utility Services

641.201 Policy.

(d) The Procurement Executive is the agency head for the purposes of FAR 41.201(d)(2)(i) and FAR 41.201(d)(3).

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 642—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 642.2—Contract Administration Services

Sec.
642.270 Contracting Officer's Representative (COR).
642.271 Government Technical Monitor (GTM).
642.272 DOSAR contract clauses.

Subpart 642.6—Corporate Administration Contracting Officer

642.602 Assignment and location.

Subpart 642.7—Indirect Cost Rates

642.703 General.
642.703–2 Certificate of indirect costs.

Subpart 642.14—Traffic and Transportation Management

642.1406–2 Contract clause.
642.1406–2–70 DOSAR contract clauses.

Subpart 642.15—Contractor Performance Information

642.1503 Procedures.
642.1503–70 Contractor Performance System (CPS).

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26176, July 11, 1988, unless otherwise noted.

Subpart 642.2—Contract Administration Services

642.270 Contracting Officer's Representative (COR).

(a) *Scope*. Contracting officers may designate technically qualified personnel as their authorized representatives to assist in the administration of contracts. This section is mandatory for domestic contracting activities and recommended for overseas contracting activities.

(b) *Policy*. It is Department policy that only Department of State employees who have completed adequate training and have the necessary experience and judgment shall be appointed as CORs. This policy shall be reinforced by contracting officers and administered jointly by A/OPE and FSI. Required training shall be funded by the COR's office.

[59 FR 66766, Dec. 28, 1994]

642.271 Government Technical Monitor (GTM).

(a) *Policy*. The contracting officer may appoint a Government Technical Monitor (GTM) to assist the Contracting Officer's Representative (COR) in monitoring a contractor's performance. The contracting officer may appoint a GTM because of physical proximity to the contractor's work site, or because of special skills or knowledge necessary for monitoring the contractor's work. The contracting officer may also appoint a GTM to represent the interests of another requirements office or post concerned with the contractor's work. A GTM shall be a direct-hire U.S. Government employee.

[69 FR 19338, Apr. 13, 2004]

642.272 DOSAR contract clauses.

(a) The contracting officer shall insert a clause substantially the same as the clause at 652.242–70, Contracting Officer's Representative, in solicitations and contracts when appointment of a contracting officer's representative is anticipated.

(b) The contracting officer shall insert a clause substantially the same as the clause at 652.242–73, Authorization and Performance, in all solicitations and contracts to be awarded and/or performed overseas. For overseas local guard contracts, the contracting officer shall use the clause with its Alternate I.

[64 FR 43629, Aug. 11, 1999. Redesignated at 69 FR 19338, Apr. 13, 2004]

Subpart 642.6—Corporate Administration Contracting Officer

642.602 Assignment and location.

The Procurement Executive is the agency head's designee for the purposes of FAR 42.602(a).

Subpart 642.7—Indirect Cost Rates

642.703 General.

642.703–2 Certificate of indirect costs.

(b) The head of the contracting activity is the agency head's designee for the purpose of FAR 42.703–2(b).

[64 FR 43629, Aug. 11, 1999]

Subpart 642.14—Traffic and Transportation Management

642.1406–2 Contract clause.

642.1406–2–70 DOSAR contract clauses.

(a) The contracting officer shall insert the clause at 652.242–71, Notice of Shipment, in solicitations and contracts entered into and performed outside the United States, when overseas shipment of supplies is required.

(b) The contracting officer shall insert the clause at 652.242–72, Shipping Instructions, in solicitations and contracts with a source in the United States and overseas shipment of supplies is required.

Subpart 642.15—Contractor Performance Information

642.1503 Procedures.

642.1503–70 Contractor Performance System (CPS).

(a) The Department of State subscribes to the Contractor Performance System (CPS) maintained by the National Institutes of Health. CPS is an Internet-based tool allowing contracting officers to input past performance information and view past performance information input by other contracting officers in other locations and agencies.

(b) All DOS contracting officers with access to the Internet shall use CPS to evaluate contractor's past performance for all contracts exceeding $100,000, including options. Contracting officers shall also use the CPS to evaluate the past performance of offerors on all competitive negotiated acquisitions exceeding $100,000, including options, unless the contracting officer documents in the contract file why past performance is not an appropriate evaluation factor. The CPS may also be used for evaluating acquisitions not exceeding $100,000 to conform to the general principle of considering past performance in all acquisitions.

(c) Form DS–1771, *Contractor Past Performance Evaluation*, shall be used only:

(1) When the CPS is temporarily unavailable. When the CPS becomes available, data from any DS–1771 created in the interim shall be promptly entered into the CPS; or

(2) At overseas locations where access to the Internet is not practicable.

(d) Heads of contracting activities shall send a list of the names, work addresses, and phone numbers of all acquisition personnel whom they wish to have access to the CPS to A/LM/AQM.

[69 FR 19338, Apr. 13, 2004]

PART 643—CONTRACT MODIFICATIONS

Subpart 643.1—General

Sec.
643.102 Policy.
643.102–70 Contract compliance and review.
643.104 Notification of contract changes.
643.104–70 DOSAR contract clause.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26176, July 11, 1988, unless otherwise noted.

Subpart 643.1—General

643.102 Policy.

643.102–70 Contract compliance and review.

When applicable, the contracting officer shall ensure the proposed contract modification complies with the competition requirements of FAR Part 6 and DOSAR Part 606.

[53 FR 26176, July 11, 1988, as amended at 59 FR 66767, Dec. 28, 1994; 64 FR 43629, Aug. 11, 1999]

643.104 Notification of contract changes.

643.104–70 DOSAR contract clause.

The contracting officer shall insert the clause at 652.243–70, Notices, in all solicitations and contracts exceeding

the micro-purchase threshold which are awarded and/or performed overseas.

[64 FR 43629, Aug. 11, 1999]

PART 644—SUBCONTRACTING POLICIES AND PROCEDURES

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 64 FR 43629, Aug. 11, 1999, unless otherwise noted.

Subpart 644.3—Contractor's Purchasing System Reviews

644.302 Requirements.

(a) The Procurement Executive is the head of the agency for the purpose of FAR 44.302(a).

PART 645—GOVERNMENT PROPERTY

Subpart 645.3—Providing Government Property to Contractors

Sec.
645.302 Providing facilities.
645.302–1 Policy.

Subpart 645.4—Contractor Use and Rental of Government Property

645.403 Rental—Use and Charges clause.

Subpart 645.6—Reporting, Redistribution, and Disposal of Contractor Inventory

645.608 Screening of contractor inventory.
645.608–6 Waiver of screening requirements.
645.610 Sale of surplus contractor inventory.
645.610–2 Exemptions from sale by GSA.

AUTHORITY: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR Subpart 1.3.

SOURCE: 53 FR 26177, July 11, 1988, unless otherwise noted.

Subpart 645.3—Providing Government Property to Contractors

645.302 Providing facilities.

645.302–1 Policy.

The authority to make the determination prescribed in FAR 45.302–1(a)(4) is delegated, without power of redelegation, to the head of the contracting activity (see 601.603–70).

Subpart 645.4—Contractor Use and Rental of Government Property

645.403 Rental—Use and Charges clause.

(a) The head of the contracting activity is the agency head's designee for the purpose of FAR 45.403(a).

[64 FR 43629, Aug. 11, 1999]

Subpart 645.6—Reporting, Redistribution, and Disposal of Contractor Inventory

645.608 Screening of contractor inventory.

645.608–6 Waiver of screening requirements.

The Procurement Executive is the agency head's designee for the purposes of FAR 45.608–6.

645.610 Sale of surplus contractor inventory.

645.610–2 Exemptions from sale by GSA.

The Procurement Executive is the agency head for the purposes of FAR 45.610–2(a).

PART 647—TRANSPORTATION

Sec.
647.000 Scope of part.

Subpart 647.2—Contracts for Transportation or for Transportation-Related Services

647.207 Solicitation provisions, contract clauses, and special requirements.
647.207–7 Liability and insurance.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 59 FR 66767, Dec. 28, 1994, unless otherwise noted.

647.000 Scope of part.

The FAR and DOSAR do not apply to the acquisition of transportation services via Government bill of lading (GBL) or other similar forms.

Subpart 647.2—Contracts for Transportation or for Transportation-Related Services

647.207 Solicitation provisions, contract clauses, and special requirements.

647.207–7 Liability and insurance.

(e) The Procurement Executive has approved a class deviation for paragraph (c) of FAR clause 52.247–23, Contractor Liability for Loss of and/or Damage to Household Goods. The contracting officer shall indicate that the contractor shall indemnify the owner of the goods at a rate of $5.00 per pound (or metric equivalent in local currency) based on the total net weight. The rate conforms with liability calculations found in International Through Government Bills of Lading (ITGBL).

[64 FR 43629, Aug. 11, 1999]

PART 648—VALUE ENGINEERING

AUTHORITY: 22 U.S.C. 2658; 40 U.S.C. 486(c); 48 CFR 1.3.

Subpart 648.1—Policies and Procedures

648.102 Policies.

(a) The authority to grant exemptions prescribed in FAR 48.102(a), or to extend future contract savings or sharing pursuant to FAR 48.102(g), is delegated, without power of redelegation, to the head of the contracting activity (see 601.603–70).

[55 FR 5775, Feb. 16, 1990]

Subpart 648.2—Contract Clauses

648.201 Clauses for supply or service contracts.

The authority to determine exemptions prescribed in FAR 48.201(a)(6) is delegated, without power of redelegation, to the head of the contracting activity.

[55 FR 5775, Feb. 16, 1990]

PART 649—TERMINATION OF CONTRACTS

AUTHORITY: 40 U.S.C. 485(c); 22 U.S.C. 2658.

SOURCE: 59 FR 66767, Dec. 28, 1994, unless otherwise noted.

Subpart 649.1—General Principles.

649.106 Fraud or other criminal conduct.

If the Termination Contracting Officer (TCO) suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts to the Office of the Inspector General.

PART 651—USE OF GOVERNMENT SOURCES BY CONTRACTORS

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

Subpart 651.70—Contractor Use of Travel Advances, Official Travel Orders, and Government Travel Requisitions

651.701 Policy.

(a) It is the Department's policy that contractors shall not:

(1) Receive travel advances from the Department for contract-related travel;

(2) Travel under official travel orders; or,

(3) Receive Government Travel Requisitions (GTRs) for transportation.

(b) All contract-related travel shall be performed on the contractor's account with reimbursement provided after submission of a proper voucher.

(c) This policy does not apply to personal services contractor; *provided,* that such contractors are paid through the Department's payroll system and they are subject to the standard payroll deductions of Federal Withholding Tax and FICA.

[59 FR 66767, Dec. 28, 1994, as amended at 69 FR 19338, Apr. 13, 2004]

SUBCHAPTER H—CLAUSES AND FORMS

PART 652—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.
652.000 Scope of part.

Subpart 652.1—Instructions for Using Provisions and Clauses

652.100 Scope of subpart.
652.100–70 Policy.
652.102 Incorporating provisions and clauses.
652.102–1 Incorporation by reference.

Subpart 652.2—Texts of Provisions and Clauses

652.200 Scope of subpart.
652.206–70 Competition Advocate/Ombudsman.
652.216–70 Ordering—Indefinite-Delivery Contract.
652.216–71 Price Adjustment.
652.219–70 Department of State Subcontracting Goals.
652.219–71 Section 8(a) Direct Awards.
652.219–72 Department of State Mentor-Protégé Program.
652.219–73 Mentor Requirements and Evaluation.
652.225–70 Arab League Boycott of Israel.
652.225–71 Section 8(a) of the Export Administration Act of 1979, as Amended.
652.228–70 Defense Base Act—Covered Contractor Employees.
652.228–71 Worker's Compensation Insurance (Defense Base Act)—Services.
652.228–72—652.228–73 [Reserved]
652.228–74 Defense Base Act insurance rates—Limitation.
652.229–70 Excise Tax Exemption Statement for Contractors Within the United States.
652.229–71 Personal Property Disposition at Posts Abroad.
652.232–70 Payment Schedule and Invoice Submission (Fixed-Price).
652.232–71 Voucher Submission (Cost-Reimbursement).
652.232–72 Limitation of Funds.
652.236–70 Accident Prevention.
652.236–71 Foreign Service Buildings Act, as Amended
652.236–72 Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act.
652.237–70 Compensatory time off.
652.237–71 Identification/Building Pass.
652.237–72 Observance of Legal Holidays and Administrative Leave.
652.237–73 Statement of Qualifications for Preference as a U.S. Person.
652.239–70 Information Technology Security Plan and Accreditation.
652.239–71 Security Requirements for Unclassified Information Technology Resources.
652.242–70 Contracting Officer's Representative (COR).
652.242–71 Notice of Shipments.
652.242–72 Shipping Instructions.
652.242–73 Authorization and Performance.
652.243–70 Notices.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26177, July 11, 1988, unless otherwise noted.

652.000 Scope of part.

This part sets forth solicitation provisions and contract clauses, in addition to those prescribed in FAR Part 52, for use in DOS acquisitions.

