

subordinate element of such party or entity, that participates in the performance of the agreement, to create or maintain any record that is not otherwise maintained in the ordinary course of business or pursuant to a provision of law.

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

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

[65 FR 35576, June 5, 2000. Redesignated at 67 FR 54956, Aug. 27, 2002]

§ 3.8 DoD access to records policy.

(a) *Applicability.* This section provides policy concerning DoD access to award-ee and subawardee records on OT agreements for prototype projects. This access is separate and distinct from Comptroller General access.

(1) *Fixed-price type OT agreements.* (i) *General*—DoD access to records is not generally required for fixed-price type OT agreements. In order for an agreement to be considered a fixed-price type OT agreement, it must adequately specify the effort to be accomplished for a fixed amount and provide for defined payable milestones, with no provision for financial or cost reporting that would be a basis for making adjustment in the work scope or price of the effort.

(ii) *Termination considerations.* The need to provide for DoD access to records in the case of termination of a fixed-price type OT can be avoided by limiting potential termination settlements to an amount specified in the original agreement or to payment for the last completed milestone. However, if a fixed-price agreement provides that potential termination settlement amounts may be based on amounts generated from cost or financial records and the agreement exceeds the specified threshold, the OT should provide that DoD will have access to records in the event of termination.

(2) *Cost-type OT agreements.* (i) *Single Audit Act*—In accordance with the requirements of Public Law 98-502, as amended by Public Law 104-156, 110

STAT. 1396-1404, when a business unit that will perform the OT agreement, or a subawardee, meets the criteria for an audit pursuant to the Single Audit Act, the DoD must have sufficient access to the entity's records to assure compliance with the provisions of the Act.

(ii) *Traditional Defense contractors.* The DoD shall have access to records on cost-type OT agreements with traditional Defense contractors that provide for total Government payments in excess of \$5,000,000. The content of the access to records clause shall be in accordance with paragraph (c) of this section. The value establishing the threshold is the total value of the agreement including all options.

(iii) *Nontraditional Defense contractors.* The DoD should have access to records on cost-type OT agreements with nontraditional Defense contractors that provide for total Government payments in excess of \$5,000,000. The content of the access to records clause should be in accordance with paragraph (c) of this section. The value establishing the threshold is the total value of the agreement including all options.

(iv) *DoD access below threshold.* The Agreements Officer has the discretion to determine whether to include DoD access to records when the OT does not meet any of the requirements in (a)(2)(i) through (a)(2)(iii) of this section. The content of that access to records clause should be tailored to meet the particular circumstances of the agreement.

(v) *Examples of cost-type OT agreements.* (A) An agreement that requires at least one-third cost share pursuant to statute.

(B) An agreement that includes payable milestones, but provides for adjustment of the milestone amounts based on actual costs or reports generated from the awardee's financial or cost records.

(C) An agreement that is for a fixed-Government amount, but the agreement provides for submittal of financial or cost records/reports to determine whether additional effort can be accomplished for the fixed amount.

(3) *Subawardees.* When a DoD access to records provision is included in the OT agreement, the awardee shall use the criteria established in paragraphs

(a)(2)(i) through (a)(2)(iii) of this section to determine whether DoD access to records clauses should be included in subawards.

(b) *Exceptions*—(1) *Nontraditional Defense contractors*—(i) The Agreements Officers may deviate, in part or in whole, from the application of this access to records policy for a nontraditional Defense contractor when application of the policy would adversely impact the government's ability to incorporate commercial technology or execute the prototype project.

(ii) The Agreements Officer will document:

(A) What aspect of the audit policy was not applied;

(B) Why it was problematic;

(C) What means will be used to protect the Government's interest; and

(D) Why the benefits of deviating from the policy outweigh the potential risks.

(iii) This determination will be reviewed by the approving official as part of the pre-award approval of the agreement and submitted to the agency POC within 10 days of award.

(iv) The agency POC will forward all such documentation received in any given fiscal year, to the Director, Defense Procurement by 15 October of each year.

(2) *Traditional Defense contractor*. (i) Any departure from this policy for other than nontraditional Defense contractors must be approved by the Head of the Contracting Activity prior to award and set forth the exceptional circumstances justifying deviation.