Subpart 652.1—Instructions for Using Provisions and Clauses

652.100 Scope of subpart.

652.100–70 Policy.

(a) The solicitation provisions and contract clauses in FAR Subpart 52.2 or this Subpart 652.2 shall be used as prescribed therein, except when the use of any provision or clause is prohibited by or inconsistent with local laws, or the supplies or services could not be obtained if the provision or clause were to be included.

(b) The contracting officer shall justify the exclusion of any provisions or clauses in accordance with FAR Subpart 1.4 and 601.470.

652.102 Incorporating provisions and clauses.

652.102–1 Incorporation by reference.

The Procurement Executive is the agency head for the purposes of FAR 52.102–1(a)(2)(ii).

Subpart 652.2—Texts of Provisions and Clauses

652.200 Scope of subpart.

This subpart sets forth the text of all DOSAR provisions and clauses, and for each provision and clause provides a cross-reference to the location in the DOSAR that prescribes its use.

652.206–70 Competition Advocate/Ombudsman.

As prescribed in 606.570, insert the following provision:

COMPETITION ADVOCATE/OMBUDSMAN (AUG 1999)

(a) The Department of State's Competition Advocate is responsible for assisting industry in removing restrictive requirements from Department of State solicitations and removing barriers to full and open competition and use of commercial items. If such a solicitation is considered competitively restrictive or does not appear properly conducive to competition and commercial practices, potential offerors are encouraged to first contact the contracting officer for the respective solicitation. If concerns remain unresolved, contact the Department of State Competition Advocate on (703) 516–1680, by fax at (703) 875–6155, or write to: Department of State, Competition Advocate, Office of the Procurement Executive (A/OPE), Suite 603, SA–6, Washington, DC 20522–0602.

(b) The Department of State's Acquisition Ombudsman has been appointed to hear concerns from potential offerors and contractors during the preaward and postaward phases of this acquisition. The role of the ombudsman is not to diminish the authority of the contracting officer, the Technical Evaluation Panel or Source Evaluation Board, or the selection official. The purpose of the ombudsman is to facilitate the communication of concerns, issues, disagreements, and recommendations of interested parties to the appropriate Government personnel, and work to resolve them. When requested and appropriate, the ombudsman will maintain strict confidentiality as to the source of the concern. The ombudsman does not participate in the evaluation of proposals, the source selection process, or the adjudication of formal contract disputes. Interested parties are invited to contact the contracting activity ombudsman, [insert name], at [insert telephone and fax numbers]. For an American Embassy or overseas post, refer to the numbers below for the Department Acquisition Ombudsman. Concerns, issues, disagreements, and recommendations which cannot be resolved at a contracting activity level may be referred to the Department of State Acquisition Ombudsman at (703) 516–1680, by fax at (703) 875–6155, or write to: Department of State, Acquisition Ombudsman, Office of the Procurement Executive (A/OPE), Suite 603, SA–6, Washington, DC 20522–0602.

(End of provision)

[64 FR 43629, Aug. 11, 1999]

652.216–70 Ordering—Indefinite-Delivery Contract.

As prescribed in 616.506–70, insert the following clause:

ORDERING—INDEFINITE-DELIVERY CONTRACTS (APR 2004)

The Government shall use one of the following forms to issue orders under this contract:

(a) The Optional Form 347, Order for Supplies or Services, and Optional Form 348, Order for Supplies or Services Schedule—Continuation; or,

(b) The DS–2076, Purchase Order, Receiving Report and Voucher, and DS–2077, Continuation Sheet.

(End of clause)

[53 FR 26177, July 11, 1988, as amended at 59 FR 66768, Dec. 28, 1994; 64 FR 43630, Aug. 11, 1999; 69 FR 19338, Apr. 13, 2004]

652.216–71 Price Adjustment.

As prescribed in 616.203–4, insert a clause substantially the same as follows:

PRICE ADJUSTMENT (AUG 1999)

(a) The contract price may be increased or decreased in actual costs of direct service labor which result directly from laws enacted and effective during the term of this contract by the [insert name of country] Government. Direct service labor costs include only the costs of wages and direct benefits (such as social security, health insurance, unemployment compensation insurance) paid to or incurred for the direct benefit of personnel performing services under one of the categories listed in Section [identify section number] of this contract. Price adjustments will include only changes in direct service labor costs incurred in order to comply with the requirements of the law. No adjustment will be made under this clause with respect to labor costs of personnel not performing direct service labor under the categories of Section [identify section], nor for overhead, profit, general and administrative (G&A) costs, taxes or any other costs whatsoever.

(b) For the contracting officer to consider any request for adjustment, the contractor shall demonstrate in writing:

(1) That the change in the law occurred during the term of this contract and subsequent to the award date of this contract; and,

(2) That the change in the law could not have been reasonably anticipated prior to contract award; and,

(3) How the change in the law directly affects the contractor's costs under this contract.

(c) The contractor shall present data that clearly supports any request for adjustment. This data shall be submitted no later than 30 calendar days after the changes in the law have been made public. This data shall include, but not be limited to, the following:

(1) The calculation of the amount of adjustment requested; and,

(2) Documentation which identifies and provides the appropriate portions of the text of the particular law from which the request is derived.

(d) In order to establish the change between the requested adjusted rate and the original rate, the contractor shall support the appropriate data and composition of the original rate and the requested adjusted rate. This shall include details regarding specific hourly rates paid to individual employees. For contracts paid in U.S. dollars, the contractor's request for price adjustment shall present data reflecting:

(1) The exchange rate in effect on the date of the contractor's proposal that was accepted for the basic contract; and

(2) The current exchange rate and its effect on payment of workers in local currency. The allowable adjustment shall be limited to the extent to which increases in direct service labor costs due to host country law changes are not offset by exchange rate gains.

(e) Only direct cost changes mandated by enacted laws shall be considered for adjustment under this contract. Changes for purposes of maintaining parity of pay between employees at the minimum mandated levels and employees already paid at levels above the newly mandated minimums shall not be considered. Therefore, if the contractor elects to increase payments to employees who are already being paid at or above the mandated amounts, such increased costs shall be borne solely by the contractor and shall not be justification for an increase in the hourly and monthly rates under this contract.

(f) Any request for adjustment shall be presented by signature of an officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

(g) No adjustment shall be made to the contract price that relates to any indirect, overhead, or fixed costs, profit or fee. Only the changes in direct service labor wages (and any benefits based directly on wages) shall be considered by the U.S. Government as basis for contract price changes.

(h) No request by the contractor for an adjustment under this clause shall be allowed if asserted after final payment has been made under this contract.

(i) This clause shall only apply to laws enacted by the [insert name of country] Government meeting the criterion set forth above in paragraph (b). No adjustments shall be made due to currency fluctuations in exchange rates.

(End of clause)

[64 FR 43630, Aug. 11, 1999]

652.219–70 Department of State Subcontracting Goals.

As prescribed in 619.708–70, insert a provision substantially the same as follows:

DEPARTMENT OF STATE SUBCONTRACTING GOALS (APR 2004)

(a) The offeror shall provide a Small, Small Disadvantaged, Woman-Owned Small, HUBZone Small, and Service-Disabled Veteran-Owned Small Enterprise Subcontracting Plan that details its approach to selecting and using Small, Small Disadvantaged, Woman-Owned Small, HUBZone Small, and Service-Disabled Veteran-Owned Small Business Enterprises.

(b) For the fiscal year [insert appropriate fiscal year], the Department's subcontracting goals are as follows:

(1) Goal for subcontracting to SB: _____

(2) Goal for subcontracting to SDB: _____

(3) Goal for subcontracting to SWB: _____

(4) Goal for subcontracting to HUBZone Firms: _____

(5) Goal for subcontracting to SDVO: _____

(6) Omnibus goals (if applicable): _____

(i) 10% to minority business

(ii) 10% to small business

(End of provision)

[69 FR 19338, Apr. 13, 2004]

652.219–71 Section 8(a) Direct Awards.

As prescribed in 619.811–3(f), insert the following clause:

SECTION 8(A) DIRECT AWARDS (AUG 1999)

(a) This purchase order or contract is issued as a direct award between the contracting activity and the 8(a) contractor pursuant to the Memorandum of Understanding between the Small Business Administration (SBA) and the Department of State (DOS). SBA retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and provides counseling and assistance to the 8(a) contractor under the 8(a) program. The cognizant SBA district office is: [To be completed by the contracting officer at the time of award]

(b) The DOS contracting officer is responsible for administering the purchase order or contract and taking any action on behalf of the Government under the terms and conditions of the purchase order or contract. However, the DOS contracting officer shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the purchase order or contract. The DOS contracting officer shall also coordinate with SBA prior to processing any novation agreement. The DOS contracting officer may assign contract administration functions to a contract administration office.

(c) The contractor agrees:

(1) to notify the DOS contracting officer, simultaneous with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based, plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership and control; and,

(2) to adhere to the requirements of FAR 52.219–14, Limitations on Subcontracting.

(End of clause)

[64 FR 43630, Aug. 11, 1999]

652.219–72 Department of State Mentor-Protégé Program.

As prescribed in 619.202–70(o)(1), insert the following provision:

DEPARTMENT OF STATE MENTOR-PROTÉGÉ PROGRAM (APR 2004)

(a) Large and small businesses are encouraged to participate in the Department of State Mentor-Protégé Program. Mentor firms provide eligible small business protégés with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(b) Mentor firms are large prime contractors or eligible small businesses capable of providing developmental assistance. Protégé firms are small businesses, as defined in 13 CFR parts 121, 124, and 126.

(c) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that aids protégés. Firms interested in participating in the program are encouraged to contact the Department of State OSDBU for further information.

(End of provision)

[69 FR 19338, Apr. 13, 2004]

652.219–73 Mentor Requirements and Evaluation.

As prescribed in 619.202–70(o)(2), insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (APR 2004)

(a) Mentor and protégé firms shall submit an evaluation to the Department of State's OSDBU at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the program, whichever occurs first. At the conclusion of each year in the mentor-protégé program, the prime contractor and protégé will formally brief the Department of State Mentor-Protégé Program Manager regarding program accomplishments under their mentor-protégé agreement.

(b) A mentor or protégé shall notify the OSDBU and the contracting officer, in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the program. A mentor firm shall notify the OSDBU and the contracting officer upon receipt of a protégé's notice of withdrawal from the program.

(End of clause)

[69 FR 19338, Apr. 13, 2004]

652.225–70 Arab League Boycott of Israel.

As prescribed in 625.7002(a), insert the following provision:

ARAB LEAGUE BOYCOTT OF ISRAEL (AUG 1999)

(a) *Definitions.* As used in this provision:

Foreign person means any person other than a United States person as defined below.

United States person means any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), any domestic concern (including any permanent domestic establishment of

any foreign concern), and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as provided under the Export Administration Act of 1979, as amended.

(b) *Certification.* By submitting this offer, the offeror certifies that it is not:

(1) Taking or knowingly agreeing to take any action, with respect to the boycott of Israel by Arab League countries, which Section 8(a) of the Export Administration Act of 1979, as amended (50 U.S.C. 2407(a)) prohibits a United States person from taking; or,

(2) Discriminating in the award of subcontracts on the basis of religion.

(End of provision)

[64 FR 43631, Aug. 11, 1999]

652.225–71 Section 8(a) of the Export Administration Act of 1979, as Amended.

As prescribed in 625.7002(b), insert the following clause:

SECTION 8(A) OF THE EXPORT ADMINISTRATION ACT OF 1979, AS AMENDED (AUG 1999)

(a) Section 8(a) of the U.S. Export Administration Act of 1979, as amended (50 U.S.C. 2407(a)), prohibits compliance by U.S. persons with any boycott fostered by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation. The Boycott of Israel by Arab League countries is such a boycott, and therefore, the following actions, if taken with intent to comply with, further, or support the Arab League Boycott of Israel, are prohibited activities under the Export Administration Act:

(1) Refusing, or requiring any U.S. person to refuse to do business with or in Israel, with any Israeli business concern, or with any national or resident of Israel, or with any other person, pursuant to an agreement of, or a request from or on behalf of a boycotting country;

(2) Refusing, or requiring any U.S. person to refuse to employ or otherwise discriminating against any person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person;

(3) Furnishing information with respect to the race, religion, or national origin of any U.S. person or of any owner, officer, director, or employee of such U.S. person;

(4) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the State of Israel, with any business concern organized under the laws of the State of Israel, with any Israeli national or resident, or with any person which is known or believed to be restricted from having any business relationship with or in Israel;

(5) Furnishing information about whether any person is a member of, has made contributions to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports the State of Israel; and,

(6) Paying, honoring, confirming, or otherwise implementing a letter of credit which contains any condition or requirement against doing business with the State of Israel.

(b) Under Section 8(a), the following types of activities are not forbidden ''compliance with the boycott,'' and are therefore exempted from Section 8(a)'s prohibitions listed in paragraphs (a)(1)–(6) above:

(1) Complying or agreeing to comply with requirements:

(i) Prohibiting the import of goods or services from Israel or goods produced or services provided by any business concern organized under the laws of Israel or by nationals or residents of Israel; or,

(ii) Prohibiting the shipment of goods to Israel on a carrier of Israel, or by a route other than that prescribed by the boycotting country or the recipient of the shipment;

(2) Complying or agreeing to comply with import and shipping document requirements with respect to the country of origin, the name of the carrier and route of shipment, the name of the supplier of the shipment or the name of the provider of other services, except that no information knowingly furnished or conveyed in response to such requirements may be stated in negative, blacklisting, or similar exclusionary terms, other than with respect to carriers or route of shipments as may be permitted by such regulations in order to comply with precautionary requirements protecting against war risks and confiscation;

(3) Complying or agreeing to comply in the normal course of business with the unilateral and specific selection by a boycotting country, or national or resident thereof, of carriers, insurance, suppliers of services to be performed within the boycotting country or specific goods which, in the normal course of business, are identifiable by source when imported into the boycotting country;

(4) Complying or agreeing to comply with the export requirements of the boycotting country relating to shipments or transshipments of exports to Israel, to any business concern of or organized under the laws of Israel, or to any national or resident of Israel;

(5) Compliance by an individual or agreement by an individual to comply with the

immigration or passport requirements of any country with respect to such individual or any member of such individual's family or with requests for information regarding requirements of employment of such individual within the boycotting country; and,

(6) Compliance by a U.S. person resident in a foreign country or agreement by such person to comply with the laws of that country with respect to his or her activities exclusively therein, and such regulations may contain exceptions for such resident complying with the laws or regulations of that foreign country governing imports into such country of trademarked, trade named, or similarly specifically identifiable products, or components of products for his or her own use, including the performance of contractual services within that country, as may be defined by such regulations.

(End of clause)

[64 FR 43631, Aug. 11, 1999]

652.228–70 Defense Base Act—Covered Contractor Employees.

As prescribed in 628.309–70(a), insert the following provision:

DEFENSE BASE ACT—COVERED CONTRACTOR EMPLOYEES (JUN 2006)

(a) Bidders/offerors shall indicate below whether or not any of the following categories of employees will be employed on the resultant contract, and, if so, the number of such employees:

Category	Yes/No	Number
(1) United States citizens or residents		
(2) Individuals hired in the United States, regardless of citizenship		
(3) Local nationals or third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.	.....	Local nationals: _____ Third country nationals: _____
(4) Local nationals or third country nationals where contract performance takes place in a country where there are local workers' compensation laws.	.....	Local nationals: _____ Third country nationals: _____

(b) The contracting officer has determined that for performance in the country of [contracting officer insert country of performance and check the appropriate block below]

☐ Workers' compensation laws exist that will cover local nationals and third country nationals.

☐ Workers' compensation laws do not exist that will cover local nationals and third country nationals.

(c) If the bidder/offeror has indicated ''yes'' in block (a)(4) of this provision, the bidder/offeror shall not purchase Defense Base Act insurance for those employees. However, the bidder/offeror shall assume liability toward the employees and their beneficiaries for war-hazard injury, death, capture, or detention, in accordance with the clause at FAR 52.228–4.

(d) If the bidder/offeror has indicated ''yes'' in blocks (a)(1), (2), or (3) of this provision, the bidder/offeror shall compute Defense Base Act insurance costs covering those employees pursuant to the terms of the contract between the Department of State and the Department's Defense Base Act insurance carrier at the rates specified in DOSAR 652.228–74, Defense Base Act Insurance Rates—Limitation. If DOSAR provision 652.228–74 is not included in this solicitation, the bidder/offeror shall notify the contracting officer before the closing date so that the solicitation can be amended accordingly.

(End of provision)

[71 FR 34841, June 16, 2006; 71 FR 41177, July 20, 2006]

652.228–71 Worker's Compensation Insurance (Defense Base Act)—Services.

As prescribed in 628.309–70(b), insert the following clause:

WORKERS' COMPENSATION INSURANCE (DEFENSE BASE ACT)—SERVICES (JUN 2006)

(a) This clause supplements FAR 52.228–3. For the purposes of this clause, ''covered contractor employees'' includes the following individuals:

(1) United States citizens or residents;

(2) Individuals hired in the United States or its possessions, regardless of citizenship; and

(3) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(b) The Contractor shall procure Defense Base Act (DBA) insurance pursuant to the

terms of the contract between the Department of State and the Department's DBA insurance carrier for covered contractor employees, unless the Contractor has a DBA self-insurance program approved by the Department of Labor. The Contractor shall submit a copy of the Department of Labor's approval to the contracting officer upon contract award, if applicable.

(c) The current rate under the Department of State contract is [contracting officer insert rate] of compensation for services.

(d) The Contractor shall insert a clause substantially the same as this in all subcontracts. The Contractor shall require that subcontractors insert a similar clause in any of their subcontracts.

(e) Should the rates for DBA insurance coverage increase or decrease during the performance of this contract, the contracting officer shall modify this contract accordingly.

(f) The Contractor shall demonstrate to the satisfaction of the contracting officer that the equitable adjustment as a result of the insurance increase or decrease does not include any reserve for such insurance. Adjustment shall not include any overhead, profit, general and administrative expenses, etc.

(g)(1) Section 16 of the State Department Basic Authorities Act (22 U.S.C. 2680a), as amended, provides that the Defense Base Act shall not apply with respect to such contracts as the Secretary of State determines are contracts with persons employed to perform work for the Department of State on an intermittent basis for not more than 90 days in a calendar year. ''Persons'' includes individuals hired by companies under contract with the Department. The Procurement Executive has the authority to issue the waivers for Contractor employees who work on an intermittent or short-term basis.

(2) The Contractor shall submit waiver requests to the contracting officer. The request shall contain the following information:

(i) Contract number;

(ii) Name of Contractor;

(iii) Brief description of the services to be provided under the contract and country of performance;

(iv) Name and position title of individual(s);

(v) Nationality of individual(s) (must be U.S. citizen or U.S. resident);

(vi) Dates (or timeframe) of performance at the overseas location; and,

(vii) Evidence of alternative workers' compensation coverage for these employees (e.g., evidence that the State workers' compensation program covers workers on short-term foreign assignments).

(3) The contracting officer shall provide to the Contractor the original of the approved or disapproved document and maintain a copy in the contract file.

(End of clause)

Alternate I. (MO/YR) If the contract is for construction, as prescribed in 628.309–70(b), substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) The current rate under the Department of State contract is [contracting officer insert rate] of compensation for construction.

[71 FR 34841, June 16, 2006; 71 FR 41177, July 20, 2006]

652.228–72—652.228–73 [Reserved]

652.228–74 Defense Base Act insurance rates—Limitation.

As prescribed in 628.309–70(c), insert the following provision:

DEFENSE BASE ACT INSURANCE RATES—LIMITATION (JUN 2006)

(a) The Department of State has entered into a contract with an insurance carrier to provide Defense Base Act (DBA) insurance to Department of State covered contractor employees at a contracted rate. For the purposes of this provision, ''covered contractor employees'' includes the following individuals:

(1) United States citizens or residents;

(2) Individuals hired in the United States or its possessions, regardless of citizenship; and

(3) Local nationals and third country nationals where contract performance takes place in a country where there are no local workers' compensation laws.

(b) In preparing the cost proposal, the bidder/offeror shall use the following rates in computing the cost for DBA insurance:

Services @[contracting officer insert current rate] of compensation; or

Construction @[contracting officer insert current rate] of compensation.

(c) Bidders/offerors shall compute the total compensation (direct salary plus differential, but excluding per diem, housing allowance and other miscellaneous allowances) to be paid to covered contractor employees and the cost of the DBA insurance in their bid/offer using the foregoing rate. Bidders/offerors shall include the estimated DBA insurance costs in their proposed total fixed price or estimated cost. However, the DBA insurance costs shall be identified in a separate line item in the bid/proposal.

(End of provision)

[71 FR 34841, June 16, 2006; 71 FR 41177, July 20, 2006]

652.229–70 Excise Tax Exemption Statement for Contractors Within the United States.

As prescribed in 629.401–70, insert the following clause:

EXCISE TAX EXEMPTION STATEMENT FOR CONTRACTORS WITHIN THE UNITED STATES (JUL 1988)

This is to certify that the item(s) covered by this contract is/are for export solely for the use of the U.S. Foreign Service Post identified in the contract schedule.

The Contractor shall use a photocopy of this contract as evidence of intent to export. Final proof of exportation may be obtained from the agent handling the shipment. Such proof shall be accepted in lieu of payment of excise tax.

(End of clause)

[53 FR 26177, July 11, 1988, as amended at 64 FR 43632, Aug. 11, 1999]

652.229–71 Personal Property Disposition at Posts Abroad.

As prescribed in 629.402–1–70, insert the following clause:

PERSONAL PROPERTY DISPOSITION AT POSTS ABROAD (AUG 1999)

Regulations at 22 CFR Part 136 require that U.S. Government employees and their families do not profit personally from sales or other transactions with persons who are not themselves entitled to exemption from import restrictions, duties, or taxes. Should the contractor experience importation or tax privileges in a foreign country because of its contractual relationship to the United States Government, the contractor shall observe the requirements of 22 CFR part 136 and all policies, rules, and procedures issued by the chief of mission in that foreign country.

(End of clause)

[64 FR 43633, Aug. 11, 1999]

652.232–70 Payment Schedule and Invoice Submission (Fixed-Price).

As prescribed in 632.908(a), the contracting officer may insert a clause substantially the same as follows:

PAYMENT SCHEDULE AND INVOICE SUBMISSION (FIXED-PRICE) (AUG 1999)

(a) *General*. The Government shall pay the contractor as full compensation for all work required, performed and accepted under this contract, inclusive of all costs and expenses, the firm fixed-price stated in Section B of this contract.

[*Use paragraph (b) only if partial payments apply. Otherwise, paragraph (a) above assumes the contractor will be paid in full amount upon completion of all contractural requirements.*]

(b) *Payment Schedule*. Payments will be made in accordance with the following partial payment schedule:

Partial payment No.	Specific deliverable	Delivery date	Payment amount
1			
2			
3			

[*Continue as necessary*]

(c) Invoice Submission. Invoices shall be submitted in an original and [contracting officer insert appropriate number of copies] to the office identified in Block 10 of the SF–26, Block 23 of the SF–33, or Block 18b of the SF–1449. To constitute a proper invoice, the invoice must include all items per FAR 52.232–25, ''Prompt Payment''.

(d) *Contractor Remittance Address*. Payment shall be made to the contractor's address as specified on the cover page of this contract, unless a separate remittance address is specified below:

_____

_____

_____

_____

(End of clause)

[59 FR 66771, Dec. 28, 1994, as amended at 64 FR 43633, Aug. 11, 1999]

652.232–71 Voucher Submission (Cost-Reimbursement).

As prescribed in 632.908(b), the contracting officer may insert a clause substantially the same as follows:

VOUCHER SUBMISSION (COST-REIMBURSEMENT) (AUG 1999)

(a) *General*. The contractor shall submit, on a monthly basis [*contracting officer may substitute a different time frame, if appropriate*], an original and [*contracting officer insert appropriate number*] copies of each voucher. In addition to the items necessary per FAR 52.232–25, ''Prompt Payment'', the voucher shall show the elements of cost for the billing period and the cumulative costs to date. All vouchers shall be submitted to

the office identified in Block 10 of the SF–26, Block 23 of the SF–33, or Block 18b of the SF–1449.

(b) *Contractor Remittance Address.* Payment shall be made to the contractor's address as specified on the cover page of this contract, unless a separate remittance address is specified below:

_____

_____

_____

_____

(End of clause)

[59 FR 66772, Dec. 28, 1994, as amended at 64 FR 43633, Aug. 11, 1999]

652.232–72 Limitation of Funds.

As prescribed in 632.705–70, insert the following clause:

LIMITATION OF FUNDS (AUG 1999)

(a) Of the total price in Section B (or the ''Prices'' section), only the amount stated on the contract award document or subsequent modifications is now available for payment and obligated under this contract. It is anticipated that from time to time, additional funds will be obligated under the contract until the total price of the contract is obligated.

(b) The Government is not obligated to pay or reimburse the contractor more than the amount obligated pursuant to this clause. The contractor agrees to perform the contract up to the point at which the total amount paid and payable by the Government (including amounts payable for subcontracts and settlement costs if this contract is terminated for convenience) approximates but does not exceed the total amount obligated.

(c)(1) It is contemplated that funds now obligated under this contract will cover the work to be performed until [contracting officer insert date].

(2) If the contractor considers the funds obligated under this contract to be insufficient to cover the work to be performed until that date, or another date agreed to by the parties, the contractor shall notify the contracting officer in writing and indicate the date on which it expects expended funds to approximate 75 percent of the total amount obligated. The notice shall state the estimated amount of additional funds required to continue performance through the date specified in paragraph (c)(1) of this clause or another date agreed to by the parties.

(3) If, after notification is provided pursuant to paragraph (c)(2) of this clause, additional funds are not obligated, or an earlier date than the date in paragraph (c)(1) of this clause is not agreed to, the contractor shall not be obligated to continue performance under this contract (including actions under the termination clause of this contract) beyond the funds obligated for contract performance.