(ii) Additionally, the justification will document:

(A) What aspect of the policy was not applied;

(B) Why it was problematic;

(C) What means will be used to protect the Government's interest; and

(D) Why the benefits of deviating from the policy outweigh the potential risks.

(iii) The HCA will forward documentation associated with such waivers in any given fiscal year, to the Director, Defense Procurement by 15 October of each year.

(3) *DoD access below the threshold*. When the Agreements Officer determines that access to records is appro-

priate for an agreement below the \$5,000,000 threshold, the content, length and extent of access may be mutually agreed to by the parties, without documenting reasons for departing from the policy of this section.

(4) *Flow down provisions*. The awardee shall submit justification for any exception to the DoD access to records policy to the Agreements Officer for subawardees. The Agreements Officer will review and obtain appropriate approval, as set forth in paragraphs (b)(1) and (b)(2) of this section.

(c) *Content of DoD access to records clause*. When a DoD access to records clause is included as part of the OT agreement, address the following areas during the negotiation of the clause:

(1) *Frequency of audits*. Audits will be performed when the Agreements Officer determines it is necessary to verify statutory cost share or to verify amounts generated from financial or cost records that will be used as the basis for payment or adjustment of payment.

(2) *Means of accomplishing audits*. (i) *Business units subject to the Single Audit Act*—When the awardee or subawardee is a state government, local government, or nonprofit organization whose Federal cost reimbursement contracts and financial assistance agreements are subject to the Single Audit Act (Public Law 98–502, as amended by Public Law 104–156, 110 STAT. 1396–1404), the clause must apply the provisions of that Act for purposes of performing audits of the awardee or subawardee under the agreement.

(ii) *Business units not subject to the Single Audit Act currently performing on procurement contracts*. The clause must provide that DCAA will perform any necessary audits if, at the time of agreement award, the awardee or subawardee is not subject to the Single Audit Act and is performing a procurement contract that is subject to the Cost Principles Applicable to Commercial Organizations (48 CFR part 31.2) and/or the Cost Accounting Standards (48 CFR part 99).

(iii) *Other business units*. DCAA or a qualified IPA may perform any necessary audit of a business unit of the awardee or subawardee if, at the time of agreement award, the business unit

does not meet the criteria in (c)(2)(i) or (c)(2)(ii) of this section. The clause must provide for the use of a qualified IPA if such a business unit will not accept the agreement if the Government has access to the business unit's records. The Agreements Officer will include a statement in the file that the business unit is not performing on a procurement contract subject to the Cost Principles or Cost Accounting Standards at the time of agreement award, and will not accept the agreement if the government has access to the business unit's records. The Agreements Officer will also prepare a report (Part III to the annual report submission) for the Director, Defense Procurement that identifies, for each business unit that is permitted to use an IPA: the business unit's name, address and the expected value of its award. When the clause provides for use of an IPA to perform any necessary audits, the clause must state that:

(A) The IPA will perform the audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). Electronic copies of the standards may be accessed at www.gao.gov. Printed copies may be purchased from the U.S. Government Printing Office (for ordering information, call (202) 512-1800 or access the Internet Site at www.gpo.gov).

(B) The Agreements Officers' authorized representative has the right to examine the IPA's audit report and working papers for 3 years after final payment or three years after issuance of the audit report, whichever is later, unless notified otherwise by the Agreements Officer.

(C) The IPA will send copies of the audit report to the Agreements Officer and the Assistant Inspector General (Audit Policy and Oversight) [AIG(APO)], 400 Army Navy Drive, Suite 737, Arlington, VA 22202.

(D) The IPA will report instances of suspected fraud directly to the DoDIG.

(E) The Government has the right to require corrective action by the awardee or subawardee if the Agreements Officer determines (subject to appeal under the disputes clause of the agreement) that the audit has not been performed or has not been performed in accordance with GAGAS. The Agree-

ments Officer should take action promptly once the Agreements Officer determines that the audit is not being accomplished in a timely manner or the audit is not performed in accordance with GAGAS but generally no later than twelve (12) months of the date requested by the Agreements Officer. The awardee or subawardee may take corrective action by having the IPA correct any deficiencies identified by the Agreements Officer, having another IPA perform the audit, or electing to have the Government perform the audit. If corrective action is not taken, the Agreements Officer has the right to take one or more of the following actions:

(1) Withhold or disallow a specified percentage of costs until the audit is completed satisfactorily. The agreement should include a specified percentage that is sufficient to enhance performance of corrective action while also not being unfairly punitive.