(d) When additional funds are obligated from time to time for continued performance of this contract, the contract shall be modified to increase the funds obligated and to indicate the period of performance for which funds are applicable. The contractor may notify the contracting officer as provided in paragraph (c)(2) of this clause regarding any additional funds obligated.

(e) If the contractor incurs additional costs or is delayed in the performance of work under this contract, solely by reason of the Government's failure to obligate additional funds in amounts sufficient for the timely performance of this contract, an equitable adjustment may be made to the price, or time of delivery, or both.

(f) This clause shall become inoperative upon obligation of funds sufficient to cover the full price stated in the contract, except for rights and obligations then existing under this clause.

(g) Nothing in this clause shall affect the Government's right to terminate the contract for convenience or default.

(End of clause)

[64 FR 43633, Aug. 11, 1999]

652.236–70 Accident Prevention.

As prescribed in 636.513, insert the following clause:

ACCIDENT PREVENTION (APR 2004)

(a) General. The contractor shall provide and maintain work environments and procedures which will safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to contractor operations and activities; avoid interruptions of Government operations and delays in project completion dates; and, control costs in the performance of this contract. For these purposes, the contractor shall:

(1) Provide appropriate safety barricades, signs and signal lights;

(2) Comply with the standards issued by any local government authority having jurisdiction over occupational health and safety issues; and,

(3) Ensure that any additional measures the contracting officer determines to be reasonably necessary for this purpose are taken.

(4) For overseas construction projects, the contracting officer shall specify in writing additional requirements regarding safety if the work involves:

(i) Scaffolding;

(ii) Work at heights above two (2) meters;

(iii) Trenching or other excavation greater than one (1) meter in depth;

(iv) Earth moving equipment;

(v) Temporary wiring, use of portable electric tools, or other recognized electrical hazards. Temporary wiring and portable electric tools require the use of a ground fault circuit interrupter (GFCI) in the affected circuits; other electrical hazards may also require the use of a GFCI;

(vi) Work in confined spaces (limited exits, potential for oxygen less than 19.5 percent or combustible atmosphere, potential for solid or liquid engulfment, or other hazards considered to be immediately dangerous to life or health such as water tanks, transformer vaults, sewers, cisterns, etc.);

(vii) Hazardous materials—a material with a physical or health hazard including but not limited to, flammable, explosive, corrosive, toxic, reactive or unstable, or any operations which creates any kind of contamination inside an occupied building such as dust from demolition activities, paints, solvents, etc.; or

(viii) Hazardous noise levels.

(b) Records. The contractor shall maintain an accurate record of exposure data on all accidents incident to work performed under this contract resulting in death, traumatic injury, occupational disease, or damage to or theft of property, materials, supplies, or equipment. The contractor shall report this data in the manner prescribed by the contracting officer.

(c) Subcontracts. The contractor shall be responsible for its subcontractors' compliance with this clause.

(d) Written program. Before commencing work, the contractor shall:

(1) Submit a written plan to the contracting officer for implementing this clause. The plan shall include specific management or technical procedures for effectively controlling hazards associated with the project; and,

(2) Meet with the contracting officer to discuss and develop a mutual understanding relative to administration of the overall safety program.

(e) Notification. The contracting officer shall notify the contractor of any non-compliance with these requirements and the corrective actions required. This notice, when delivered to the contractor or the contractor's representative on site, shall be deemed sufficient notice of the non-compliance and corrective action required. After receiving the notice, the contractor shall immediately take corrective action. If the contractor fails or refuses to promptly take corrective action, the contracting officer may issue an order suspending all or part of the work until satisfactory corrective action has been taken. The contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any suspension of work order issued under this clause.

(End of clause)

[64 FR 43633, Aug. 11, 1999, as amended at 69 FR 19339, Apr. 13, 2004]

652.236–71 Foreign Service Buildings Act, as Amended.

As prescribed in 636.570(a), insert the following provision:

FOREIGN SERVICE BUILDINGS ACT, AS AMENDED (APR 2004)

(a) This solicitation is subject to Section 11 of the Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 302). This statute limits competition under this solicitation to:

(1) American-owned firms, as described in paragraph (b) of this provision; and,

(2) Firms from countries that permit or agree to permit substantially equal access to American firms for comparable diplomatic and consular building projects.

(b) To qualify as an American-owned firm for purposes of this solicitation, the bidder/offeror must demonstrate evidence of:

(1) Performance of similar construction work in the United States; and

(2) Either—

(i) Ownership in excess of 50% by U.S. citizens or permanent residents; or

(ii) Incorporation in the United States for more than three (3) years and employment of U.S. citizens or permanent residents in more than half of the company's permanent full-time professional and managerial positions in the United States.

(c) For purposes of determining competitive status, offers submitted by American-owned firms shall be reduced by ten (10) percent, provided that two responsible bidders/offerors submit a bid/offer.

(d) *Evidence of qualification*. (1) Performance of similar construction work in the United States. The bidder/offeror must describe below one or more similar projects completed in the United States. For each project, provide the following information:

Location: _____
(City and State) _____
Complexity: _____
_____
(Office building, etc.)
Type of construction: _____
Value of project: _____
Location: _____
(City and State) _____
Complexity: _____
_____
(Office building, etc.)
Type of construction: _____
Value of project: _____
Location: _____

(City and State) _____
Complexity: _____
_____
(Office building, etc.)
Type of construction: _____
Value of project: _____

If the bidder/offeror's participation was as a partner or co-venture, indicate the percentage of the project performed by the bidder/offeror: _____ %

(2) Corporate location or ownership.

(i) The bidder/offeror certifies that it □ is □ is not owned in excess of fifty (50) percent by United States citizens or permanent residents.

(ii) The bidder/offeror certifies that it □ has □ has not been incorporated in the United States for more than three years and that it □ employs □ does not employ United States citizens or permanent residents in more than half of its permanent full-time professional and managerial positions in the United States.

(e) By signing this bid/offer, the bidder/offeror certifies to the best of its knowledge, all of the representations and certifications provided in this provision are accurate, current and complete.

(End of provision)

[69 FR 19339, Apr. 13, 2004]

652.236–72 Statement of Qualifications for the Omnibus Diplomatic Security and Antiterrorism Act.

As prescribed in 636.570(b), insert the following provision:

STATEMENT OF QUALIFICATIONS FOR THE OMNIBUS DIPLOMATIC SECURITY AND ANTITERRORISM ACT (APR 2004)

(a) This solicitation is subject to Section 402 and Section 406(c) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (P.L. 99–399; 22 U.S.C. 4852). The Act limits certain construction projects abroad to United States persons or United States joint venture persons, and excludes organizations that have business arrangements with Libya. This Statement of Qualifications shall be used to determine if a bidder/offeror meets the definition of a ''United States person'' or a ''United States joint venture person'' and whether they have any business arrangements with Libya that may disqualify them from participating in this solicitation.

(b) *Definition*. As used in this provision—

U.S. person means a company, partnership, or joint venture that the Government determines, after consideration of all available information, including but not limited to that provided by the bidder/offeror in response to this solicitation, to be qualified pursuant to Section 402.

(c) *Representation*. The bidder/offeror represents as part of its bid/offer that it □ does □ does not meet the qualifications as a U.S. person as set forth in Section 402 of the Act.

[*Complete a Statement of Qualifications for Purposes of Determining Status as a U.S. Person if the offeror represents that it is eligible. See paragraph (d) of this provision.*]

Warning: Any material misrepresentation made in the Statement of Qualifications may be the basis for disqualification of a bidder/offeror and reference for consideration of suspension or debarment or for prosecution under Federal law (cf. 18 U.S.C. 1001). Bidder/offeror qualifications will be determined primarily on the basis of information submitted in the Statement of Qualifications, including attachments thereto, but the Government may, at its discretion, rely on information contained elsewhere in the bidder's/offeror's bid/proposal or obtained from other sources.

(d) *Statement of Qualifications for Purposes of Determining Status as a U.S. Person (22 U.S.C. 4852)*. A bidder/offeror that represents that it is a U.S. person must provide the following information.

Statement of Qualifications for Purposes of Determining Status as a U.S. Person (22 U.S.C. 4852)

Name and address of U.S. person organization providing this information:

_____
_____
_____

Introduction. Section 402 of the Omnibus Diplomatic Security and Antiterrorism Act (Public Law 99–399) provides that a ''United States person'' or a ''qualified United States joint venture'' must meet certain requirements, listed in sections 402(c)(2) and (3) of the Act, to be eligible to compete. To assist business entities to determine whether they qualify as a U.S. person or U.S. joint venture person, guidance is hereby provided. For ease of reference, the statutory language is quoted immediately before the definitions that apply to it. Space for the required information is provided immediately following each definition.

NOTE: The Statement of Qualifications shall provide information correctly applicable to the U.S. person whose qualifications are being certified, and shall not include information pertaining to corporate affiliates or subsidiaries. Organizations that wish to use the experience or financial resources of any other legally dependent organization or individual, including parent companies, subsidiaries, or other related organizations, must do so by way of a joint venture. A prospective bidder/offeror may be an individual organization or firm, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture where no formal agreement has been reached, but the offering entity relies upon the experience of a related U.S. firm that

guarantees performance. To be considered a ''qualified United States joint venture person,'' the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. person listed in Section 402. By signing this bid/proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

1. *Section 402(c)(2)(A):* ''The term 'United States person' means a person which—(A) is incorporated or legally organized under the laws of the United States, including the District of Columbia, and local laws.''

Definitions for purposes of Section 402 determinations of eligibility—

Incorporated means the successful de jure incorporation of a business organization pursuant to the laws of any United States jurisdiction or component thereof.

Legally organized means the legally recognized existence of an organization other than a de jure corporation (e.g., a partnership) under the laws of any United States jurisdiction or component thereof. Only organizations that have a legal status, including the right to bring suit, to sign contracts, and to hold property under the law of the jurisdiction where they are doing business will qualify as legally organized. A natural person who is a United States citizen acting in his or her entrepreneurial capacity will be deemed to be a ''person legally organized'' within the scope of this definition, provided that the prospective bidder/offeror holds all required licenses to do business in the jurisdiction where he or she is located.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Question 1. The organization seeking eligibility under Section 402 is incorporated or is legally organized under the laws of what jurisdiction?

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2. *Section 402(c)(2)(B):* ''The term 'United States person' means a person which—(B) has its principal place of business in the United States.''

Definitions for purposes of Section 402 determinations of eligibility—

Principal place of business means the main location of the prospective bidder/offeror. For purposes of this section, a prospective bidder/offeror shall identify only one principal place of business, and such location shall include at least the offices of the chief operating officer and headquarters staff. The named location must be a United States jurisdiction from which a tax return has been filed or will be filed during the calendar year in which the prospective bidder/offeror submits this bid/offer.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Question 2(a). The organization seeking eligibility has its principal place of business in what city and state?

Question 2(b). What kind of tax return was or will be filed, and in what jurisdiction, during the current calendar year?

(i) Jurisdiction: _____

(e.g., federal, state, city)

(ii) Type of return (e.g., income tax, franchise tax, etc.). Include all that apply:

---

3. *Section 402(c)(2)(C):* ''The term 'United States person' means a person which has been incorporated or legally organized in the United States—

(i) for more than 5 (five) years before the issuance date of the invitation for bids or request for proposals with respect to a construction project under subsection (a)(1); and,

(ii) for more than 2 (two) years before the issuance date of the invitation for bids or request for proposals with respect to a construction or design project abroad that involves technical security under subsection (a)(2).''

Definitions for purposes of Section 402 determinations of eligibility—

Has been incorporated or legally organized means that the organization can show continuity as an ongoing business. Organizations that have changed only their names meet the continuity requirement of this subsection. Organizations that have been bought, sold, merged, or otherwise substantially altered or enlarged their principal business activities will have the burden of proving that there have been ongoing operations by the same business entity for the required period of time. If the successor entity has acquired all of the assets and liabilities of the predecessor business and the predecessor business has no further existence, the successor may claim the incorporation date of the predecessor. In any other circumstance, the prospective bidder/offeror must show that the law of the jurisdiction in which it operates regards the prospective bidder/offeror as the complete successor in interest of the predecessor business for purpose of contractual obligations.

Issuance date means the date in Block 3 of the Standard Form 1442 accompanying this solicitation.

Years means calendar years measured from day of the month to day of the month. For example, January 1, 2002 through December

31, 2002 is one calendar year, as is July 1, 2002 through July 1, 2003.

Question 3:

(i) On what date was the organization seeking eligibility incorporated or legally organized? _____

(ii) If this date is less than the required number of years before the issuance date, on the basis of what documentation does the organization seeking eligibility claim that it has been in business for the requisite period of time?_____ (Identify, and forward copies as an Attachment to this Statement. This material may include such items as certificates of incorporation, partnership agreements, resolutions of boards of directors, etc.).

4. *Section 402(c)(2)(D):* ''The term 'United States person' means a person which has performed within the United States or at a United States diplomatic or consular establishment abroad administrative and technical, professional, or construction services similar in complexity, type of construction, and value to the contract being bid.''

Definitions for purposes of Section 402 determination of eligibility—

Administrative and technical, professional, or construction services means the kind of work in which the prospective bidder/offeror is interested. If the proposed contract is for construction management services, the prospective bidder/offeror will be expected to demonstrate construction management expertise. In general, ''administrative'' means the capacity or ability to manage; ''technical'' means the specific skills peculiar to the type of work required; ''professional'' means expert services resulting from advanced training in the type of work required; and ''construction'' experience if it has not directly performed all of the actual construction activities. Thus, an entity whose only construction work experience was performed by its legally distinct subsidiary or parent will not be considered to have construction experience.

Complexity means the physical size and technical size and demands of the project. ''Performed'' means projects that have been fully completed by the prospective bidder/offeror and accepted by the owner or other party to the transaction. Projects still in progress have not yet been performed for purposes of this definition.

Type of construction means the overall nature of the facilities to be built, including the kinds of materials to be used. Thus, if the contract will require the construction of a multi-story office building, the prospective bidder/offeror will be expected to demonstrate experience with facilities of this type.

Value means the total contract price of the project, not to the profit or loss to the bidder/offeror.

Within the United States means a United States jurisdiction that is the place where the subject matter of the contract or other arrangement was in fact completed. It does not mean the place where the contract or other arrangement was negotiated or signed. The term ''United States'' means any jurisdiction that is one of the 50 states, the District of Columbia, a United States territory, a United States possession, or the Commonwealth of Puerto Rico and the Northern Mariana Islands.

Question 4: List on this page, and an attachment (if necessary), one or more similar projects completed by the prospective bidder/offeror. For each project, provide the following information:

_____

Location:
(City and State, or Country)

_____

Type of service:
(administrative, etc.)

_____

Complexity:
(office building, etc.)

_____

Type of construction:

_____

Value of project:

If the prospective bidder/offeror's participation was as a partner or co-venturer, indicate the percentage of the project performed by the prospective offeror: _____ %

5. *Section 402(c)(2)(E):* ''The term 'United States person' means a person which—with respect to a construction project under subsection (a)(1)—has achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C)(i).''

Definitions of purposes of Section 402 determination of eligibility—

3 years of the 5-year period before the date specified in subparagraph (C)(i) means the three to five calendar year period immediately preceding the issuance date of this solicitation.

Total business volume means the U.S. dollar value of the gross income or receipts reported by the prospective bidder/offeror on its annual federal income tax returns.

Years means the business year of the prospective bidder/offeror, as reflected on its annual federal income tax returns.

Question 5: Please complete the information below for at least three of the five listed years.

The gross receipts for the business year: (list year and amount).

The gross receipts for the business year: (list year and amount).

The gross receipts for the business year: (list year and amount).

The gross receipts for the business year: (list year and amount).

The gross receipts for the business year: (list year and amount).

6. *Section 402(c)(2)(F):* ''The term 'United States person' means a person which—(i) employs United States citizens in at least 80 percent of its principal management positions in the United States; (ii) employs United States citizens in more than half of its permanent, full-time positions in the United States; and (iii) will employ United States citizens in at least 80 percent of the supervisory positions on the foreign buildings office project site.''

Definitions for purposes of Section 402 determinations of eligibility—

In the United States refers to those positions that the prospective bidder/offeror maintains within all jurisdictions which are one of the 50 states, the District of Columbia, a United States territory, a United States possession, or the Commonwealths of Puerto Rico and the Northern Mariana Islands.

Permanent, full-time positions means positions with the prospective bidder/offeror that are intended to be indefinite, as opposed to limited, seasonal, or project-duration periods. The term 'full-time' refers to positions in which the occupants are expected to and ordinarily work 40 hours a week. The term 'permanent, full-time positions' covers the portion of the prospective bidder's/offeror's workforce that continues to be employed without regard to the fluctuating requirements of production or projects.

Principal management positions refers to chief operating officer and those management officials reporting directly to him or her. In the case of a partnership, the term refers to every general partner. In the case of a corporation, the term refers to those officers of the corporation who are active in running its day-to-day operations. Members of corporation boards of directors who do not have operational responsibilities do not occupy ''principal management positions'' simply by virtue of their service on the board. In all cases, the term ''principal management positions'' also includes the position or positions held by the individual or individuals who will have primary corporate management oversight responsibility for this contract if the prospective bidder/offeror is awarded the contract. Each prospective bidder/offeror is responsible for listing all of its principal management positions and identifying their current occupants by name and citizenship.

Supervisory positions means all positions with significant authority to direct the work of others as well as those for which access to classified or controlled documents is required. Such positions will be identified in each contract.

United States citizen means natural persons with United States citizenship by virtue either of birth or of naturalization.

Question 6(a): The bidder/offeror has the following staff:

(i) Principal management positions in the United States:

Chief Operating Officer:

_____
(name)

_____
(citizenship)

(ii) For each individual reporting directly to the above-named Chief Operating Officer, list position, name, and citizenship:

_____
Position:

_____
Name:

_____
Citizenship:

(iii) Individual(s) expected to have primary management oversight responsibility for contract if it is awarded:

_____
(name)

_____
(citizenship)

Question 6(b): Number of permanent, full-time positions in the United States: _____

Question 6(c): Number of United States citizens currently employed in permanent, full-time positions in the United States: _____

Question 6(d): Certification of intent to employ U.S. citizens in a minimum of 80 percent of the supervisory positions identified by the Government on this project:

I so certify: _____
(signature)

_____
(name typed or printed)

_____
(position)

_____
(date)

7. *Section 402(c)(2)(G):* ''The term 'United States person' means a person which has the existing technical and financial resources in the United States to perform this contract.''

Definitions for purposes of Section 402 determinations of eligibility—

Existing technical and financial resources means the capability of the prospective bidder/offeror to mobilize adequate staffing and monetary arrangements from within the United States sufficient to perform the contract. Adequate staffing levels may be demonstrated by presenting the resumes of current United States citizens and resident aliens with skills and expertise necessary for the work in which the prospective bidder/offeror is interested or some other indication of available United States citizen or permanent legal resident human resources. Demonstration of adequate financial resources must be issued by entities that are subject to the jurisdiction of United States courts and have agents located within the United States for acceptance of service of process.

Question 7: Submit, as an Attachment to this Statement, materials demonstrating existing technical and financial resources in the United States.

8. *Section 402(c)(3):* ''The term 'qualified United States joint venture person' means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.''

Definitions for purposes of Section 402 determinations of eligibility—

Assets means tangible and intangible things of value conveyed or made available to the joint venture by the co-venturers.

Joint venture means a formal or *de facto* arrangement by and through which two or more persons or entities associate for the purpose of carrying out the prospective contract. Prospective bidders/offerors are advised that a joint venture may not be acceptable to projects requiring a Department of Defense facility security clearance because each co-venturer may post particular problems in obtaining security clearances. To be acceptable, all members of a joint venture must be individually and severally liable for the full performance of and resolution of any and all matters arising out of the contract, notwithstanding any provision of the joint venture agreement of law of the jurisdiction under which the joint venture was created.

Question 8(a): The bidder/offeror is is not a joint venture.

Question 8(b): If the bidder/offeror is a joint venture, the U.S. person participant is:

_____
(name)

_____
(address)

Question 8(c): If the bidder/offeror is a joint venture, the names and countries of citizenship for all co-venturers are as follows:

_____
(name)

_____
(citizenship)

_____
(name)

_____
(citizenship)

_____
(name)

_____
(citizenship)

Question 8(d): If the bidder/offeror is a joint venture, the U.S. person will own at least 51 percent of the assets of the joint venture.

I so certify: _____
(signature)

_____
(name typed printed)

_____
(position)

_____
(title)

9. *Libya.* Section 406(c) states ''No person doing business with Libya may be eligible for any contract awarded pursuant to this Act.''

Definitions for purposes of Section 406 eligibility—

Contract awarded establishes a time frame for the bar on doing business with Libya. The time during which a relationship with Libya is prohibited begins on the date the Section 406 information is submitted. For bidders/offerors not selected for contract award, the prohibition ceases on the date of award. For the bidder/offeror that is awarded the contract, the bar continues through the life of the contract, ending on the date of final acceptance of the work.

Doing business means all transactions of any kind agreed to or performed after the earlier of the date on which a bid/proposal is submitted to the Department of State under this solicitation or on which the contract, subcontract, program, or other arrangement with the Department of State is awarded or becomes effective. Any transaction commenced prior to the date of submittal or award and not yet completed must be reported. Transactions that call for continued or future performance shall be disqualifying. Transactions that have been completely performed but for which payment has not yet been made must be reported, but shall not be disqualifying unless any event other than payment of a previously-agreed upon sum occurs. Examples of disqualifying actions include any pending litigation arising out of business transactions with Libya, renegotiation of the terms of a loan, and refinancing an amount owed or owing.

Person means any individual or legal entity, whether U.S. or foreign. Subcontractors and others who do not have a direct contractual relationship with the United States are not covered by this section.

With Libya means transactions between any person and the Government of Libya, government entities of Libya, or any other organization wholly owned or effectively controlled by the Government of Libya. It is the responsibility of the entity submitting Section 406 information to disclose existing relationships with the entities that it has reasonable grounds to believe are or may be Libyan. In case of doubt or dispute, the Department of State shall determine, at its sole discretion, whether any organization is a governmental entity of Libya, wholly owned by the Government of Libya, or effectively controlled by the Government of Libya.

Certification

Based on the foregoing, I hereby certify on behalf of this organization that it is is not doing business with Libya as those terms are used in Section 406(c) of the Omnibus Diplomatic Security and Antiterrorism Act of 1986.

(e) *Signature:* By signing this document, the offeror indicates that to the best of his or her knowledge, all of the representations and certifications provided in response to the questions contained in this Statement of Qualifications are accurate, current, and complete and that the offeror is aware of the penalty prescribed in 18 U.S.C. 1001 for making false statements.

(End of provision)

[69 FR 19339, Apr. 13, 2004]

652.237–70 Compensatory time off.

As prescribed in 637.110(a), insert the following clause:

COMPENSATORY TIME OFF (DEC 1994)

(a) Compensatory time off means time from work during the personal service contract employee's basic work week in exchange for performing an equal amount of irregular of occasional overtime work which is officially ordered or approved.

(b) At the discretion of the Contracting Officer's Representative (COR), the contractor may earn compensatory time off in accordance with 3 FAM Section 232.6—Compensatory Time Off. Compensation time off remaining to the credit of a personal services contract employee at the end of a 16-week period and/or at the end of the contract period shall be forfeited.

(c) Compensatory time may not be converted to overtime.

(End of clause)

[59 FR 66772, Dec. 28, 1994]

652.237–71 Identification/Building Pass.

As prescribed in 637.110(b), insert the following clause.

IDENTIFICATION/BUILDING PASS (APR 2004)

(a) *Contractors working in domestic facilities who already possess a security clearance.* (1) The contractor shall obtain a Department of State building pass for all employees performing under this contract who require frequent and continuing access to Department of State facilities. The Bureau of Diplomatic Security, Office of Domestic Facilities Protection, shall issue passes. They shall be used for the purpose of facility access only, and shall not be used for any other purpose.

(2) The contractor shall submit a Visitor Authorization Request (VAR) Letter to the Bureau of Diplomatic Security, Information Security Programs Division, Industrial Security Branch (DS/ISP/INB) on its cleared employees containing the following information:

(i) Contractor employee's full name, social security number, and date of birth;

(ii) Contractor's company name;

(iii) Security clearance level;

(iv) Date the clearance was granted;

(v) Name of the contractor's Facility Security Officer;

(vi) Contracting Officer's Representative (COR); and,

(vii) Contract number.

(3) DS/ISP/INB shall process and approve the VAR letter, if appropriate. The approved VAR letter shall be forwarded to the contractor for their records.

(4) The contractor employee shall handcarry the following documentation to the Building Pass Office, Department of State, 520 23rd Street, courtyard of Columbia Plaza, Washington, DC:

(i) A Department of State sponsorship letter from the COR, addressing the following:

(A) The purpose for which the pass is being requested;

(B) The employee's valid security clearance level (reflected on the VAR);

(C) Contract number and period of performance;

(D) Type of access (24/7, normal business hours, escort authority or no escort authority granted); and

(E) Expiration date of building pass (1 year or 3 years);

(ii) Letter on company letterhead to accompany the application, containing the following information:

(A) The purpose for which the pass is being requested;

(B) Verification of employment;

(C) The employee's valid security clearance level; and,

(D) Contract number and period of performance;

(iii) The DS–1838, *Request for Building Pass Identification Card.*

(b) *Contractors working in domestic facilities where security clearances are not required.* (1) The contractor shall obtain a Department of State building pass for all employees performing under this contract who require frequent and continuing access to Department of State facilities. The Bureau of Diplomatic Security, Office of Domestic Facilities Protection, shall issue passes. They shall be used for the purpose of facility access only, and shall not be used for any other purpose.