(2) Suspend performance until the audit is completed satisfactorily; and/or

(3) Terminate the agreement if the agreements officer determines that imposition of either (c)(2)(iii)(E)(1) or (c)(2)(iii)(e)(2) of this section is not practical.

(F) If it is found that the awardee or subawardee was performing a procurement contract subject to Cost Principles Applicable to Commercial Organizations (48 CFR part 31.2) and/or Cost Accounting Standards (48 CFR part 99) at the time of agreement award, the Agreements Officer, or an authorized representative, has the right to audit records of the awardee or subawardee to verify the actual costs or reporting information used as the basis for payment or to verify statutorily required cost share under the agreement, and the IPA is to be paid by the awardee or subawardee. The cost of an audit performed in accordance with this policy is reimbursable based on the business unit's established accounting practices and subject to any limitations in the agreement.

(3) *Scope of audit.* The Agreements Officer should coordinate with the auditor regarding the nature of any audit envisioned.

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(4) *Length and extent of access.* (i) *Clauses that do not provide for use of an IPA*—The clause must provide for the Agreements Officer's authorized representative to have access to directly pertinent records of those business units of the awardee or subawardee's performing effort under the OT agreement, when needed to verify the actual costs or reporting used as the basis for payment or to verify statutorily required cost share under the agreement.

(ii) *Clauses that provide for use of an IPA to perform the audits.* The clause must:

(A) Provide the Agreements Officer's authorized representative access to the IPA's audit reports and working papers to ensure that the IPA has performed the audit in accordance with GAGAS.

(B) State that the Government will make copies of contractor records contained in the IPA's work papers if needed to demonstrate that the audit was not performed in accordance with GAGAS.

(C) State that the Government has no direct access to any awardee or subawardee records unless it is found that the awardee or subawardee was performing a procurement contract subject to Cost Principles (48 CFR part 31) and/or Cost Accounting Standards (48 CFR part 99) at the time of agreement award.

(iii) *Business Units subject to the Single Audit Act.* The clause must provide access to the extent authorized by the Single Audit Act.

(iv) *Record Retention/Period of Access.* The clause must require that the awardee and subawardee retain, and provide access to, the records referred to in (c)(4)(i) and (c)(4)(ii) of this section for three years after final payment, unless notified of a shorter or longer period by the Agreements Officer.

(5) *Awardee flow down responsibilities.* Agreements must require awardees to include the necessary provisions in subawards that meet the conditions set forth in this DoD access to records policy.

(d) *DoDIG and GAO access.* In accordance with statute, if an agreement gives the Agreements Officer or another DoD component official access to a business unit's records, the DoDIG or

GAO are granted the same access to those records.

[68 FR 27457, May 20, 2003]

§ 3.9 Follow-on production contracts.

(a) *Authority.* A competitively awarded OT agreement for a prototype project that satisfies the condition set forth in law that requires non-Federal parties to the OT agreement to provide at least one-third of the costs of the prototype project may provide for the award of a follow-on production contract to the awardee of the OT prototype agreement for a specific number of units at specific target prices, without further competition.

(b) *Conditions.* The Agreements Officer must do the following in the award of the prototype project:

(1) Ensure non-Federal parties to the OT prototype agreement offer at least one-third of the costs of the prototype project pursuant to subsection (d)(1)(B)(i), 10 U.S.C. 2371 note.

(2) Use competition to select parties for participation in the OT prototype agreement and evaluate the proposed quantity and target prices for the follow-on production units as part of that competition.

(3) Determine the production quantity that may be procured without further competition, by balancing of the level of the investment made in the project by the non-Federal parties with the interest of the Federal Government in having competition among sources in the acquisition of the product or products prototyped under the project.

(4) Specify the production quantity and target prices in the OT prototype agreement and stipulate in the agreement that the Contracting Officer for the follow-on contract may award a production contract without further competition if the awardee successfully completes the prototype project and agrees to production quantities and prices that do not exceed those specified in the OT prototype agreement (*see* part 206.001 of the Defense Federal Acquisition Regulation Supplement).

(c) *Limitation.* As a matter of policy, establishing target prices for production units should only be considered when the risk of the prototype project permits realistic production pricing