(2) The contractor shall submit the following paperwork, in original, to the Bureau of Diplomatic Security, Information Security Programs Division, Industrial Security Branch (DS/ISP/INB):

(i) SF–85P, *Questionnaire for Public Trust Positions*;

(ii) SF–85P/S, *Supplemental Questionnaire for Selected Positions*; and,

(iii) DOS Credit Release, which may be obtained from DS/ISP/INB via mail or facsimile.

(3) DS/ISP/INB shall conduct a preliminary background check. If the background check is favorable, DS/ISP/INB will forward a letter to the company Facility Security Officer (FSO) notifying them that the individual may proceed to the Building Pass Office to continue the badging process. DS/ISP/INB will forward a copy of this letter to the Building Pass Office.

(4) When a contractor employee is approved to receive a building pass, he/she shall hand-carry the following documentation to the Contractor Building Pass Office, Department of State, 520 23rd Street, NW., courtyard of Columbia Plaza, NW., Washington, DC.:

(i) A Department of State sponsorship letter from the COR, addressing the following:

(A) The purpose for which the pass is being requested;

(B) Whether or not the employee has a valid security clearance;

(C) Contract number and period of performance;

(D) Type of access (24/7, normal business hours, escort authority or no escort authority granted); and

(E) Expiration date of building pass (1 year or 3 years);

(ii) DS Form 1838, *Request for Building Pass Identification Card*;

(iii) Letter on company letterhead to accompany the application, containing the following information:

(A) The purpose for which the pass is being requested;

(B) Verification of employment;

(C) Whether or not the applicant has a valid security clearance; and,

(D) Contract number and period of performance;

(iv) Original SF–85P or a copy of the SF–85P, with an original signature and current date;

(v) Original SF–85P/S or a copy of the SF–85P/S, with an original signature and current date;

(vi) Copy of the DOS Credit Release, with an original signature and current date; and,

(vii) Original proof of U.S. citizenship, such as a birth certificate or valid U.S. passport. Non-U.S. citizens must submit a valid photo Immigration and Naturalization Service Employment Authorization Document (INS EAD).

(5) Applicants shall be fingerprinted at the Building Pass Office and the process for a building pass shall be initiated. The approval process shall take at least 48 hours. Applicants shall not return to the Building Pass Office until they receive notification from DS/ISP/INB that the process is complete. Once DS/ISP/INB receives notification from the Building Pass Office that a building pass can be issued, DS/ISP/INB shall notify the FSO and the COR that the applicant has been approved for initial contract performance.

(c) *Contractors working in overseas facilities.* Contractors shall submit appropriate documentation to obtain building passes as specified in the contract.

(d) All contractor employees, both domestic and overseas, shall wear the passes in plain sight at all times while in Department of State buildings. All contractor employees shall show their passes, where appropriate, when entering these buildings and upon request of uniformed guards or any other authorized personnel.

(e) All passes shall be returned to the COR upon separation of the employee, or expiration or termination of the contract. Final payment under this contract shall not be made until all passes are returned to the COR.

(End of clause)

[69 FR 19342, Apr. 13, 2004]

652.237–72 Observance of Legal Holidays and Administrative Leave.

As prescribed in 637.110(c), insert the following clause:

OBSERVANCE OF LEGAL HOLIDAYS AND ADMINISTRATIVE LEAVE (APR 2004)

(a) The Department of State observes the following days as holidays:

New Year's Day
Martin Luther King's Birthday
Washington's Birthday
Memorial Day
Independence Day
Labor Day
Columbus Day
Veterans Day
Thanksgiving Day
Christmas Day
Any other day designated by Federal law, Executive Order, or Presidential Proclamation.

(b) When any such day falls on a Saturday or Sunday, the following Monday is observed. Observance of such days by Government personnel shall not be cause for additional period of performance or entitlement to compensation except as set forth in the contract. If the contractor's personnel work on a holiday, no form of holiday or other premium compensation will be reimbursed either as a direct or indirect cost, unless authorized pursuant to an overtime clause elsewhere in this contract.

(c) When the Department of State grants administrative leave to its Government employees, assigned contractor personnel in Government facilities shall also be dismissed. However, the contractor agrees to continue to provide sufficient personnel to

perform round-the-clock requirements of critical tasks already in operation or scheduled, and shall be guided by the instructions issued by the contracting officer or his/her duly authorized representative.

(d) For fixed-price contracts, if services are not required or provided because the building is closed due to inclement weather, unanticipated holidays declared by the President, failure of Congress to appropriate funds, or similar reasons, deductions will be computed as follows:

(1) The deduction rate in dollars per day will be equal to the per month contract price divided by 21 days per month.

(2) The deduction rate in dollars per day will be multiplied by the number of days services are not required or provided. If services are provided for portions of days, appropriate adjustment will be made by the contracting officer to ensure that the contractor is compensated for services provided.

(e) If administrative leave is granted to contractor personnel as a result of conditions stipulated in any ''Excusable Delays'' clause of this contract, it will be without loss to the contractor. The cost of salaries and wages to the contractor for the period of any such excused absence shall be a reimbursable item of direct cost hereunder for employees whose regular time is normally charged, and a reimbursable item of indirect cost for employees whose time is normally charged indirectly in accordance with the contractor's accounting policy.

(End of clause)

[59 FR 66772, Dec. 28, 1994, as amended at 64 FR 43634, Aug. 11, 1999; 69 FR 19343, Apr. 13, 2004]

652.237–73 Statement of Qualifications for Preference as a U.S. Person.

As prescribed in 637.110(d), insert the following provision:

STATEMENT OF QUALIFICATIONS FOR PREFERENCE AS A U.S. PERSON (APR 2004)

(a) This solicitation is subject to Section 136 of the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (22 U.S.C. 4864). The Act encourages the participation of United States persons and qualified United States joint venture persons in the provision of local guard services overseas, and provides for a preference for eligible offers.

(b) *Definitions.* As used in this provision—

Eligible offer means an offer that (1) is otherwise responsive to the solicitation; and (2) contains a fully prepared Statement of Qualifications (see paragraph (d) of this provision), which upon review is determined by the Government to meet the requirements of Section 136 for assignment of preference as a U.S. person.

Preference means subtraction by the Government of ten percent (10%) from the total evaluated price of an offer.

U.S. person means a company, partnership, or joint venture that the Government determines, after consideration of all available information, including but not limited to that provided by the offeror in response to the solicitation, to be qualified for assignment of preference pursuant to Section 136.

(c) *Representation.* The offeror represents as part of its offer that it is, is not eligible for preference as a U.S. person. [*Complete a Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person if the offeror represents that it is eligible.* See *paragraph (d) of this provision.*]

Warning: Any material misrepresentation made in the Statement of Qualifications may be the basis for disqualification of an offeror and reference for consideration of suspension or debarment or for prosecution under Federal law (cf. 18 U.S.C. 1001). The Government will determine offeror qualifications primarily on the basis of information submitted in the Statement of Qualifications, including Attachments thereto, but the Government may, at its discretion, rely on information contained elsewhere in the offeror's proposal or obtained from other sources.

(d) *Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person (22 U.S.C. 4864).* An offeror that represents that it is eligible for preference as a U.S. person must provide the following information. This Statement of Qualifications must be a complete and certified document, and submitted as a separate Volume 5, with all necessary attachments, as defined in Section L of this solicitation.

Statement of Qualifications for Purposes of Obtaining Preference as a U.S. Person (22 U.S.C. 4864)

Name and address of U.S. person or organization providing this information:

_____

_____

Introduction. Section 136 of the Foreign Relations Authorization Act for Fiscal Years 1990 and 1991, Public Law 101–246 (22 U.S.C. 4864), as amended, provides that a ''United States person'' or a ''qualified United States joint venture'' must meet certain requirements, listed in the Act, to be eligible for the statutory preference. To assist business entities to determine whether they qualify as a

U.S. person or U.S. joint venture person entitled to preference under Section 136, guidance is hereby provided. Only those prospective offerors submitting a properly completed and certified Volume 5 with their initial proposals will be considered in the determination of eligibility for assignment of preference as a U.S. person or U.S. joint venture person. For ease of reference, statutory language is quoted immediately before the definitions that apply to it. Space for the required information is provided immediately following each definition.

NOTE: The Statement of Qualifications shall provide information correctly applicable to the U.S. person whose qualifications are being certified, and shall not include information pertaining to corporate affiliates or subsidiaries. Organizations that wish to use the experience or financial resources of another organization or individual, including parent companies, subsidiaries, or local, national or offshore organizations, must do so by way of a joint venture. The contract resulting from this solicitation shall not allow subcontracting. A prospective offeror may be a sole proprietorship, a formal joint venture in which the co-venturers have reduced their arrangement to writing, or a de facto joint venture with no written agreement. To be considered a ''qualified joint venture person,'' the joint venture must have at least one firm or organization that itself meets all the requirements of a U.S. joint venture person listed in Section 136. By signing this proposal, the U.S. person co-venturer agrees to be individually responsible for performance of the contract, notwithstanding the terms of any joint venture agreement.

1. *Section 136(d)(1):* ''The term 'United States person' means a person which—(A) is incorporated or legally organized under the laws of the United States, including the laws of any State, locality, or the District of Columbia.''

Definitions for purposes of Section 136 determinations of eligibility—

Incorporated means the state of legal recognition as an artificial person that may be afforded to a business entity pursuant to the laws of any United States jurisdiction or component thereof.

Legally organized means the state of legal recognition that may be afforded to a business entity that is other than a corporation pursuant to the laws of any United States jurisdiction or component thereof. This is the least form of legal recognition that will qualify an offeror for this preference. Only those prospective offerors that have legal status, including the right to bring suit, to sign contracts, and to hold property under the law of the jurisdiction under which they are doing business will qualify as legally organized. A natural person who is a United States citizen acting in his or her entrepreneurial capacity will be deemed to be a ''person legally organized'' within the scope of this definition, provided that the prospective offeror holds all required licenses to do business in the jurisdiction where he or she is located.

United States means any jurisdiction that is one of the fifty States, the District of Columbia, a United States territory, a United States possession, or the Commonwealth of Puerto Rico and the Northern Mariana Islands.

Question 1. The organization seeking eligibility under Section 136 is incorporated or is legally organized under the laws of what jurisdiction?

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2. *Section 136(d)(1):* ''The term 'United States person' means a person that—(B) has its principal place of business in the United States.''

Definitions for purposes of Section 136 determinations of eligibility—

Principal place of business means the geographic location of the main office or seat of management of the prospective offeror. For purposes of this Statement, a prospective offeror shall identify only one principal place of business, and such location shall include at least the offices of the chief operating officer and headquarters staff. The named location must be a United States jurisdiction in which the prospective offeror may bring suit and be sued and in which service of process shall be accepted.

Question 2(a). The organization seeking eligibility has its principal office in what city and state?

Question 2(b). What kind of tax return was or will be filed, and in what jurisdiction, during the current calendar year? The jurisdiction identified herein need not be the same jurisdiction identified in Question 2(a).

(i) Jurisdiction:

(ii) Type of return (e.g., income tax, franchise tax, etc.). Include all that apply:

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3. *Section 136(d)(1):* ''The term 'United States person' means a person which—(C) has been incorporated or legally organized in the United States—(i) for more than 2 (two) years before the issuance date of the invitation for bids or request for proposals with respect to the contract under subsection (c) of this section.''

Definitions for purposes of Section 136 determinations of eligibility—

Has been incorporated or legally organized means that the organization can show continuity as an ongoing business. Organizations that have changed only their names meet the continuity requirement of this subsection. Organizations that have been

bought, sold, merged, or otherwise substantially altered or enlarged their principal business activities will have the burden of proving that there have been ongoing operations by the same business entity for the required period of time. If the successor entity has acquired all of the assets and liabilities of the predecessor entity and the predecessor entity has no further existence, the successor may claim the incorporation or legal organization date of the predecessor. In any other circumstance, the prospective offeror must show that the law of the jurisdiction in which it operates regards the prospective offeror as the complete successor in interest of the predecessor entity for purpose of contractual obligations.

Issuance date means the date in Block 5 of the Standard Form 33 accompanying this solicitation.

Years means calendar years measured from day of the month to day of the month. For example, January 1, 2002 through December 31, 2002 is one calendar year, as is July 1, 2002 through July 1, 2003.

Question 3:

(i) On what date was the organization seeking eligibility incorporated or legally organized?

_____

(ii) If this date is less than two years before the issuance date, on the basis of what documentation does the organization seeking eligibility claim that it has been in business for the requisite period of time?

_____

(Identify, and forward copies as an Attachment to this Statement).

4. *Section 136(d)(1):* ''The term 'United States person' means a person which—(D) has performed within the United States or overseas security services similar in complexity to the contract being bid.''

Definitions for purposes of Section 136 determination of eligibility—

Complexity means the physical size or extent of the effort, as described in Section B and Exhibit A of this solicitation; combined with the required quality of the effort as described in Sections C and H of this solicitation.

Overseas means within any jurisdiction that is not a part of the United States as defined below.

Performed means contracts that have been fully completed by the prospective offeror and accepted by the other party to the transaction. Contracts still in progress have been performed for purposes of this definition if performance in complexity to the contract being bid has been ongoing for at least one year. Contracts need not have been with the U.S. Government.

Security services means work of a kind as to fall within or compare closely with those described in the Statement of Work in Section C of this solicitation. An entity whose only security services experience was performed by its legally distinct parent or subsidiary organization will not be considered to have security services experience.

Within the United States means within the legal geographic boundaries of a United States jurisdiction that is the place where the subject matter (e.g., services) of the contract or other arrangement was in fact completed. The place where the contract or other arrangement was negotiated or signed is not relevant to this definition.

Question 4: Describe in an Attachment to this Statement (*see* L.1.3.5), the qualifying similar contracts or other arrangements performed by the prospective offeror. Provide required information on a sufficient number of arrangements to show that similar services have been performed overseas or in the United States. The description must consist of the following information on each arrangement, which shall be submitted as an Attachment to this Statement:

Location: (city and state or country).

Type of service: (for example, stationary guards, roving patrol, quick-reaction force, etc.).

Complexity: (type of facilities guarded, and number or extent of facilities, number of guards, etc.).

5. *Section 136(d)(1):* ''The term 'United States person' means a person which—(E) with respect to the contract under subsection (c) of this section, has achieved a total business volume equal to or greater than the value of the project being bid in 3 years of the 5-year period before the date specified in subparagraph (C).''

Definitions of purposes of Section 136 determination of eligibility—

3 years of the 5-year period before the date specified in subparagraph (C) means the three to five calendar year period immediately preceding the issuance date of this solicitation.

Total business volume means the U.S. dollar value of the gross income or receipts reported by the prospective offeror on its annual federal income tax returns.

Years means calendar years.

Question 5: Describe in an Attachment to this Statement (*see* L.1.3.5), for at least three of the five twelve-month income tax periods (fiscal years) defined below, the gross receipts of the organization seeking eligibility.

(i) The fiscal year ending during the calendar year that includes the date of this solicitation.

(ii) The fiscal year ending in the calendar year immediately prior to the calendar year that includes the date of this solicitation.

(iii) The fiscal year ending in the calendar year two years before the calendar year that includes the date of this solicitation.

(iv) The fiscal year ending in the calendar year three years before the calendar year that includes the date of this solicitation.

(v) The fiscal year ending in the calendar year four years before the calendar year that includes the date of this solicitation.

An entity will be deemed to have met this requirement if the total cumulative business volume for the three years presented exceeds the contract price at time of award under this solicitation for the full term for which prices are solicited, including any option periods.

6. *Section 136(d)(1):* ''The term 'United States person' means a person which '' (F)(i) employs United States citizens in at least 80 percent of its principal management positions in the United States; and (F)(ii) employs United States citizens in more than half of its permanent full-time positions in the United States.''

Definitions for purposes of Section 136 determinations of eligibility—

Full-time (positions) means those personnel positions in which the occupants are expected to and ordinarily work for 40 or more hours per week.

In the United States refers to those personnel positions that are encumbered as of the date of this solicitation and that the prospective offeror maintains in geographic locations within the jurisdictions defined above as constituting the United States.

Permanent (positions) means personnel positions that are intended to be indefinite as to length of employment, as opposed to limited, seasonal, or project-length personnel appointments.

Permanent, full-time positions means that portion of the prospective offeror's workforce that continues to be employed without regard to the ordinary fluctuations of production or projects.

Principal management positions means those personnel positions including at least the chief executive officer (if any) and the chief operating officer (whether by title or by function) of the organization seeking eligibility, together with all those management officials who constitute the highest levels of management authority within the organization. In the case of a partnership, all general partners are deemed to hold principal management positions. In the case of a corporation, those officers of the corporation who are principally responsible for the day-to-day operation of the corporation. Members of corporation boards of directors do not occupy ''principal management positions'' simply by virtue of their service on the board. In all cases, the term ''principal management positions'' also includes the position or positions held by the individual or individuals in the United States who will have primary corporate management oversight responsibility for this contract if the prospective contractor is awarded the contract.

United States citizen means natural persons with United States citizenship by virtue either of birth or of naturalization.

Question 6(a): The organization seeking eligibility shall list all of its principal management positions and identify the current occupant of each listed position by name and citizenship. Provide the information as an Attachment to this Statement in the following format:

(i) Principal management positions in the United States:

Chief Executive Officer (if any):

_____

(name)

_____

(citizenship)

Chief Operating Officer:

_____

(name)

_____

(citizenship)

(ii) For each additional corporate officer having principal responsibility for the day-to-day operations of the corporation, list position, name, and citizenship.

_____

Position:

_____

Name:

_____

Citizenship:

(iii) Individual(s) in the United States expected to have primary management oversight responsibility for contract if it is awarded:

_____

(name)

_____

(citizenship)

Question 6(b): Number of permanent, full-time, currently encumbered personnel positions that are located in the United States (good faith estimates acceptable): _____

Question 6(c): Number of United States citizens currently employed in permanent, full-time positions that are located in the United States (good faith estimates acceptable): _____

7. *Section 136(d)(1):* ''The term 'United States person' means a person which—(G) has the existing technical and financial resources in the United States to perform the contract.''

Definitions for purposes of Section 136 determinations of eligibility—

Existing technical and financial resources means technical and financial capability within the United States to mobilize adequate staffing, equipment and organizational arrangements to perform the contract. Adequate technical resources may be demonstrated by presenting an organization chart, and résumés of current officers and employees in the United States who possess skills and expertise necessary to provide management and oversight of the work. Other indicia will be considered if offered to demonstrate that the prospective offeror has

available resources in the United States adequate to provide home office management and oversight of the work. Adequate financial resources may be demonstrated by proof of possession of a combination of net worth, bank lines of credit, or bank guarantees. If lines of credit or bank guarantees are used to demonstrate adequate financial resources, they must be from entities within the United States.

Question 7: Submit, as an Attachment to this Statement, materials demonstrating existing technical and financial resources in the United States (*see* L.1.3.5).

8. *Section 136(d)(2):* ''The term 'qualified United States joint venture person' means a joint venture in which a United States person or persons owns at least 51 percent of the assets of the joint venture.''

Definitions for purposes of Section 136 determinations of eligibility—

Assets means tangible and intangible things of value conveyed or made available to the joint venture by the co-venturers. To be qualified for U.S. preference, 51 percent of the assets of the joint venture must be owned by the U.S. person co-venturer(s).

Joint venture means a formal or de facto association of two or more persons or entities to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skills, and knowledge. To be acceptable, all members of a joint venture must be jointly and severally liable for full performance and resolution of matters arising out of the contract.

Question 8(a): The prospective offeror is is not a joint venture.

Question 8(b): If the prospective offeror is a joint venture, the U.S. person participant is:

_____
(name)

_____
(address)

Question 8(c): If the prospective offeror is a joint venture, the names and countries of citizenship for all co-venturers are as follows:

_____
(name)

_____
(citizenship)

_____
(name)

_____
(citizenship)

_____
(name)

_____
(citizenship)

Question 8(d): If the prospective offeror is a joint venture, the U.S. person will own at least 51 percent of the assets of the joint venture.

_____
I so certify: (name)

_____
(position)

_____
(title)

(e) *Signature:* By signing this document, the offeror indicates that to the best of his or her knowledge, all of the representations and certifications provided in response to the questions contained in this Statement of Qualifications are accurate, current, and complete and that the offeror is aware of the penalty prescribed in 18 U.S.C. 1001 for making false statements.

(End of provision)

[69 FR 19343, Apr. 13, 2004]

652.239–70 Information Technology Security Plan and Accreditation.

As prescribed in 639.107–70(a), insert the following provision:

INFORMATION TECHNOLOGY SECURITY PLAN AND ACCREDITATION (SEP 2007)

All offers/bids submitted in response to this solicitation must address the approach for completing the security plan and certification and accreditation requirements as required by the clause at 652.239–71, Security Requirements for Unclassified Information Technology Resources.

(End of provision)

[72 FR 51569, Sept. 10, 2007]

652.239–71 Security Requirements for Unclassified Information Technology Resources.

As prescribed in 639.107–70(b), insert the following clause:

SECURITY REQUIREMENTS FOR UNCLASSIFIED INFORMATION TECHNOLOGY RESOURCES (SEP 2007)

(a) *General.* The Contractor shall be responsible for information technology (IT) security, based on Department of State (DOS) risk assessments, for all systems connected to a Department of State (DOS) network or operated by the Contractor for DOS, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or electronic access to DOS's information that directly supports the mission of DOS. The term ''information technology'', as used in this clause, means any equipment, including telecommunications equipment, that is used

in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This includes both major applications and general support systems as defined by OMB Circular A–130. Examples of tasks that require security provisions include:

(1) Hosting of DOS e-Government sites or other IT operations;

(2) Acquisition, transmission or analysis of data owned by DOS with significant replacement cost should the Contractor's copy be corrupted; and

(3) Access to DOS general support systems/major applications at a level beyond that granted the general public; e.g., bypassing a firewall.

(b) *IT Security Plan*. The Contractor shall develop, provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that will be followed to ensure appropriate security of IT resources that are developed, processed, or used under this contract. The plan shall describe those parts of the contract to which this clause applies. The Contractor's IT Security Plan shall comply with applicable Federal laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Management Act (FISMA) of 2002, and the E-Government Act of 2002. The plan shall meet IT security requirements in accordance with Federal and DOS policies and procedures, as they may be amended from time to time during the term of this contract that include, but are not limited to:

(1) OMB Circular A–130, Management of Federal Information Resources, Appendix III, Security of Federal Automated Information Resources;

(2) National Institute of Standards and Technology (NIST) Guidelines (see NIST Special Publication 800–37, Guide for the Security Certification and Accreditation of Federal Information Technology Systems (*http://csrc.nist.gov/publications/nistpubs/800-37/SP800–37-final.pdf*)); and

(3) Department of State information security sections of the Foreign Affairs Manual (FAM) and Foreign Affairs Handbook (FAH) (*http://foia.state.gov/Regs/Search.asp*), specifically:

(i) 12 FAM 230, Personnel Security;

(ii) 12 FAM 500, Information Security (sections 540, 570, and 590);

(iii) 12 FAM 600, Information Security Technology (section 620, and portions of 650);

(iv) 5 FAM 1060, Information Assurance Management; and

(v) 5 FAH 11, Information Assurance Handbook.

(c) *Submittal of IT Security Plan*. Within 30 days after contract award, the Contractor shall submit the IT Security Plan to the Contracting Officer and Contracting Officer's Representative (COR) for acceptance. This plan shall be consistent with and further detail the approach contained in the contractor's proposal or sealed bid that resulted in the award of this contract and in compliance with the requirements stated in this clause. The plan, as accepted by the Contracting Officer and COR, shall be incorporated into the contract as a compliance document. The Contractor shall comply with the accepted plan.

(d) *Accreditation*. Within six (6) months after contract award, the Contractor shall submit written proof of IT security accreditation for acceptance by the Contracting Officer. Such written proof may be furnished either by the Contractor or by a third party. Accreditation must be in accordance with NIST Special Publication 800–37. This accreditation will include a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. This accreditation, when accepted by the Contracting Officer, shall be incorporated into the contract as a compliance document, and shall include a final security plan, a risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan. The Contractor shall comply with the accepted accreditation documentation.

(e) *Annual verification*. On an annual basis, the Contractor shall submit verification to the Contracting Officer that the IT Security Plan remains valid.

(f) *Warning notices*. The Contractor shall ensure that the following banners are displayed on all DOS systems (both public and private) operated by the Contractor prior to allowing anyone access to the system:

Government Warning

WARNINGWARNING**WARNING**

Unauthorized access is a violation of U.S. law and Department of State policy, and may result in criminal or administrative penalties. Users shall not access other user's or system files without proper authority. Absence of access controls IS NOT authorization for access! DOS information systems and related equipment are intended for communication, transmission, processing and storage of U.S. Government information. These systems and equipment are subject to monitoring by law enforcement and authorized Department officials. Monitoring may result in the acquisition, recording, and analysis of all data being communicated, transmitted, processed or stored in this system by law enforcement and authorized Department officials. Use of this system constitutes consent to such monitoring.

WARNINGWARNING**WARNING**

(g) *Privacy Act notification*. The Contractor shall ensure that the following banner is displayed on all DOS systems that contain Privacy Act information operated by the Contractor prior to allowing anyone access to the system:

This system contains information protected under the provisions of the Privacy Act of 1974 (Pub. L. 93–579). Any privacy information displayed on the screen or printed shall be protected from unauthorized disclosure. Employees who violate privacy safeguards may be subject to disciplinary actions, a fine of up to $5,000, or both.

(h) *Privileged or limited privileged access*. Contractor personnel requiring privileged access or limited privileged access to systems operated by the Contractor for DOS or interconnected to a DOS network shall adhere to the specific contract security requirements contained within this contract and/or the Contract Security Classification Specification (DD Form 254).

(i) *Training*. The Contractor shall ensure that its employees performing under this contract receive annual IT security training in accordance with OMB circular A–130, FISMA, and NIST requirements, as they may be amended from time to time during the term of this contract, with a specific emphasis on rules of behavior.

(j) *Government access*. The Contractor shall afford the Government access to the Contractor's and subcontractor's facilities, installations, operations, documentation, databases and personnel used in performance of the contract. Access shall be provided to the extent required to carry out a program of IT inspection (to include vulnerability testing), investigation and audit to safeguard against threats and hazards to the integrity, availability and confidentiality of DOS data or to the function of information technology systems operated on behalf of DOS, and to preserve evidence of computer crime.

(k) *Subcontracts*. The Contractor shall incorporate the substance of this clause in all subcontracts that meet the conditions in paragraph (a) of this clause.

(l) *Notification regarding employees*. The Contractor shall immediately notify the Contracting Officer when an employee either begins or terminates employment when that employee has access to DOS information systems or data.

(m) *Termination*. Failure on the part of the Contractor to comply with the terms of this clause may result in termination of this contract.

(End of clause)

[72 FR 51569, Sept. 10, 2007]

652.242–70 Contracting Officer's Representative (COR).

As prescribed in 642.272(a), insert a clause substantially the same as follows:

CONTRACTING OFFICER'S REPRESENTATIVE (COR) (AUG 1999)

(a) The Contracting Officer may designate in writing one or more Government employees, by name and position title, to take action for the Contracting Officer under this contract. Each designee shall be identified as a Contracting Officer's Representative (COR). Such designation(s) shall specify the scope and limitations of the authority so delegated; provided, that the designee shall not change the terms or conditions of the contract, unless the COR is a warranted Contracting Officer and this authority is delegated in the designation.

(b) The COR is [insert job title of COR].

(End of clause)

[53 FR 26177, July 11, 1988, as amended at 59 FR 66772, Dec. 28, 1994; 64 FR 43634, Aug. 11, 1999; 69 FR 19345, Apr. 13, 2004]

652.242–71 Notice of Shipments.

As prescribed in 642.1406–2–70(a), insert the following clause:

NOTICE OF SHIPMENTS (JUL 1988)

At the time of delivery of supplies to a carrier for onward transportation, the Contractor shall give notice of prepaid shipment to the consignee establishment, and to such other persons as instructed by the Contracting Officer. If the Contractor has not received such instructions by 24 hours prior to the delivery time, the Contractor shall contact the Contracting Officer and request instructions from the Contracting Officer concerning the notice of shipment to be given.

(End of clause)

[53 FR 26177, July 11, 1988, as amended at 64 FR 43634, Aug. 11, 1999]

652.242–72 Shipping Instructions.

As prescribed in 642.1406–2–70(b), insert the following clause:

SHIPPING INSTRUCTIONS (DEC 1994)

(a) Each packing box shall be of solid construction in accordance with best commercial practices and sufficiently strong in direct ratio to the weight of the contents to withstand excessively rough handling while in transit overseas. It shall be constructed of lumber that is well seasoned, reasonably

sound, free from bad cross grain and from knots or knotholes that interfere with nailing or that occupy more than ⅓ of the width of the piece of lumber. Box shall be constructed with three-way corners and diagonal bracing. All nails shall be cement-coated, of correct size and properly spaced to avoid splitting or warping, and shall be driven into the grain of the wood. Dimension of lumber shall be in accordance with the following table, dependent upon the weight of the contents:

Weight of box and contents	Minimum dimensions of lumber for struts, frame members, and single diagonal braces
Up to 45 kg	19.05 × 57.15mm
46 to 113 kg	22.23 × 73.03mm
114 to 181 kg	22.23 × 98.43mm
182 to 272 kg	22.23 × 123.83mm or 25.4 × 98.43 mm

(b) Each box shall be lined with waterproof paper and shall be bound with 19.05mm″ steel straps firmly stapled in position to prevent the straps from slipping off the box. Articles must be secured and braced inside the shipping container to prevent the articles from shifting.

(c) Packing cases weighing 453.5kg and more must be equipped with skids. Each skid shall consist of two end sections of 50.8 × 152.4mm lumber placed flat and a center section of 50.8 × 101.6mm lumber placed flat and then arranged in line to provide 254mm forklift spaces between center and end sections. When goods are ready for shipment, the Contractor shall prepare four (4) copies of a packing list, indicating the contract and, if applicable, order numbers; case number; itemized list of contents; net and gross weights in kilograms; and outside dimensions, including all clears, of each shipping container. The Contractor shall provide three (3) copies of the packing list to the U.S. Despatch Agent as specified in the contract or order. The Contractor shall place the fourth copy of the packing list in packing case number one, which shall be marked as such so that it is easily identified by the consignee. Upon receipt of the packing list, the Despatch Agent will furnish export marks and instructions regarding shipment to the port specified, depending upon steamer services available at the time.

(d) The export marks shall be stenciled on one side of each box reserved for that purpose, and the appropriate case number stenciled in the lower left-hand corner of the same side. The contract and, as necessary, order numbers, net and gross weights in kilograms shall be stenciled on the same side. However, if the size of the box is too small to accommodate all stenciling on one side, the contract and order numbers and weights may be stenciled on the side opposite that used for the export marks and case number.

(e) The contract and, as necessary, order numbers must appear on all containers and papers relating to this clause.

(End of clause)

[53 FR 26177, July 11, 1988; 53 FR 36462, Sept. 20, 1988, as amended at 59 FR 66772, Dec. 28, 1994; 64 FR 43634, Aug. 11, 1999]

652.242–73 Authorization and Performance.

As prescribed in 642.272(b), insert a clause substantially the same as follows:

AUTHORIZATION AND PERFORMANCE (AUG 1999)

(a) The contractor warrants the following:

(1) That is has obtained authorization to operate and do business in the country or countries in which this contract will be performed;

(2) That is has obtained all necessary licenses and permits required to perform this contract; and,

(3) That it shall comply fully with all laws, decrees, labor standards, and regulations of said country or countries during the performance of this contract.

(b) If the party actually performing the work will be a subcontractor or joint venture partner, then such subcontractor or joint venture partner agrees to the requirements of paragraph (a) of this clause.

(End of clause)

Alternate I (AUG 1999). If the contract is for overseas local guard services, as prescribed in 642.272(b), substitute the following paragraphs (a)(1) and (a)(2) for paragraphs (a)(1) and (a)(2) of the basic clause:

(a)(1) That it has obtained authorization to operate and do business in the country or countries in which this contract will be performed, or will obtain such authorization before performance of this contract begins;

(a)(2) That it has obtained all necessary licenses and permits required to perform this contract, or will obtain such licenses and permits before performance of this contract begins;

[64 FR 43634, Aug. 11, 1999, as amended at 69 FR 19345, Apr. 13, 2004]

652.243–70 Notices.

As prescribed in 643.104–70, insert the following clause:

NOTICES (AUG 1999)

Any notice or request relating to this contract given by either party to the other shall

be in writing. Said notice or request shall be mailed or delivered by hand to the other party at the address provided in the schedule of the contract. All modifications to the contract must be made in writing by the contracting officer.

(End of clause)

[64 FR 43634, Aug. 11, 1999]

PART 653—FORMS

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653.000 Scope of part.

Subpart 653.1—General

653.101 Requirements for use of forms.
653.101–70 Policy.
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653.200 Scope of subpart.
653.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, OF's 347, 348).
653.217 Special contracting methods.
653.217–70 DOS form DS–1921, Award/Modification of Interagency Acquisition Agreement.
653.219 Small business programs.
653.219–70 DOS form DS–1910, Small Business Agency Review—Actions Above the Simplified Acquisition Threshold.
653.219–71 DOS form DS–4053, Department of State Mentor-Protégé Program Application.

AUTHORITY: 40 U.S.C. 486(c); 22 U.S.C. 2658.

SOURCE: 53 FR 26180, July 11, 1988, unless otherwise noted.

653.000 Scope of part.

This part prescribes DOSAR forms in addition to those provided in FAR Part 53.

Subpart 653.1—General

653.101 Requirements for use of forms.

653.101–70 Policy.

The forms in FAR subpart 53.2 or in subpart 653.2 shall be used as precribed therein, except when the use of any form is prohibited by or inconsistent with local laws, or the supplies or services could not be obtained if the form were used. The contracting officer shall justify the exclusion of any form in accordance with FAR subpart 1.4 and 601.470.

[53 FR 26180, July 11, 1988, as amended at 69 FR 19345, Apr. 13, 2004; 72 FR 45696, Aug. 15, 2007]

653.110 Continuation sheets.

The provisions of FAR 53.110 also apply to forms prescribed in the DOSAR.

Subpart 653.2—Prescription of Forms

653.200 Scope of subpart.

This subpart prescribes or references optional and DOS forms for use in acquisition. Consistent with FAR 53.200, this subpart is arranged by subject matter, in the same order as and keyed to the parts of the DOSAR in which the form usage requirements are addressed.

653.213 Simplified acquisition procedures (SF's 18, 30, 44, 1165, OF's 347, 348).

653.217 Special contracting methods.

653.217–70 DOS form DS–1921, Award/Modification of Interagency Acquisition Agreement.

As prescribed in 617.504–70(b)(5)(i), DS–1921 is prescribed for use when awarding or modifying Economy Act Interagency Acquisition Agreements where the Department is the requesting agency.

[59 FR 66773, Dec. 28, 1994]

653.219 Small business programs.

653.219–70 DOS form DS–1910, Small Business Agency Review—Actions Above the Simplified Acquisition Threshold.

As prescribed in 619.501(c), DS–1910 is prescribed for use in documenting set-aside decisions.

[64 FR 43634, Aug. 11, 1999]

653.219–71 DOS form DS–4053, Department of State Mentor-Protégé Program Application.

As prescribed in 619.102–70(i), DS–4053 is prescribed for use in applying for an

agreement under the Department of State Mentor-Protégé Program.

[69 FR 19345, Apr. 13, 2004]

FINDING AIDS

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442,1502 Revised; eff. 11–30–01 49867
452.219–70 Amended; eff. 11–26–01 49317

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356 Authority citation revised 5576
356.3 (g), (h), (i) through (k) and (l) through (x) redesignated as (h), (i), (k) through (m) and (o) through (aa); new (g), (j) and (n) added; (e)(2), new (h)(2), (s), (u) and (y)(2) revised; new (p) and (q) amended; new (q)(2) removed; new (q)(3) redesignated as new (q)(2); new (q)(3) added 5576
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501.106 Amended (OMB numbers) 41288
511 Authority citation revised 24378
511.204 (c)(3) and (d) amended 24378
516 Authority citation revised 24378
516.506 (c) redesignated as (d); new (c) added; new (d) amended 24378
532 Authority citation revised 24378

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532.206 Revised 24378
532.7003 (b) revised; (c) added 24378
538 Authority citation revised 24378
538.272 (a) amended 24378
538.273 (a)(2) introductory text revised; (b)(2) amended 24378
(b)(1) revised; (b)(3) removed 41288
(a)(3) revised 52128
538.7000—538.7004 (Subpart 538.70) Added 24378
546 Authority citation revised 24378
546.710 (b) amended 24379
552 Authority citation revised 24378
552.211–75 Amended 24379
552.211–77 Amended 24379
552.212–71 Amended 41288
552.212–72 Amended 41288, 52128
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504.602–71 (Subpart 504.6) Added; interim 77662
511.204 (c)(3) and (d) amended 28065
511.600—511.604 (Subpart 511.6) Added 55934
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538.273 (a)(2) and (b)(2) amended 28065
538.7000 Amended 28065
538.7001 Amended 28065
538.7002 (c) amended 28065
538.7003 Introductory text amended 28065
538.7004 (a), (b) and (c) amended 28065
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552.211–15 Added 55935
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603.601 (a) amended 19331
603.804 (Subpart 603.8) Added 19331
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605.207–70 Amended 19331
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609.406–3 (a)(1) amended 19331
611.600–611.603 (Subpart 611.6) Added 19332
612 Added 19332
613.303–5 (b) added 19332
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617.204 (e) amended 19332
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352.231–70 Clause heading amended 21511
352.233–70 Clause heading amended 21511
352.239–70 Clause heading amended 21511
352.239–71 Clause heading amended 21511
352.239–72 Clause heading amended 21511
352.239–73 Provision and clause headings amended 21512
352.270–7 Clause heading amended 21512
352.270–8 Clause heading amended 21512
352.270–9 Provision heading amended 21512
370.400 Revised 21512
370.403 (a) revised 21512
370.404 Revised 21512

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505 Removed 32860
512.301 Revised 5242
516.203–4 Revised 41095
516.506 Revised 41096
516.603—516.603–3 (Subpart 516.6) Removed 41096
541 Added 48873
552.212–70 Removed 5243
552.212–73 Removed 5243
552.216–71 Heading and introductory text revised; clause, Alternate I and Alternate II amended 41096

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552.216–72 Introductory text revised; clause and Alternate I amended; Alternates II, III and IV removed 41096
552.216–73 Introductory text revised; clause and Alternate I amended; Alternate II removed 41096
552.216–74 Added 41096
552.241–70 Added 48873
552.241–71 Added 48873